



University of New South Wales Law Research Series

Australia's Consumer Data-Sharing Regime: A World-Leading Reform

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[2022] *UNSWLRS* 2

Forthcoming in the *University of New South Wales Law Journal*

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AUSTRALIA’S CONSUMER DATA-SHARING REGIME: A WORLD-LEADING REFORM

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(Forthcoming in the *University of New South Wales Law Journal*)

The Consumer Data Right (‘CDR’) regime introduced in Australia in 2019 is world-leading and could promote much-needed competition in major sectors of the economy and reinvigorate a waning commercial morality. As with virtually all potentially transformative innovations, however, the challenges are many and, in this case, include the need to rigorously protect consumer data without imposing regulatory burdens that could deter new market entrants. The success of CDR will require a careful and ongoing balancing of risks and benefits. We analyse its extraordinary potential and argue for nuanced regulation and timely and extensive consumer education by government and industry.

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I INTRODUCTION

The Consumer Data Right (‘CDR’) regime introduced in Australia in 2019 is world leading. CDR gives consumers a right to determine whether the data businesses hold about them is released to other providers of their choice¹ so these can offer a better value for

¹ See *Competition and Consumer Act 2010* (Cth) s 56AA (‘CCA’), inserted by the *Treasury Laws Amendment (Consumer Data Right) Act 2019* (Cth) (‘CDR Act’). Note, CCA s 56AA(a)(i) speaks of the right of consumers to request disclosure of their data to themselves, however, this right is not yet operative, as no standards have yet been devised to implement it in practice; and furthermore, presumably most consumers lack access to the technology to safely access the data via the application programming interfaces (‘APIs’) through which that data is provided.

money service. When the regime is extended to include action initiation, if analysis of the transferred data results in a superior or cheaper service, the consumer should often be able to simply click on a link and change providers. Under CDR, businesses will also be required to provide public access to data on the goods and services they offer, thereby empowering comparison websites and consumers with up-to-date information.² After its initial roll out in the banking sector, the regime will be extended to energy and telecommunications, and the plan, in time, is to extend it to superannuation, insurance, and other sectors. In comparison, other countries with such data-sharing regimes have presently limited them to banking and finance.

While the CDR regime will continuously evolve, its fundamental principles are meant to endure. It aims to be consumer-focused, encourage competition, employment and business opportunities, and be efficient and fair. By raising and empowering a new generation of ‘smart customers’, CDR aspires to radically change the competition landscape in Australia, particularly in sectors which today lack competition. An added, currently underappreciated, benefit, in our opinion, lies in its potential to restore commercial morality, a basic fairness, which modern businesses, alas, have often set aside.³ As with most potentially transformative innovations, however, the challenges are many. They include the need to rigorously protect consumer data to ensure the system’s trustworthiness without imposing regulatory burdens that could deter new market entrants. Furthermore, the evolving regime needs to be intelligible to its users and consumers who thus need to be educated about its benefits and risks. Notably, despite CDR being announced and in development since 2017, knowledge of it remains severely limited and misconceptions abound.

To date there has been little legal scholarly analysis of the CDR legislation, its regulatory framework and its potential impact on users and the economy more broadly.⁴ Nonetheless, the determination of the Australian government to give unprecedented control

² Ibid.

³ We speak here to what we perceive as the unfairness of the now common practice of offering far better terms to new customers than to existing ones, in the context, for instance, of home loans or electricity plans.

⁴ The framework CDR legislation (*CDR Act*) came into effect on 1 August 2019 and the *Competition and Consumer (Consumer Data Right) Rules 2020* (*‘CDR Rules’*) applicable to banking on 6 February 2020. Even though both sets of regulations were based on extensive consultation and drafting processes from July 2017 (when the Open Banking Review was commissioned by then Treasurer Scott Morrison) and November 2017 (when the government announced its decision to roll-out CDR across economy sectors), there are only a handful of legal academic papers on the subject and these are limited to the analysis of certain selected aspects of the regime. See: J Scranton, ‘The Consumer Data Right: Right for Competition in Australian Retail Energy Markets?’ (2020) 27(2) *Competition & Consumer Law Journal* 107; Mark Burdon and Tom Mackie, ‘Australia’s Consumer Data Right and the Uncertain Role of Information Privacy Law’ (2020) 10(3) *International Data Privacy Law* 222 (*‘Australia’s Consumer Data Right’*) focusing on the information privacy laws / data protection laws; Gerard Goggin et al, ‘Data and Digital Rights: Recent Australian Developments’ (2019) 8(1) *Internet Policy Review* 1–19, focusing on data privacy rights (*‘Data and Digital Rights’*); Bruno Zeller and Andrew M Dahdal, *Open Banking and Open Data in Australia: Global Context, Innovation and Consumer Protection* (Working Paper No 2021/001, College of Law, Qatar University, 14 January 2021), focusing on open banking. Some commentary on CDR has also been offered by other academic disciplines and can be found on SSRN.

over data to consumers – and, with this, tools to drive competition and innovation across the economy – calls for the active engagement of scholars in the discussions on how the CDR ecosystem should best be shaped. CDR is unlikely to flourish unless the data shared pursuant to it are not rigorously protected and the advantages it seeks to provide are not widely recognised and appreciated. We therefore argue that the success of the regime depends upon highly effective data governance practices and effective consumer education. We first discuss the origins and unique nature of the CDR regime (Part II) and outline the status of regulatory developments (Part III). We then examine the benefits offered by CDR (Part IV) and the key risks and challenges it brings (Part V). Part VI concludes.

II ORIGINS OF THE CDR REGIME IN AUSTRALIA

A Realising the Value of Data

As follows from its name, CDR focuses upon consumer data. The amount of digital data generated globally is increasing exponentially, with the existing assessments suggesting that between 40 to 60 zettabytes of data have been created and consumed worldwide by 2020 and a mark of nearly 150 zettabytes will be reached by 2024.⁵ With the world's current population of nearly 7.8 billion, more than 5.22 billion people now use mobile phones and 4.66 billion are now online.⁶ Even though measuring the volume of data is not an exact science, it is estimated that about 130 devices are connected to the internet worldwide each second and every person generates around 1.7 megabytes of data in the same period of time.⁷ Cisco estimates that around 500 billion devices – equipped with sensors, collecting data, and communicating over a network – will be connected to the Internet by 2030.⁸ Against this background, the company's former chairman John Chambers argues that we are currently moving beyond the Internet of Things ('IoT') (ie, the network of connected devices) to what he calls 'the Internet of Everything: the penetration of the World Wide Web into the everyday aspects of our lives'⁹ intertwining people, things, processes, and data.

⁵ See Arne Holst, 'Volume of Data/Information Created, Captured, Copied, and Consumed Worldwide from 2010 to 2024', *Statista* (Web Page, 5 Feb 2021) <<https://www.statista.com/statistics/871513/worldwide-data-created/>> and Christo Petrov, '25+ Impressive Big Data Statistics for 2020', *Techjury* (online, 7 July 2021).

⁶ Daniel S Hamilton and Joseph P Quinlan, *The Transatlantic Economy 2021* (Annual Survey, 2021) 42.

⁷ Louis Christian Püschel, Maximilian Röglinger, and Ramona Brandt, 'Unblackboxing Smart Things—A Multilayer Taxonomy and Clusters of Nontechnical Smart Thing Characteristics' (2021) *IEEE Transactions on Engineering Management* (forthcoming) 1 available at <<https://ieeexplore.ieee.org/document/9130947>>; Petrov (n 4).

⁸ 'Internet of Things', *CISCO* (Web Page, 10 March 2020) <<https://www.cisco.com/c/en/us/products/collateral/se/internet-of-things/at-a-glance-c45-731471.html>>.

⁹ John Chambers, 'The Digital Transformation of Europe,' *World Economic Forum* (Web Page, 13 March 2015) <<https://www.weforum.org/agenda/2015/03/the-digital-transformation-of-europe/>>.

Much of this data is provided by and collected on consumers to be utilised in the delivery and development of products and services. Coupled with advanced and low-cost data analytics tools, the amounts of existing data allow its holders to derive new insights from that data and create novel and better products and services, thereby directly fostering market competition.¹⁰ In Australia, for example, data-driven innovation has been estimated to contribute up to \$64 billion per annum to the economy.¹¹ The CDR regime is intended and designed to further this trend.

Under the CDR, individuals providing data to private and public sector entities will be empowered to participate in our data-driven world by assuming control over their data. Instead of continuing to provide information to corporations to boost the latter's revenues, consumers will have an opportunity to become proactive and control how value is created and extracted from their data.¹²

The idea of empowering consumers with the right to determine who will gain access to their data and under what circumstances is not uniquely Australian. Its origins lie in the banking sector in Europe. The revised Payment Services Directive ('PSD2')¹³ set the stage for account data retrieval and payment initiation by third parties in 2016,¹⁴ while the General Data Protection Regulation ('GDPR') sought to better protect data, and its transfer.¹⁵ The UK pioneered open banking at the EU Member State level by passing an Open Banking Standard to guide how financial data should be created, used, and shared by its custodians and those who access it.¹⁶ The use of standardised application programming interfaces ('APIs') for data access and transfer purposes is explicitly required as part of this

¹⁰ Productivity Commission, *Data Availability and Use* (Inquiry Report No 82, 8 May 2017) 192 ('Data Availability').

¹¹ See 'The Australian Government's response to the Productivity Commission Data Availability and Use Inquiry', *Department of the Prime Minister and Cabinet* (Web Page, 2018) <<https://dataavailability.pmc.gov.au/index.html>>.

¹² Productivity Commission, *Data Availability* (n 9) 192.

¹³ *Directive 2015/2366/EU of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC* [2015] OJ L 337.

¹⁴ PSD2 came into force on 12 January 2016 (replacing an earlier regulation from 2009). EU Member States were required to implement its provisions into national law by 13 January 2018. However, the deadline for ensuring adequate security protocols for client authentication was later extended to 31 December 2020: see 'EBA Publishes Opinion on the Deadline and Process for Completing the Migration to Strong Customer Authentication (SCA) for E-commerce Card-based Payment Transactions', *European Banking Authority* (Web Page, 16 October 2019) <<https://www.eba.europa.eu/eba-publishes-opinion-on-the-deadline-and-process-for-completing-the-migration-to-strong-customer-authentication-sca-for-e-commerce-card-based-payment>>. On 'payment initiation', see Part II(B) below.

¹⁵ *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation)* [2016] OJ L 119 (adopted 4 May 2016, came into force on 25 May 2018).

¹⁶ See Competition and Markets Authority, *Retail Banking Market Investigation* (Final Report, 9 August 2016) 55 <<https://assets.publishing.service.gov.uk/media/57ac9667e5274a0f6c00007a/retail-banking-market-investigation-full-final-report.pdf>>.

standard.¹⁷ PSD2, in contrast, does not specifically mention APIs. They have been, however, regarded as the preferred technology to facilitate secure and reliable access to customers' accounts.¹⁸ As will be shown next, while following in the footsteps of the EU and the UK, Australia is working to give broader and more practical effect to the concept of consumer data portability. Australia's initiative with CDR is ground-breaking.

B One-of-a-kind Regime

The number of jurisdictions around the world that have adopted, or are in the process of adopting, data sharing as part of open banking is steadily growing.¹⁹ As well as the EU and UK, the list currently includes US, Canada, China, India, Japan, New Zealand, Hong Kong, Singapore, South Africa, United Arab Emirates, and Mexico.²⁰ No single approach prevails: depending on the state of the economy and policy objectives, open banking frameworks show variations in the (1) scope of products and services, (2) levels of standardisation (eg, in relation to interfaces, messaging protocols, data security, etc), (3) implementation timelines, (4) type of regulatory or advisory institutions, and (5) accredited data holders and recipients.²¹

Whilst 'there are almost as many unique versions of open banking as there are countries which have deployed it',²² the approaches to open banking can broadly be divided into prescriptive²³ (with designated authorities regulating the ways and means of data sharing and supervising the implementation progress), facilitative²⁴ (providing legally non-binding

¹⁷ Competition and Markets Authority, *Retail Banking Market Investigation Order 2017*, (2 February 2017) pt 2 made under the *Enterprise Act 2002* and *Payment Services Regulation 2017* pt 7. On APIs, see below, Part V(A). The Open Banking Standard covers technical standards (to ensure safe and efficient transfer of data), user experience standards (to give consumers a seamless experience) and operational guidelines (to ensure that implementations meet minimum service requirements), see Open Data Institute and Fingleton, *Open Banking, Preparing for Lift Off* (Report, June 2019) 22 ff.

¹⁸ Competition and Markets Authority, *Retail Banking Market Investigation Order 2017* (2 February 2017) pt 2 made under the *Enterprise Act 2002*, and *Payment Services Regulation 2017* (UK) pt 7. On APIs, see below, Part V(A).

¹⁹ The Paypers, *Open Banking Report 2019: Insights into the Global Open Banking Landscape* (Report, September 2019) 10–18 <<https://thepayers.com/reports/the-open-banking-report-2019-insights-into-the-global-open-banking-landscape-2/r780814>> ('*Open Banking Report 2019*').

²⁰ See Norton Rose Fulbright, *Open Banking Around the World: A Global Comparative Guide* (July 2020) [Redacted by Editors]. See also Oana Ifrim, 'Open Banking – A Very Global Business', *The Paypers* (Web Page, 19 December 2019) <<https://thepayers.com/expert-opinion/open-banking-a-very-global-business--1240033>> and Treasury, *Report of the Review into Open Banking: Giving Customers Choice, Convenience and Confidence* (Report, December 2017) appendix C ('*Review into Open Banking*') <https://treasury.gov.au/sites/default/files/2019-03/Review-into-Open-Banking-_For-web-1.pdf>.

²¹ See Deloitte, *Shaping the Future: Consumer Data Right* (Submission to the Inquiry into Future Directions for the Consumer Data Right, 21 May 2020) 12–13.

²² Ibid 12. See also Norton Rose Fulbright (n 20) 2. CHECK cross-referencing

²³ Followed, for example, by EU, UK, and Australia. Note, some include Hong Kong under 'prescriptive' approaches, see Deloitte (n 21) 12–13.

²⁴ Adopted by Singapore, South Korea, and Japan. Note, some also include Hong Kong, see Basel Committee on Banking Supervision, *Report on Open Banking and Application Programming Interfaces* (Bank for International Settlements Report, November 2019) 10 ('*Report on Open Banking*').

guidance and standards on data disclosure and transfer), and market-driven²⁵ (with no explicit rules or guidance on sharing customer data).²⁶

Along with the UK, Australia has adopted a prescriptive approach. However, Australia's approach is unique in its commitment to implement *economy-wide* standardisation of consumer data with the only limits to the range of services enabled by CDR being 'the imagination of entrepreneurs'.²⁷ Initially rolled out in the banking sector (where CDR is referred to as 'open banking'), the regime will be extended to energy and telecommunications, with superannuation and insurance currently being examined as further priority sectors for CDR deployment.²⁸ Other sectors are expected to follow.

With its government strongly supporting the purpose and extent of the reform, Australia may be well placed to drive global data sharing standards and be a leader in digital trade.²⁹ By making it easier for domestic financial services providers to cooperate with offshore partners, CDR promises to reduce barriers to international collaboration and may position Australia as a leading FinTech export hub and 'a gateway between Asian and European markets'.³⁰ Other States are beginning to look to Australia for lessons around national cross-sectoral CDR models.³¹

Nonetheless, CDR remains surrounded by misconceptions, with many industry participants and consumers perceiving it as being confined to open banking. Choosing to first roll out CDR in banking made sense at the time, as Australia was following the lead of the EU and UK, where these reforms are confined to banking. But it has also clouded the message. For if people know of CDR at all, they tend to think it is limited to banking, whereas it is intended in time to be an economy-wide reform.³²

²⁵ Followed, for example, by the United States, Argentina and China: *ibid* 10.

²⁶ *Ibid* 4–5, 12. Others distinguish broadly between 'regulatory-driven' and 'market-driven' approaches', see Deloitte (n 21) 12–13.

²⁷ Treasury, 'Consumer Data Right: Giving Customers Greater Control over Their Data', *Treasury* (Web Page, September 2019) <https://treasury.gov.au/sites/default/files/2019-09/20190904_cdr_handout.pdf>.

²⁸ See, eg, Productivity Commission, *Superannuation: Assessing Efficiency and Competitiveness* (Inquiry Report No 91, 21 December 2018) 40. See also Julian Lincoln, David J Ryan and Audrey Vong, 'CDR: Challenges and Opportunities in the Superannuation Sector', *Herbert Smith Freehills* (Web Page, 22 November 2019) <<https://www.herbertsmithfreehills.com/latest-thinking/cdr-challenges-and-opportunities-in-the-superannuation-sector>>.

²⁹ KPMG, *30 Voices on 2030: The New Reality for Financial Services* (Report, 22 February 2021) <<https://assets.kpmg/content/dam/kpmg/au/pdf/2021/30-voices-on-2030-new-reality-financial-services.pdf>>.

³⁰ *Ibid*.

³¹ See, eg, 'Consumer Data Right', *Ministry for Business, Innovation and Employment, New Zealand Government* (Web Page, 9 July 2021) <<https://www.mbie.govt.nz/business-and-employment/business/competition-regulation-and-policy/consumer-data-right/>>.

³² See Ross Buckley, 'More than banking done right, consumer data rights are set to transform our lives', *The Conversation* (online, 26 August 2021) <<https://theconversation.com/more-than-banking-done-right-consumer-data-rights-are-set-to-transform-our-lives-166036>>.

The government intends to expand CDR's potential by introducing 'action initiation', aka 'write access'.³³ Under the extant CDR framework, consumers are only able to share data with third parties (see Part III below) – a functionality known as 'read access'. Currently, consumers cannot authorise accredited third parties to initiate payments or change product providers on their behalf. While some elements of action initiation have been implemented in the banking sector in the UK and Europe,³⁴ Australia deliberately abstained from including action initiation in the inaugural CDR regime. The government was particularly mindful that for CDR to succeed, consumers must first gain confidence in their data being used securely and only for the purposes to which they have consented. Giving third parties the right to act on consumers' behalf upfront was considered premature and likely to endanger the framework's acceptance.³⁵ With open banking operational since July 2020, recommendations on the implementation of action initiation have been published in 2021 and, in response, the government has announced its support for those recommendations in December 2021.³⁶

With Australia poised to allow action initiation, and with the benefits of hindsight, another sector may well have been a more felicitous starting point for CDR. For instance, with energy or a mobile phone plan, a consumer can direct data about their current energy or phone usage to a potential new supplier, and if they like the service and price offered, simply change suppliers by clicking on another link and initiating the change. However, changing banks is not nearly so simple. It is difficult to envisage such a change being able to be implemented without considerable interaction with one's current, and proposed new, bank, and this interaction will provide one's current bank with the opportunity to retain one as a customer by offering better terms. Banking is therefore not as fertile a ground in which CDR can restore a fairer commercial morality, as other sectors, in which provider change is far simpler. Given that the idea for data-sharing of this kind was taken from the developments in the EU which related to banking and the sharing of payments data, starting in Australia with banking is entirely understandable, but other nations yet to go down this path may be well advised to look to the power of action initiation in their choice of the initial sector in which they roll out a data-sharing regime.

³³ 'Government Response to the Final Report of the Inquiry into Future Directions for the Consumer Data Right', *Australian Government* (Government Response, 14 December 2021) 2 <<https://treasury.gov.au/publication/p2021-225462>>.

³⁴ In the UK, for example, action initiation applies to transaction accounts only and to just nine banks, Deloitte, *Open Banking Payment Initiation – Completing the Vision* (Document, December 2019) 2 <<https://www2.deloitte.com/content/dam/Deloitte/au/Documents/financial-services/au-fsi-deloitte-open-data-banking-payment-060120.pdf>> ('*Open Banking Payment Initiation*'). Some sources suggest that Japan and New Zealand are also experimenting with 'payment initiation' (The Paypers, *Open Banking Report 2019* (n 18) 12).

³⁵ Treasury, *Review into Open Banking* (n 19) 109.

³⁶ See Treasury, Australian Government, *Inquiry into Future Directions for the Consumer Data Right* (Report, October 2020) 36 <<https://treasury.gov.au/sites/default/files/2021-02/cdrinquiry-final.pdf>> ('*Inquiry into Future Directions*'); 'Government Response' (n 33) 2; Brenton Charnley, 'The CDR: Why All Eyes Are on Australia', *InnovationAus* (Web Page, 21 December 2020) <<https://www.innovationaus.com/the-cdr-why-all-eyes-are-on-australia/>> ('The CDR').

While the nature of CDR is unique and its scope ambitious, as the remainder of this article will demonstrate, much work remains to be done to ensure its success.

III REGULATORY FRAMEWORK

A CDR and Open Banking

The government announced its decision to introduce CDR in Australia in November 2017,³⁷ following recommendations in a series of sector-specific reviews and inquiries commissioned between 2014 and 2017.³⁸ In particular, the Productivity Commission's report on data availability and use, released in May 2017, recommended a fundamental reform to Australia's competition policy by facilitating better use of consumer data.³⁹ Emphasising that piecemeal adjustments to the existing regulatory framework would not be sufficient, the Productivity Commission advocated a comprehensive catalogue of rights for individuals and small and medium businesses to allow them easier access to and usage of their data.⁴⁰

With the banking sector designated as the first sector of the economy to which this set of rights would apply, the then Treasurer, the Hon Scott Morrison MP, commissioned shortly thereafter, in July 2017, the review into open banking in Australia. Chaired by Mr Scott Farrell, the review was tasked with identifying the most appropriate model for the

³⁷ See Angus Taylor, Assistant Minister for Cities and Digital Transformation, 'Australians to Own Their Own Banking, Energy, Phone and Internet Data', *Parliament of Australia* (Media Release, 26 November 2017) <https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/5656429/upload_binary/5656429.pdf;fileType=application%2Fpdf#search=%22media/pressrel/5656429%22>; see also Treasury, *Treasury Laws Amendment (Consumer Data Right) Bill 2019* (Digest No 68 of 2018–19) 3–7 ('*Treasury Laws Amendment (Consumer Data Right) Bill*').

³⁸ The most significant influencers of the CDR framework were the 2014 Financial Systems Inquiry: Treasury, *Financial Systems Inquiry* (Final Report, 7 December 2014) 190 ff, 283 ('*The Murray Inquiry*') <<https://treasury.gov.au/sites/default/files/2019-03/p2014-FSI-01Final-Report.pdf>>; the 2015 Competition Policy Review (Treasury, Australian Government, *Competition Policy Review* (Final Report, March 2015) 54, 238 ('*The Harper Review*') <https://treasury.gov.au/sites/default/files/2019-03/Competition-policy-review-report_online.pdf>; the 2016 Report of the House of Representatives Standing Committee on Economics: Review of the Four Major Banks (Standing Committee on Economics, Parliament of Australia, *Review of the Four Major Banks* (Report, 24 November 2016) v, 21–60 <https://www.aph.gov.au/parliamentary_business/committees/house/economics/four_major_banks_review/report> ('*The Coleman Report*')); the 2017 *Independent Review into the Future Security of the National Electricity Market* (Department of Industry, Science, Energy and Resources, Parliament of Australia, *Independent Review into the Future Security of the National Electricity Market* (Final Report, 9 June 2017) 181 <<https://www.energy.gov.au/sites/default/files/independent-review-future-nem-blueprint-for-the-future-2017.pdf>> ('*The Finkel Report*'). See also Explanatory Memorandum, Treasury Laws Amendment (Consumer Data Right) Bill 2019, [1.11]–[1.12] ('*CDR Explanatory Memorandum*').

³⁹ Productivity Commission, *Data Availability* (n 9) 2.

⁴⁰ *Ibid* 15.

national open banking ecosystem, and recommending the regulatory framework under which it would operate and the necessary instruments – policies, standards and infrastructure – required to support and enforce it.⁴¹ The review was to consider the 2017 Productivity Commission’s report along with existing international best practice, potential and stimuli for innovation, regulatory compliance costs and measures for consumer protection.⁴² The decision to prioritise banking over other sectors of economy was grounded on the solid foundation provided by the duties that a bank owes to its customer. As rationalised by Farrell:

A bank has a duty to keep a customer’s money safe and to pay it to others at the customer’s direction. Similarly, a bank has a duty to keep its customer’s information confidential. An obligation for a bank to provide the customer’s information to others at the customer’s direction makes sense – both money and information are valuable and the bank would not have either without the customer. In this way, the long-established banker-customer relationship can help guide Open Banking’s construction and once the framework is built, it can be extended to other sectors.⁴³

Scott Farrell is a deeply experienced banking lawyer, so any other perspective on where to start would have been surprising.

The Final Report on the Review into Open Banking was released in December 2017, soon after the executive announcement about the introduction of CDR.⁴⁴ The Report provided 50 recommendations on the design and implementation of Australia’s open banking system, including on legal and regulatory arrangements for an economy-wide CDR. It carefully considered the type of banking data subject to disclosure and sharing, privacy and security safeguards for banking customers, data transfer methods and potential implementation mechanisms. The report was released for public comment in February 2018. Having engaged with detailed feedback from a range of stakeholders,⁴⁵ the government endorsed the suggested recommendations in May 2018, both for the framework of the overarching CDR and its application to open banking. The system was slated for gradual implementation from July 2019.⁴⁶ To ensure CDR is supported by well-funded regulators, the government allocated \$90 million for its implementation over five years (2018–2023).⁴⁷

⁴¹ Treasury, *Review into Open Banking* (n 19) 121–22.

⁴² Ibid vii, 121–22.

⁴³ Ibid v–vi.

⁴⁴ The government announcement was made on 26 November 2017, see ‘Consumer Data Right Overview’, *Treasury* (Booklet, September 2019) 9 (‘CDR Booklet’) <https://treasury.gov.au/sites/default/files/2019-09/190904_cdr_booklet.pdf>; Treasury, *Review into Open Banking* (n 19).

⁴⁵ The submission can be accessed here: ‘Review into Open Banking’, *Treasury* (Web Page, 2018) <<https://treasury.gov.au/consultation/c2018-t247313>>.

⁴⁶ ‘Government Response to Review into Open Banking’, *Treasury* (Web Page, 9 May 2018) <<https://treasury.gov.au/publication/p2018-t286983>>.

⁴⁷ CDR Booklet (n 41).

The legislative and consultative processes subsequently put in place were extensive. The Treasury consulted on the draft *Treasury Laws Amendment (Consumer Data Right) Bill* throughout the second half of 2018.⁴⁸ The Australian Parliament passed the bill which amended the *Competition and Consumer Act 2010*,⁴⁹ the *Australian Information Commissioner Act 2010*, and the *Privacy Act 1988* ('Privacy Act') on 1 August 2019.⁵⁰ This enabling legislation outlined the overarching objectives and principles of CDR, empowered the Treasurer to apply CDR to new sectors of the economy, set out the role and functions of the regulatory bodies charged with establishing and enforcing CDR rules, and enshrined minimum privacy protections.⁵¹

In the meantime, the ACCC was consulting on the CDR rules applicable to open banking. It presented its view on the structure and content of suggested rules to stakeholders in September 2018. Having considered numerous submissions and viewpoints,⁵² the ACCC published an outline of the proposed rules in January⁵³ and the first full draft of them in March 2019.⁵⁴ A further version of the CDR Rules, accompanied by an Explanatory Statement, followed in September 2019.⁵⁵ The final CDR Rules came into effect on 6 February 2020.⁵⁶

⁴⁸ Ibid 9.

⁴⁹ See CCA (n 1) pt IVD.

⁵⁰ CCA (n 1). See also Treasury, *Treasury Laws Amendment (Consumer Data Right) Bill* (n 34) 3–7.

⁵¹ CDR Booklet (n 41) 9.

⁵² 'Consumer Data Right (CDR): ACCC Consultation on Rules Framework', *Australian Competition and Consumer Commission* (Web Page 12 September 2018) <<https://www.accc.gov.au/focus-areas/consumer-data-right-cdr-0/accc-consultation-on-rules-framework>>.

⁵³ Australian Competition and Consumer Commission, *Consumer Data Right: Rules Outline* (Document, 25 January 2019) <<https://www.accc.gov.au/system/files/CDR-Rules-Outline-corrected-version-Jan-2019.pdf>>.

⁵⁴ 'Consumer Data Right (CDR): CDR Draft Rules (Banking)', *Australian Competition and Consumer Commission* (Web Page, 28 March 2019A) <<https://www.accc.gov.au/focus-areas/consumer-data-right-cdr-0/cdr-draft-rules-banking>>, listing submissions from consumers, businesses and community organisations on the approach and positions of the draft rules.

⁵⁵ See 'Consumer Data Right (CDR): CDR Rules (Banking)', *Australian Competition and Consumer Commission* (Web Page, 2 September 2019) <<https://www.accc.gov.au/focus-areas/consumer-data-right-cdr-0/cdr-rules-banking>>.

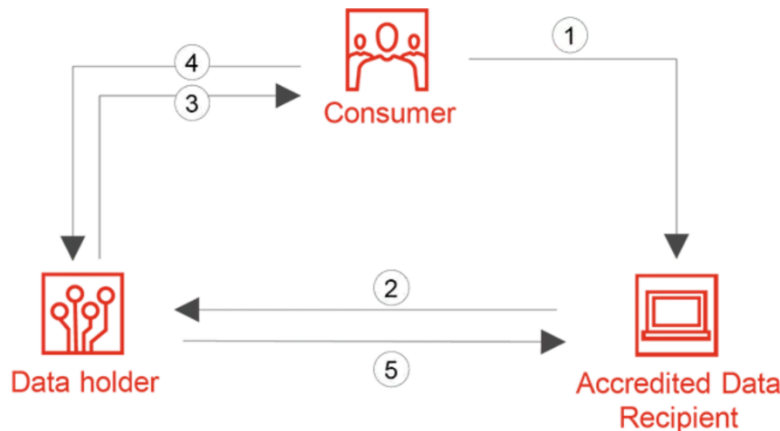
⁵⁶ See the ACCC's announcement: 'Consumer Data Right (CDR): Commencement of CDR Rules', *Australian Competition and Consumer Commission* (Web Page, 6 February 2020) <<https://www.accc.gov.au/focus-areas/consumer-data-right-cdr-0/commencement-of-cdr-rules>>. For the current version of the rules see the Federal Register of Legislation: *CDR Rules* (n 3).

Amendments:

- *Competition and Consumer (Consumer Data Right) Amendment Rules (No. 1) 2020* (Cth), (dated 18 June 2020) no longer in force;
- *Competition and Consumer (Consumer Data Right) Amendment Rules (No. 2) 2020* (Cth), (dated 1 October 2020) no longer in force;
- *Competition and Consumer (Consumer Data Right) Amendment Rules (No. 3) 2020* (Cth), (dated 22 December 2020) in force.
- *Competition and Consumer (Consumer Data Right) Amendment Rules (No. 1) 2021* (Cth), dated 30 September 2021) ('CDR Amendment Rules 2021') in force.

The rules operate as illustrated in Figure 1. (1) The consumer consents to the accredited trusted recipient (ie, accredited data recipient ('ADR')⁵⁷) obtaining their data. (2) The ADR seeks to access the consumer's data and her identity; and the ADR's accreditation status is authenticated by the data holder. (3) The data holder authenticates the identity of the consumer. (4) The consumer authorises the data holder to disclose her data to the ADR. (5) The consumer's data is shared between the data holder and the ADR.

Figure 1: CDR in Banking⁵⁸



It was decided that open banking should commence with the four major Authorised Deposit-taking Institutions ('ADIs') – Australia and New Zealand Banking Group ('ANZ'), Commonwealth Bank ('CBA'), National Australia Bank ('NAB'), and Westpac.⁵⁹ After a shift in dates due to a delayed roll-out and the unfolding COVID-19 pandemic,⁶⁰ all major ADIs were required to commence sharing data on a range of products, including savings accounts and debit card accounts, by 1 July 2020.⁶¹ Data

⁵⁷ 'Accredited data recipient' is defined in CCA (n 1) s 56AK.

⁵⁸ 'Consumer Data Right: How to Get Your Ticket to the Game', PwC (Web Page, 2021) <<https://www.pwc.com.au/assurance/protecting-and-realising-the-value-of-digital-assets/consumer-data-right-offering.html>>.

⁵⁹ Reserve Bank of Australia, *Competition in the Australian Financial System – Public Inquiry, Submission to the Productivity Commission Inquiry* (Submission No 29, 15 September 2017) <https://www.pc.gov.au/__data/assets/pdf_file/0008/221876/sub029-financial-system.pdf>.

⁶⁰ The original timeframe envisaged that all major banks would make data on credit and debit card, deposit and transaction accounts available by July 2019, mortgages by February 2020, and remaining products by July 2020. All remaining ADIs were given further 12 months for each phase (see 'ACCC Welcomes Consumer Data Right', *Australian Competition and Consumer Commission* (Web Page, 9 May 2018) <<https://www.accc.gov.au/media-release/accc-welcomes-consumer-data-right>> and 'Government Response to Review into Open Banking' (n 43)).

⁶¹ Phase 1 of the CDR implementation in open banking, see 'Consumer Data Right: Phasing', Australian Competition and Consumer Commission (Document, December 2020) <https://www.accc.gov.au/system/files/20-64FAC_CDR_Phasing_D07.pdf>.

sharing on residential home loans, investment property loans, mortgage offset accounts and personal loans was to be completed by 1 November 2020 and data sharing on the remaining products – such as investment loans and trust accounts – by 1 February 2021.⁶² The remaining ADIs were given a further 12 months beyond the timelines for the major ADIs.⁶³ It is expected that open banking will be fully implemented by 1 November 2022.⁶⁴

B Regulators

Because CDR covers competition and consumer matters, as well as privacy and confidentiality protections applicable to the use of data, it was originally devised to be administered by multiple authorities, with the Treasury given overarching responsibility for the design and implementation of the overall framework.⁶⁵ The ACCC was mandated to analyse and recommend to the Treasury which sectors of the economy should be subject to CDR and develop sector-specific consumer data rules.⁶⁶ The Office of the Australian Information Commissioner ('OAIC') was put in charge of matters of privacy and confidentiality.⁶⁷ The task of devising standards for the format and processes by which data would be provided to consumers and ADRs was given to Data61 of the Commonwealth Scientific and Industrial Research Organisation ('CSIRO').⁶⁸ This focus on developing standards is another area in which Australia leads. The absence of promulgated standards in the EU is often identified as a major impediment to the growth of open banking there.⁶⁹

However, soon after the roll-out of open banking, a legislative amendment shifted responsibility for sectoral assessments and rule-development from the ACCC to the Treasury.⁷⁰ This was in response to concerns that the CDR framework is unnecessarily fragmented with the ACCC, Treasury, OAIC, and Data61 all sharing responsibilities.⁷¹ Under the terms of the amendment, the Secretary of Treasury must now consult on the sectors to be designated under CDR and report to the Minister, who may designate the

⁶² Phases 2 and 3 of the CDR implementation in open banking, *ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.* See also 'The State of Open Banking in Australia in 2021', *Fintechnews Singapore* (online, 4 February 2021) ('State of Open Banking in Australia').

⁶⁵ CCA (n 1) ss 56AC and 56BR. See comment to fn 1

⁶⁶ *Ibid* s 56AE-AG and ss 56BA-BB.

⁶⁷ *Ibid* ss 56EQ and 56ER.

⁶⁸ CDR Explanatory Memorandum (n 35) [1.15].

⁶⁹ David Cox, 'Outdated APIs Threaten to Hold Back Open Banking in Europe', *American Banker* (New York, 8 October 2021); Francis Bignell, 'European Regulation Is Outdated With Respect to Modern APIs, Hindering Open Banking's Roll Out', *The Fintech Times* (online, 11 November 2021) <<https://thefintechtimes.com/european-regulation-is-outdated-with-respect-to-modern-apis-hindering-open-bankings-roll-out/>>.

⁷⁰ See *Treasury Laws Amendment (2020 Measures No. 6) Act 2020* (Cth) sch 2 ('Amendments of the Consumer Data Right') ('*Treasury Laws Amendment (2020 Measures No. 6)*').

⁷¹ See, eg, Denham Sadler, 'Consumer Data Right Powers Shifted from ACCC', *InnovationAus* (online, 6 November 2020) <<https://www.innovationaus.com/consumer-data-right-powers-shifted-from-acc/>> and 'Frydenberg Takes Back Some Ground from the Regulators', *BankingDay* (online, 3 December 2020) <<https://www.bankingday.com/login?p=%2ffrydenberg-takes-back-ground-from-regulators>>.

sector.⁷² The rule-making responsibility has also been shifted to Treasury with obligations on it to consult with the ACCC, OAIC, or the person or body the Secretary of the Treasury believes to be the primary regulator of the sector, and (where so required by legislation) other stakeholders.⁷³ This functional reorganisation allows for a more streamlined and unified approach to the development and implementation of CDR policy, rules, and standards.⁷⁴

The legislative framework that underpins the CDR regime is Part IVD of the *Competition and Consumer Act 2010* (Cth) ('CC Act'), enacted by the *Treasury Laws Amendment (Consumer Data Right) Act 2019* (Cth). Under section 56AC(2) of the CC Act, sectors of the Australian economy may be designated by the Minister to be subject to CDR. Thus far, the banking and energy sectors have been designated.⁷⁵

There are also CDR rules to govern how the CDR operates in further detail.⁷⁶ These rules outline the elements of consent, set out the accreditation framework, and elaborate on the privacy elements of the regime.⁷⁷ Furthermore, the Information Commissioner has issued privacy guidelines,⁷⁸ which guide participants to avoid acts which may breach the privacy safeguards under the CC Act.⁷⁹ Data standards have also been made by the Data Standards Body,⁸⁰ which relate to the format and process of transferring data. Under section 172(1) of the CC Act, the Governor-General may also make regulations. As of November 2021, the Governor-General has made draft regulations to exempt the Australian Energy Market Operator (AEMO) from certain privacy safeguard responsibilities under the CC Act, and apply these obligations to retailers receiving CDR data from AEMO.⁸¹

⁷² CC Act (n 47) ss 56AC(2) and 56AE; *Treasury Laws Amendment (2020 Measures No. 6* (n 66) sch 2 [31].

⁷³ CC Act (n 47) ss 56BA(1) and 56BP. See *Treasury Laws Amendment (2020 Measures No. 6* (n 67) sch 2 [34], [36].

⁷⁴ See Paul Franklin, 'Consumer Data Right Newsletter: 3 March 2021' (3 March 2021) *Consumer Data Rights* <<https://mailchi.mp/accc.gov.au/consumer-data-right-newsletter-3-march-2021>>. An even more streamlined approach would have placed CDR under the direction and control of a single regulator, but there could well have been downsides with this approach.

⁷⁵ See *Consumer Data Right (Authorised Deposit-Taking Institutions) Designation 2019* (Cth); *Consumer Data Right (Energy Sector) Designation 2020* (Cth).

⁷⁶ *Competition and Consumer (Consumer Data Right) Rules 2020* (Cth) made under section 56BA(1) of the *Competition and Consumer Act 2010* (Cth).

⁷⁷ 'CDR Legislation' *Office of the Australian Information Commissioner* (Web Page) <<https://www.oaic.gov.au/consumer-data-right/cdr-legislation>>.

⁷⁸ Office of the Australian Information Commissioner, *Consumer Data Right Privacy Safeguard Guidelines* (Guidelines No 3.0, June 2021) <https://www.oaic.gov.au/__data/assets/pdf_file/0012/8013/privacy-safeguard-combined-chapters.pdf>.

⁷⁹ *Competition and Consumer Act 2010* (Cth) pt IVD, div 5.

⁸⁰ Data Standards Body, *Consumer Data Standards* (Standards No 1.14.0) <<https://consumerdatastandardsaustralia.github.io/standards/>>.

⁸¹ *Exposure Draft Competition and Consumer Amendment (Consumer Data Right) Regulations 2021* (Cth) <https://treasury.gov.au/sites/default/files/2021-08/200441_ed_regulations.pdf>; Exposure Draft Explanatory Memorandum, *Competition and Consumer Amendment (Consumer Data Right) Regulations 2021* 1.

Only CDR data is subject to the regime. The definition of CDR data is dependent on the designation instrument for each sector, which sets out specified classes of information as CDR data.⁸² CDR data also includes data that has been ‘wholly or partly derived’ from the specified classes listed in the designation.

C Energy Sector

The implementation of CDR in the energy sector commenced in June 2020 with the Treasurer signing the Designation Instrument.⁸³ The instrument sets out the classes of information subject to CDR; the persons who hold this information and will be authorised to share it; and designates the AEMO as a gateway for certain classes of information as specified in the Instrument. Under the gateway model, AEMO was set to act as a conduit between businesses that hold consumer data, such as energy retailers, and third parties which can make use of that data to offer products and services to consumers.⁸⁴ In April 2021, however, the government determined that a peer-to-peer (‘P2P’) model with AEMO acting as a ‘secondary data holder’ is the more effective data access model for the energy sector.⁸⁵ It operates as shown in Figure 2. (1) The consumer consents to an ADR obtaining her data. (2) The ADR contacts the retailer Data Holder (‘DH’), seeking access to the consumer’s data. (3) The retailer DH authenticates the ADR using the CDR Register. (4) The retailer DH authenticates the identity of the consumer and the latter authorises the retailer DH to disclose her data to the ADR. (5) The ADR requests access to data covered by the authorisation. (6) The retailer requests the said data from AEMO as a data holder (‘AEMO DH’). AEMO DH provides the requested data to the retailer DH. (7) The consumer’s data is shared between the retailer DH and the ADR.

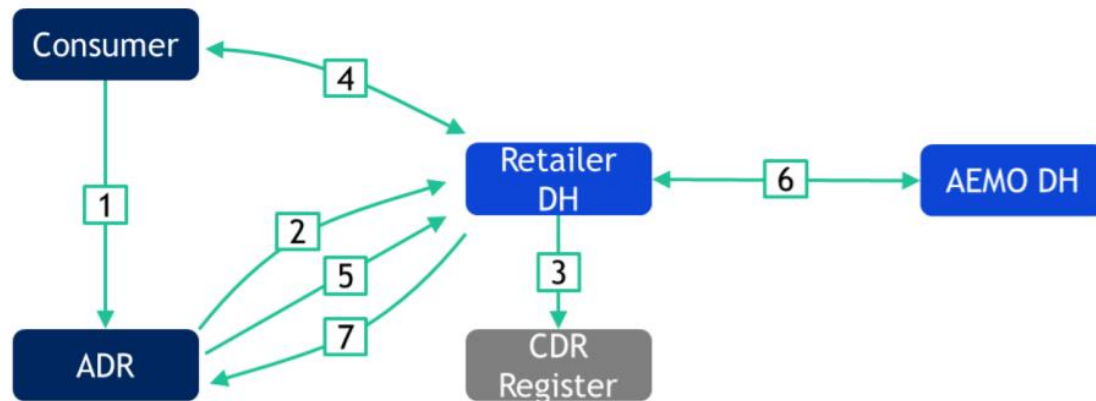
⁸² *Competition and Consumer Act 2010* (Cth) s 56AI(1)(a).

⁸³ *Consumer Data Right (Energy Sector) Designation 2020* (Cth).

⁸⁴ See Kate Reid, ‘Consumer Data Right: Consumer Forum’, *Australian Energy Market Operator* (Presentation, May 2020) <https://www.aemo.com.au/-/media/files/stakeholder_consultation/working_groups/other_meetings/consumer-forum/2020/cdr---external-slide-deck---consumer-forum.pptx?la=en>.

⁸⁵ ‘Developments in Australia’s Consumer Data Right in Response to Community Feedback’, *Treasury* (Web Page, 30 April 2021) <<https://treasury.gov.au/media-release/developments-australias-consumer-data-right-response-community-feedback>> (‘*Developments in Australia’s Consumer Data Right*’); and Treasury, Australian Government, *Peer-to-Peer Data Access Model in the Energy Sector* (Design Paper, 30 April 2021) 5 <https://treasury.gov.au/sites/default/files/2021-05/c2021-168954-cdr_design_paper_peer_to_peer.pdf> (‘*Peer-to-Peer Data Access*’).

Figure 2: P2P Model in Energy⁸⁶



As part of the Budget papers released on 11 May 2021,⁸⁷ the government pledged to accelerate the rollout of CDR to the energy sector and then across the economy, committing \$111.3 million for these purposes.⁸⁸ At the time of writing, energy specific CDR rules and data standards are being developed by Treasury and Data61.⁸⁹

This process of careful sector-by-sector roll out of the data-sharing regime appears well thought through and, frankly, unavoidable. While the conceptual framework is fit to apply across many sectors, the rules and data standards need to be adapted to each sector separately.

IV BENEFITS OF CDR

The benefits of CDR follow squarely from its goals. These goals are reflected in the key principles that have guided the regime from inception which are to be consumer-focused, promote competition, generate employment and business opportunities, and be fair and efficient.⁹⁰ To appreciate the full ambition behind CDR each goal deserves to be considered.

⁸⁶ Treasury, *Peer-to-Peer Data Access* (n 71) 4.

⁸⁷ 'Budget Documents', *Treasury* (Web Page, 11 May 2021) <<https://budget.gov.au/2021-22/content/documents.htm>>.

⁸⁸ Budget, Australian Government, *Securing Australia's Recovery: Creating Jobs and Rebuilding Our Economy* (Document, 11 May 2021) <<https://budget.gov.au/2021-22/content/jobs.htm>>.

⁸⁹ 'Developments in Australia's Consumer Data Right' (n 71).

⁹⁰ *Inquiry into Future Directions* (n 36) viii.

A Serving Consumers

The CDR is consumer-focused and goes to who controls the data. Designed to operate in addition to existing data sharing arrangements and practices – such as online bank statements containing transaction records, account balances, etc⁹¹ – it fundamentally changes the traditional way of handling customer data. Historically, service providers treated customer data as their own whether at law it was or not,⁹² with information on consumer use of products and services often residing with, and controlled by, the entities providing the services.⁹³ If a customer sought to change a service provider, it was her responsibility to obtain relevant data from her current provider and then upload it to a competing provider or comparison site.⁹⁴ It was equally her responsibility to ensure that the data would be provided to competitors in the format the latter were using. In the absence of a general obligation requiring data custodians to disclose requested information in a standardised, portable, and machine-readable form that could conveniently be employed by other businesses, the data access and transfer process was understandably accompanied by frustration – the format in which data was downloaded from the current provider may not have suited competing providers or comparison sites. In most public and private sector industries, a consumer remained the designated data recipient with no possibility to authorise third parties to access relevant information directly from her current provider.⁹⁵

CDR profoundly alters this situation. CDR is centred around consumer data, that is the data of individuals and small, medium, and even large businesses.⁹⁶ It is for these ‘consumers’ alone to provide access to their data for a defined timeframe on the understanding their preferred service providers will find ways to use it for themselves and, above all, the consumers. By giving control over their data and enabling efficient and expedient access to information about products and services, CDR is designed to assist consumers in monitoring their finances, utilities and other needs and comparing and moving between different offerings more easily.⁹⁷ Ultimately, it should help them move towards more sustainable and affordable lifestyles and enhance consumer welfare. Consider, for example, personal financial management (‘PFM’) tools, such as the Frolo app. The app uses open banking to help its customers administer their budgets and meet desired financial goals.⁹⁸ By bringing together banking data from a variety of providers

⁹¹ Australian Competition and Consumer Commission, *Explanatory Statement Proposed Competition and Consumer (Consumer Data Right) Rules 2019* (August 2019) 5 <<https://www.accc.gov.au/system/files/Proposed%20CDR%20rules%20-%20Explanatory%20Statement%20-%20August%202019.pdf>> (‘*Explanatory Statement*’).

⁹² There are no property rights in data, merely the right to control it, but this nuance was largely traditionally lost on banks who assembled the data and stored it in records maintained by them.

⁹³ Goggin et al, ‘Data and Digital Rights’ (n 3).

⁹⁴ Productivity Commission, *Data Availability* (n 9) 194.

⁹⁵ Ibid.

⁹⁶ CDR Booklet (n 41) 3.

⁹⁷ Australian Competition and Consumer Commission, *Explanatory Statement* (n 77) 13 [1.55].

⁹⁸ See Elise Donaldson, ‘Open Banking Goes Live in Australia: What Is It and What Does It Mean for Me?’, *Canstar* (online, 8 July 2020) <<https://www.canstar.com.au/credit-cards/open-banking-live-australia/>> (promoted as the first app in Australia to use CDR).

used by a consumer (eg, a deposit account with ANZ and a credit card account with AMEX), along with publicly available data about the range of financial products she might be interested in, it is designed to give her a more holistic view of personal finances, keep track of expenses, identify options for savings, etc.⁹⁹

The regime also affords consumers greater mobility. So far, many consumers have been reluctant to change providers because of the actual or perceived inconvenience, even when they end up paying more for their products or services.¹⁰⁰ However, nearly one-half of the respondents polled prior to the commencement of open banking in July 2020 felt they were paying too much for their banking and finance, listing this concern as the number one reason they would utilise open banking.¹⁰¹ For example, with open banking a consumer may be able to readily demonstrate that she can afford a home loan or credit product. With her consent, a new lender can access transaction history – salary, spending, repayments on credit cards, etc – and account balances to measure credit risks and more accurately price risk and thus shape new credit offers.

B Enhancing Competition

Where consumers are empowered to and do make better choices about what and how to consume,¹⁰² the industry is driven to become more efficient and competitive.¹⁰³ Enhancing competition is another motivating factor for the CDR regime, as competition has been identified as lower than optimal in Australia's economy.¹⁰⁴ With less opportunity to exploit economies of scale and specialisation, Australia has long paid a 'remoteness penalty' of about 10 per cent of its GDP.¹⁰⁵ In its 2017 Report, the ACCC found that the sustained high profits of the largest four banks in Australia – ANZ, CBA, NAB and Westpac – were less likely to be traced to their exceptional performance than to the market conditions in which their competitors were frequently handicapped in their ability to effectively compete.¹⁰⁶ Indeed, between 2007 and 2017, the number of ADIs decreased by

⁹⁹ Ibid.

¹⁰⁰ As noted by Tony Thrassis, Chief Information Officer of Frollo: *ibid.*

¹⁰¹ See Hotwire and Pureprofile, *Cracking the Code of Open Banking* (White Paper, 2020) 6 <<https://www.hotwireglobal.com/feature/cracking-the-code-of-open-banking-whitepaper>> ('*Cracking the Code*').

¹⁰² Data, Technology and Analytics (DaTA) Unit, 'Algorithms: How they Can Reduce Competition and Harm Consumers' (UK Competition and Markets Authority Paper, 19 January 2021) [2.3].

¹⁰³ Treasury, Australian Government, *Review into Open Banking in Australia* (Issues Paper, August 2017) 1 <<https://treasury.gov.au/sites/default/files/2019-03/Review-into-Open-Banking-IP.pdf>>.

¹⁰⁴ See *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, 4 February 2019) vol. 1, 422.

¹⁰⁵ Jim Minifie, *Competition in Australia: Too Little of a Good Thing?* (Grattan Institute Report No 2017-12, December 2017) 7 <<https://grattan.edu.au/wp-content/uploads/2017/12/895-Competition-in-Australia-Too-little-of-a-good-thing-.pdf>>.

¹⁰⁶ Australian Competition and Consumer Commission, *Productivity Commission Inquiry into Competition in the Australian Financial System: Australian Competition and Consumer Commission Submission* (Submission, September 2017) 8 <https://www.pc.gov.au/__data/assets/pdf_file/0019/221860/sub017-financial-system.pdf> ('*Submission to Productivity Commission Inquiry*').

around 32%, from 217 to 147,¹⁰⁷ while the product and service offerings of the large banks displayed a high degree of symmetry, suggesting, at a minimum, reduced corporate rivalry between them.¹⁰⁸ The energy sector, too, has been characterised by a high market concentration and developed in a manner ‘not conducive to consumers being able to make efficient and effective decisions about the range of available retail offers in the market’.¹⁰⁹ For example, from more than 30 authorised retailers supplying small energy customers in southern and eastern Australia, the ‘big three’ – AGL Energy, Origin Energy and Energy Australia – supply over 68% of small electricity customers and 75% of small gas customers.¹¹⁰ Where markets are smaller in scale – as in gas – they tend to be even more concentrated.¹¹¹ But even in regions showing some competition, retail energy industry has been blamed for not delivering the expected benefits for consumers with the latter’s satisfaction progressively declining.¹¹²

CDR aims to change this. Conceived as a framework from which new ideas can emerge and grow,¹¹³ it encourages businesses to develop products and services that better suit the specific needs and circumstances of individual consumers. A manual internet search may, for example, uncover the cheapest electricity for the typical consumption of a mid-sized family. CDR, in contrast, will allow service providers to analyse the actual electricity usage of a given family to tailor an offer specifically for them. In the long run, the more participants in this system, the greater the competition and end-user satisfaction should be; as the variety and quality of services increase, and prices and costs decrease.

C Creating New Employment and Business Opportunities

Enhanced competition goes hand in hand with creating new employment and business opportunities. CDR will call for a range of skills from technical, digital, cybersecurity, regulatory, compliance through to customer service.¹¹⁴ When exposed to increasing competition from new market entrants capable of adapting more quickly to consumer needs and with more competitive pricing, incumbents will be forced to upgrade or overhaul their

¹⁰⁷ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Some Features of the Australian Banking Industry* (Background Paper 1, 31 January 2018), at 8.

¹⁰⁸ Australian Competition and Consumer Commission, *Submission to Productivity Commission Inquiry* (n 90) 9.

¹⁰⁹ Australian Competition and Consumer Commission, *Restoring Electricity Affordability and Australia’s Competitive Advantage: Retail Electricity Pricing Inquiry* (Final Report, June 2018) 134 <https://www.accc.gov.au/system/files/Retail%20Electricity%20Pricing%20Inquiry%E2%80%94Final%20Report%20June%202018_0.pdf>.

¹¹⁰ Ibid.

¹¹¹ For instance, in NSW the ‘big three’ account for 92% of retail gas customers, see *ibid*.

¹¹² Australian Energy Regulator, *State of the Energy Market 2018* (Report, 17 December 2018) 46 <https://www.aer.gov.au/system/files/State%20of%20the%20Energy%20Market%202018%20-%20Full%20report%20A4_2.pdf>.

¹¹³ CDR Booklet (n 41).

¹¹⁴ According to Hayden Scown, Western Union Business Solutions, Director of Financial Institutions & Education, see Christine St Anne, ‘The Jobs Needed in Open Banking’, *AB+F* (online, 28 July 2019) <<https://www.rfigroup.com/australian-banking-and-finance/news/jobs-needed-open-banking>>.

legacy technology systems and potentially reconceptualise their businesses¹¹⁵ – all of which should generate new employment and business opportunities.

D Reinstating Commercial Morality

At the most fundamental level, CDR is meant to promote competition in financial services, but in our view it also has the potential to reinstitute a commercial morality, a basic fairness, that modern businesses no longer seem to prioritise. Thirty years ago, most Australian businesses operated on the understanding that charging current customers more than new customers was inappropriate.¹¹⁶ A guiding principle in commerce was that the same price be offered to all customers. Today, however, those standards of behaviour seem to have fallen by the wayside.¹¹⁷

To illustrate, many Australians with older home loans continue to pay significantly higher interest rates than borrowers with home loans entered into more recently, thereby over time paying a potentially very substantial penalty for their loyalty.¹¹⁸ As highlighted in a recent ACCC report, staying with their existing lender, instead of switching to a new one, costs many borrowers much.¹¹⁹ The situation in the energy sector has long been analogous, with many participants criticising energy companies for offering no loyalty rewards to existing customers.¹²⁰ Even where some benefits have been introduced, the ACCC remains concerned about consumers being misled and subject to opaque or unfair loyalty contract terms.¹²¹ To be sure, this problem is not uniquely Australian. In the UK, the Competition and Market Authority (‘CMA’) confirmed in December 2020 that the loyalty penalty was a significant problem across the five essential markets – mobile, broadband, cash savings, home insurance, and mortgages – affecting millions of people, with often vulnerable consumers paying most. The estimates suggest that more than 28

¹¹⁵ Gustav Korobov, ‘Open Banking as a World of Open Opportunities and Hidden Risks’, *Finextra* (online, 12 June 2020) <<https://www.finextra.com/blogposting/18875/open-banking-as-a-world-of-open-opportunities-and-hidden-risks>>.

¹¹⁶ Prior to 1995, section 49 of the *Trade Practices Act 1974* (Cth) prohibited price discrimination – businesses could not ‘discriminate between purchasers of goods of like grade and quality in relation’ to, inter alia, price. See also Russell Miller *Miller's Australian Competition Law & Policy* (Thomson Reuters, 3rd ed, 2018) [3.170] and [3.260].

¹¹⁷ Productivity Commission, *Competition in the Australian Financial System* (Inquiry Report No 89, 29 June 2018) 13.

¹¹⁸ *Ibid.*

¹¹⁹ Australian Competition and Consumer Commission, *Home Loan Price Enquiry* (Final Report, November 2020) 5 <<https://www.accc.gov.au/system/files/Home%20loan%20price%20inquiry%20-%20final%20report.pdf>>.

¹²⁰ See, for example, Australian Energy Market Commission (AEMC), *Consumer Research for Nationwide Review of Competition in Retail Energy Markets* (Research Report, June 2014) 20, 62 <<https://www.aemc.gov.au/sites/default/files/content/736bde30-3ded-4343-8bf5-0e7511801b24/Consumer-Research-for-Nationwide-Review-of-Competition-in-Energy-Retail-Markets-Newgate-Research.pdf>>.

¹²¹ Australian Competition and Consumer Commission, *Customer Loyalty Schemes* (Final Report, December 2019) iv-v, 114 <<https://www.accc.gov.au/system/files/Customer%20Loyalty%20Schemes%20-%20Final%20Report%20-%20December%202019.PDF>> (‘ACCC Report on Customer Loyalty Schemes’).

million UK customers were paying a loyalty penalty of £3.4 billion.¹²² In the US, e-commerce platforms routinely offer consumers individualised prices on prospective purchasers based on a range of factors that, in sum, mean poorer customers pay more for their goods.¹²³

By encouraging vigorous competition, CDR seeks to ameliorate this mistreatment of Australian consumers. It offers a unique opportunity to promote a long-diminished commercial morality by, as mentioned, making it possible for consumers to benefit from more streamlined switching between products and services. Crucially, with the introduction of action initiation, changing energy providers may become a matter of a few clicks on a computer or a mobile device as the consumer agrees to the new provider terminating her existing electricity supply contract, so as to take advantage of the lower prices on offer.¹²⁴ To retain customers, providers will be forced to treat them fairly and offer services at their best price, as action initiation will mean trying to salvage the relationship at the last minute by then offering better contractual terms will be impossible.

Under current arrangements, when an existing customer does the hard work of comparing prices and other terms, decides to change providers and then informs their current provider – the latter can then offer them the same or better prices that are offered to attract new customers, and most often the current customer will not change providers. Some customers will change, but as so few customers do the hard comparative work in the first place, the numbers currently shifting providers are very small and entirely insufficient to incentivise providers to offer the same terms to all. All this will change with action initiation under CDR. There will be no opportunity for current providers to win back their current customers – they will only learn the customer has shifted providers after the fact, at least in sectors in which changing a provider is simple and swift. No one can predict the impact of this change on how businesses behave towards existing customers, but we expect it to be large.

Nonetheless, we recognise there are no guarantees that the competitive market envisaged by the Productivity Commission will be the end product of the CDR.¹²⁵ There is a significant risk that major incumbents may acquire innovative competitors as they start

¹²² ‘Loyalty Penalty Update – Progress Two Years on from the CMA’s Super-Complaint Investigation’, *Competition and Markets Authority* (Press Release, 1 December 2020) 1 <https://assets.publishing.service.gov.uk/media/5fc52bdcd3bf7f7f591e141e/Loyalty_penalty_Dec_2020_.pdf>; see also ‘CMA Publishes Loyalty Penalty Update’, *Competition and Markets Authority* (Press Release, 21 January 2021) <<https://www.gov.uk/government/news/cma-publishes-loyalty-penalty-update>> and Temi Ogunye et al, *The Cost of Loyalty: Exploring How Long-Standing Customers Pay More for Essential Services* (Citizens Advice Report, 2018) 3 <<https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Citizens%20Advice%20-%20The%20cost%20of%20loyalty.pdf>>.

¹²³ Alex P Miller and Kartik Hosanagar, ‘How Targeted Ads and Dynamic Pricing Can Perpetuate Bias’, *Harvard Business Review* (Blog Post, 8 November 2019) <<https://hbr.org/2019/11/how-targeted-ads-and-dynamic-pricing-can-perpetuate-bias>>.

¹²⁴ See Treasury, *Inquiry into Future Directions* (n 36) 5, 48.

¹²⁵ Productivity Commission, *Data Availability and Use* (Inquiry Report No 82, 31 March 2017) v.

to scale and thereby restrict both competition and innovation,¹²⁶ and there is a real risk that the major incumbents may use data available through the CDR in ways that serve to entrench their own market dominance, to the detriment of consumers. Certainly, there is a broad and deep literature that critically interrogates information capitalism and the potential abuse of data by its recipients. For instance, Zuboff contends that big data and data sharing are components of *surveillance capitalism*, an emerging form of information capitalism that seeks to predict and modify human behaviour in the pursuit of market power and revenue.¹²⁷ She asserts that this architecture will lead to a new expression of uncontested power she terms the ‘Big Other’.¹²⁸ In Zuboff’s view, personalisation and customisation services are merely tools which extract predictive data and facilitate information asymmetry.¹²⁹ Similarly, Pistor argues that the accumulation of large amounts of data can be used as a tool for governance beyond markets and law.¹³⁰

The risks that CDR may not further competition or innovation are real. These highly critical perspectives of information capitalism have validity. Both factors are beyond the scope of this article but warrant careful and close attention as the CDR regime is rolled out across a range of economic sectors in Australia.

E Promoting Efficiency

Last but not least, CDR is designed to promote efficiency. The Future Directions for the Consumer Data Right Report acknowledges, for example, that regulatory costs and compliance burdens can create significant barriers to entry to new market participants.¹³¹ Similarly, if consumers are unaware of the CDR or feel insufficiently protected, they may well not engage with it. CDR has therefore sought to balance security and privacy for consumers with relatively light regulatory burdens for businesses.¹³²

CDR also aims to provide consumers with more personalised service offerings, based on their actual preferences and needs. It offers transparency in pricing, power to make better purchase decisions, and greater ease and convenience in utilising the services. As consumer awareness increases of the power of data-sharing to deliver better value services to them, they should be more likely to engage in it.¹³³ Ultimately, the wider the participation

¹²⁶ See eg, Kurt Fanning and Emily Drog, ‘Big Data: New Opportunities’ (2014) 25(2) *Journal of Corporate Accounting and Finance* 27.

¹²⁷ Shoshanna Zuboff, ‘Big Other: Surveillance Capitalism and the Prospects of an Information Civilization’ (2015) 30 *Journal of Information Technology* 75, 75.

¹²⁸ *Ibid.*

¹²⁹ *Ibid* 83; Shoshanna Zuboff, ‘Surveillance Capitalism and the Challenge of Collective Action’ (2019) 28(1) *New Labor Forum* 11, 15.

¹³⁰ Katharina Pistor, ‘Rule by Data: The End of Markets?’ (2020) 83 *Law and Contemporary Problems* 101, 101.

¹³¹ *Ibid* 7.

¹³² *Ibid* 6.

¹³³ Treasury, *Review into Open Banking* (n 19) v–vi.

in this process, the greater will be the social licence for directed data use, as larger segments of the population become confident about how their data is being utilised and by whom.¹³⁴

These numerous benefits notwithstanding, the regime is unlikely to thrive without ongoing and careful management of the risks it brings. These risks are analysed next.

V RISKS AND CHALLENGES

Unless consumers are sufficiently assured that a regulatory regime appropriately considers and safeguards their interests, they are unlikely to develop confidence in it. We are not suggesting that consumers should be able to develop *trust* in CDR. In that regard, we adopt the approach of Onora O'Neill and distinguish between 'trust' and 'trustworthiness'.¹³⁵ The former is an attitude that arises from judgements about the truthfulness or reliability of other's claims, commitments and competence. However, finding a basis for specific judgements is difficult in complex technological and institutional environment.¹³⁶ By contrast, trustworthiness emerges from a context of professional and institutional performance that exhibits honesty and reliability. Therefore what matters is to demonstrate trustworthiness.¹³⁷ This can be promoted by transparent and accessible information from, and assurances provided by, the designers of a given system to users in *their* specific circumstances and perceptions. Restated, for CDR to be trustworthy, it is important that laws, regulations and standards are devised and verified carefully before consumers test the system on its capacity to meet their individual demands. For example, if a consumer chooses to share her data with two ADRs and subsequently receives offers from ten, the trustworthiness of the system will be undermined. Trustworthiness is linked to education: appreciation of how the risk-benefit balance has been struck by the designers of CDR will support consumers in choosing to embrace it.

Industry, too, needs sufficient incentives to join the CDR ecosystem. According to a recent study, many participants in the financial services industry, including banks, FinTechs and brokers, are enthusiastic about the roll out of CDR, with 71% stating they intend to use CDR data.¹³⁸ Nonetheless, in the same study, respondents agreed the following were challenges: complexity and uncertainty about the rules (54.2%); complexity of compliance measures (45.8%); time and cost (29.2%); and lack of customer education (54.2%).¹³⁹

¹³⁴ Productivity Commission, *Data Availability* (n 9) 13.

¹³⁵ Onora O'Neill, 'Linking Trust to Trustworthiness' (2018) 26(2) *International Journal of Philosophical Studies* 293; and see also David Spiegelhalter, 'Should We Trust Algorithms?' (2020) 2(1) *Harvard Data Science Review* <<https://doi.org/10.1162/99608f92.cb91a35a>>

¹³⁶ O'Neill (n 135) 295.

¹³⁷ Ibid 298.

¹³⁸ Report downloadable here: Frolo, *The State of Open Banking* (Report, November 2020) 4 <<https://frollo.com.au/open-banking/state-of-open-banking-report-2020/>>.

¹³⁹ Ibid 22.

As will be shown in the remainder of this article, all of these concerns should be taken seriously. As CDR continues to develop, it must strike a balance between protecting consumers from insecure data sharing practices, while promoting the participation of industry. Failure to do so may well see Australia with a data sharing system that is rarely used.

A Data Safety and Security

The foremost risk to address is insecure handling of consumer data. Transaction data, for example, can reveal an individual's preferences (eg, donations can disclose one's political affiliation), health issues (as indicated through payments to doctors), location and movement (disclosed by payment patterns), relationship status and other personal attributes that can be synthesised from an analysis of expenditures. Such data can equally facilitate identity theft.¹⁴⁰ The consultative process on the CDR framework identified the leakage or misuse of sensitive financial data by non-accredited recipients as major risks for consumers and industry.¹⁴¹ Apart from privacy breaches and potential financial losses for consumers, the reputation of data custodians and, as a consequence, their ability to attract new customers or enter into business partnerships will be put at risk when data is stored or transmitted insecurely.

While Australians voluntarily share significant amounts of personal information in a wide range of contexts,¹⁴² concerns about security of personal information loom large.¹⁴³ Research on consumer sentiment toward open banking shows that significant doubts about data being adequately protected have resulted in consumer opposition to data sharing

¹⁴⁰ Australia and New Zealand Banking Group, *Open Banking Review: Response to Issues Paper* (Response, September 2017) 22 [70] <https://treasury.gov.au/sites/default/files/2019-03/c2017-t224510_ANZ.pdf> ('ANZ Response').

¹⁴¹ Select Committee on Financial Technology and Regulatory Technology, Parliament of Australia, *Interim Report* (Interim Report, September 2020), 138 [5.31] <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024366/toc_pdf/SelectCommitteeonFinancialTechnologyandRegulatoryTechnology.pdf;fileType=application%2Fpdf>; see also Australia and New Zealand Banking Group, *ANZ Response* (n 112) 22 [67]; American Express, *American Express Submission on the CDR Rules Framework* (Submission, 12 October 2018) 7 <<https://www.accc.gov.au/system/files/CDR%20-%20Rules%20-%20Submission%20to%20framework%20-%20American%20Express%20-%20PUBLIC%20VERSION.pdf>>.

¹⁴² As of January 2021, nearly 80% of Australian Internet users have a social media profile, see Simon Kemp, 'Digital 2021: Australia' *Datareportal* (Web page, 9 February 2021) <<https://datareportal.com/reports/digital-2021-australia>>; In 2019, almost 90% of Australians had a membership in a loyalty scheme, with the average Australian carrying four to six loyalty cards, see ACCC *Report on Customer Loyalty Schemes* (n 102) 6. In 2017, Australians claimed the second highest take-up rate of wearable technology, such as fitness band devices, worldwide, see Productivity Commission, *Data Availability* (n 9) 58.

¹⁴³ 70% of Australians see the protection of personal information as an important issue and a major concern in their life, see Office of the Australian Information Commissioner, *Australian Community Attitudes to Privacy Survey 2020* (September 2020) 17 <<https://www.oaic.gov.au/assets/engage-with-us/research/acaps-2020/Australian-Community-Attitudes-to-Privacy-Survey-2020.pdf>>.

practices: 48% of respondents listed cybersecurity concerns as a reason for opposing the regime, with only 40% willing to support it.¹⁴⁴

Admittedly, the risks of data loss or misuse are not new. They have existed since the inception of the digital world and are not unique to it – customer data recorded on paper is not necessarily more secure from theft or manipulation. Still, CDR heightens this risk by opening opportunities to disseminate data to a wider range of stakeholders. As more data is shared with more parties, the possibility of data breaches increases making effective data management ever more crucial.¹⁴⁵ Furthermore, as organisations become more digitally integrated and their staff more flexible in how and where they work, more safety vulnerabilities arise. With the introduction of ‘action initiation’, security risks for consumers are expected to rise even further by creating greater incentives for, and more vulnerabilities to, cyber attacks.¹⁴⁶

High levels of privacy protection and robust information security have therefore been identified as essential features of the CDR framework.¹⁴⁷ The *CDR Act* obliges data custodians and recipients to protect CDR data from misuse, interference, loss, unauthorised access, modification or disclosure, with violations subject to civil penalty.¹⁴⁸ Further, where a consumer suffers loss or damage as a result of a breach of CDR obligations, they may be entitled to compensation.¹⁴⁹

There is a complex relationship between the Privacy Safeguards under the CDR and the Australian Privacy Principles (‘APPs’) under the *Privacy Act*. This interaction is outlined in section 56EC of the *Competition and Consumer Act*. For ADRs and accredited persons, the Privacy Safeguards generally apply instead of APPs.¹⁵⁰ Broadly speaking,

¹⁴⁴ Hamish Thomas and Anita Kimber, ‘Five Approaches to Secure Open Banking’, *EY* (Web Page, 6 March 2019) <https://www.ey.com/en_gl/banking-capital-markets/five-approaches-to-secure-open-banking>; see also EY, *Taking Off or Going Slow: What Is the Optimum Pace for Open Banking to Thrive?* (Report, May 2019) 6 <https://www.innovalue.de/publikationen/2019-05_EY_OpenBankingOpportunityIndex.pdf>.

¹⁴⁵ Basel Committee on Banking Supervision, *Report on Open Banking* (n 23) 6.

¹⁴⁶ Deloitte, *Open Banking Payment Initiation* (31) 8.

¹⁴⁷ CDR Booklet (n 41).

¹⁴⁸ CCA (n 1) ss 56EO(1), 56EU.

¹⁴⁹ This entitlement to compensation arises from CCA s 56EY. It is also notable that sub-sections 56ET(3) and 56ET(4) of the *Competition and Consumer Act* extend the Office of the Australian Information Commissioner’s (‘OAIC’) powers under Part V of the *Privacy Act* to CDR matters. Relevantly, section 52(1)(b)(iii) of the *Privacy Act* provides that upon finding that a complaint is substantiated, the OAIC may make a *declaration* for compensation. However, in general to date, the OAIC has preferred conciliation as a means of resolving complaints: see Office of the Australian Information Commissioner, *Consumer Data Right Privacy Safeguard Guidelines* (Guidelines No 3.0, June 2021) <https://www.oaic.gov.au/_data/assets/pdf_file/0012/8013/privacy-safeguard-combined-chapters.pdf> 9 [A.39]. (‘OAIC Guidelines’).

¹⁵⁰ *Competition and Consumer Act 2010* (Cth) s 56EC(4)(a); 56EC(4)(aa); cf: s 56EC(5)(aa); *Privacy Act 1988* (Cth) s 6E(1D). See also OAIC Guidelines (n 145) <https://www.oaic.gov.au/_data/assets/pdf_file/0012/8013/privacy-safeguard-combined-chapters.pdf> 7. (‘OAIC Guidelines’).

Privacy Safeguards 1, 10, 11 and 13 and all APPs apply to data holders.¹⁵¹ Designated gateways must comply with Privacy Safeguards 1, 6, 7 and 12 and APPs 1–5, 8–10 and 12–13.¹⁵²

Privacy Safeguards afford stronger protection than the APPs. A ‘valid request’ from the consumer is necessary for the collection, use and disclosure of CDR data by accredited persons.¹⁵³ On the other hand, consent is not the primary basis upon which an entity may use information under the *Privacy Act*. For instance, under APP 3, an entity may collect information if it is ‘reasonably necessary for, or directly related to, one or more of the entity’s functions or activities’.¹⁵⁴ Furthermore, in circumstances where consent is required, the *Privacy Act* allows for express or implied consent.¹⁵⁵ Under *Competition and Consumer Act* section 56EI, CDR data can only be used if there was a ‘valid request’, or where that disclosure is required or authorised under Australian law or the consumer data rules..¹⁵⁶ Notably, this section does not allow for the disclosure of CDR data where that disclosure is authorised under the APPs.¹⁵⁷ By comparison, a ‘reasonable expectation’ exception is available under APP 6 and 7.¹⁵⁸

Moreover, the CDR safeguards apply to a different scope of data than the APPs under the *Privacy Act*. This is because the Privacy Safeguards apply to CDR data that ‘relates to’ a consumer,¹⁵⁹ as opposed to data ‘about’ an individual (as per the *Privacy Act*). According to the explanatory memorandum of the Consumer Data Right Bill, ‘relates to’ can include reference to identifiers including name, location, address, online identifiers as well as the physical, physiological genetic, mental, behavioural, cultural and social characteristics of that person.¹⁶⁰ The memorandum also reveals that this broader phrase was intended to capture metadata – including metadata of the type that is not covered by the *Privacy Act*.¹⁶¹ Nonetheless, it is acknowledged that it is currently unclear to what extent metadata falls under ‘personal information’ in the *Privacy Act*.¹⁶² Additionally, the Privacy Safeguards apply to CDR data where one or more consumers are identifiable or reasonably

¹⁵¹ However, once the data holder is required or authorised to disclose CDR data, Privacy Safeguards 11 and 13 replace APPs 10 and 13: OAIC Guidelines (n 145) 7; *Competition and Consumer Act 2010* (Cth) ss 56EC(4)(b), 56EC(4)(c), 56EC(5).

¹⁵² *Competition and Consumer Act 2010* (Cth) ss 56EC(4)(d), 56EC(5)(b); OAIC Guidelines (n 150) 7.

¹⁵³ *Ibid* ss 56EF, 56EI–EL. See also OAIC Guidelines (n 145) ch 3, ch 6–9.

¹⁵⁴ *Privacy Act 1988* (Cth) sch 1, pt 1, s 3.

¹⁵⁵ *Ibid* s 6(1) (definition of ‘consent’).

¹⁵⁶ See *Competition and Consumer Act 2010* (Cth) s 56EI.

¹⁵⁷ *Ibid* s 56EC(4)(a);(d).

¹⁵⁸ *Privacy Act 1988* (Cth) sch 1, pt 3, ss 6.2, 7. 2.

¹⁵⁹ *Ibid* s 56AI(3)(a).

¹⁶⁰ See Explanatory Memorandum, Treasury Laws Amendment (Consumer Data Right) Bill 2019 [1.107].

¹⁶¹ *Ibid* [1.106] citing *Privacy Commissioner v Telstra Corporation Limited* (2017) 347 ALR 1.

¹⁶² See eg, The Attorney-General’s Department, *Privacy Act Review* (Discussion Paper, October 2021) 24 <[https://consultations.ag.gov.au/rights-and-protections/privacy-act-review-discussion-paper.pdf](https://consultations.ag.gov.au/rights-and-protections/privacy-act-review-discussion-paper/user_uploads/privacy-act-review-discussion-paper.pdf)> (‘*Privacy Act Review* Discussion Paper’).

identifiable,¹⁶³ regardless of whether the consumer is an individual or a business.¹⁶⁴ In contrast, the *Privacy Act* only captures the data of identified or reasonably identifiable individuals.¹⁶⁵

There is a current review of the *Privacy Act* being undertaken by the Commonwealth Attorney General's Department at the time of writing.¹⁶⁶ The Discussion Paper, released in October 2021, illustrated stakeholder concerns regarding the 'fragmentation' and 'differential standards' between the *Privacy Act* and the CDR regime.¹⁶⁷ As such, submissions generally encouraged greater consistency or recommended caution in introducing further legislation under the *Privacy Act*.¹⁶⁸

As previously mentioned, APIs (or application programming interfaces) are regarded as the most reliable and tested technology for the purpose of transferring data. In essence, APIs enable software applications to communicate with each other over a network, using a common language and without using intermediaries.¹⁶⁹ Businesses use APIs to connect services and transfer data. APIs can be used internally, for example, to integrate diverse systems within a business entity and allow for the exchange of data across its different departments or externally to provide access to business assets to external parties; APIs can be private (to facilitate interaction with contractual partners) – or open (public) and available to third parties that might not have a formal relationship with the business.¹⁷⁰ Compared to existing methods and practices (such as screen scraping¹⁷¹ or reverse

¹⁶³ Ibid s 56EB(1).

¹⁶⁴ Ibid s 56AI(3); Explanatory Memorandum, Treasury Laws Amendment (Consumer Data Right) Bill 2019 [1.100] and [1.101]. See also section 2C(1) of the *Acts Interpretation Act 1901* (Cth): 'In any act, expression used to denote persons generally include a body politic or corporate as well as an individual'.

¹⁶⁵ *Privacy Act 1988* (Cth) s 6(1) (definition of 'personal information').

¹⁶⁶ 'Privacy Act Review – Discussion Paper' Australian Government Attorney-General's Department (Web Page) <<https://consultations.ag.gov.au/rights-and-protections/privacy-act-review-discussion-paper/>>.

¹⁶⁷ *Privacy Act Review Discussion Paper* (n 157) 209.

¹⁶⁸ Ibid.

¹⁶⁹ See Andrea Moriggi, 'Open Banking and Competition. How APIs Are Shaping the Future of Financial Institutions', *Cyberlaws* (online, 9 March 2018) <<https://www.cyberlaws.it/en/2018/open-banking-api-competition/>> ('Open Banking and Competition') and Markos Zachariadis and Pinar Ozcan, 'The API Economy and Digital Transformation in Financial Services: The Case of Open Banking' (Working Paper No 2016-001, SWIFT Institute, 15 June 2017) 4, with reference to Daniel Jacobson, Greg Brail and Dan Woods, *APIs: A Strategy Guide* (O'Reilly, 2012). On APIs generally, see Neil Madden, *API Security in Action* (Manning, 2020) 298.

¹⁷⁰ See 'What is an API?', *Red Hat* (Web Page, 2021) <<https://www.redhat.com/en/topics/api/what-are-application-programming-interfaces>>. See also Moriggi, 'Open Banking and Competition' (n 122).

¹⁷¹ Screen scraping is used by third parties to access customer's banking data, whereby a customer discloses her internet banking credentials to the said party which then uses the scraping technology to log into the bank's online banking interface and copy customer's transactional information so that it could render the required services to the customer. Treavor Jeffords, 'What is "Screen Scraping" and Is It Lawful in Australia?' (2001) 44 *Computers and Law* 24. See also 'Open Banking', *Bendigo Bank* (online, 2021) <<https://www.bendigobank.com.au/open-banking/>>.

engineering¹⁷²) data sharing arrangements under CDR are more secure and generally preferable.¹⁷³

Nonetheless, as technology is never infallible, stringent accreditation processes (see Part V(D) below) can serve as a key protection mechanism against cyber security threats. To become accredited, providers must demonstrate compliance with privacy safeguards, rules and IT system requirements that ensure customer privacy will be protected and their data handled securely.¹⁷⁴ CDR prohibits data disclosure and transfer to a non-accredited provider, even if a consumer demands it.¹⁷⁵ Specification of consumer consent requirements (see next section) as well as remedies for potential security breaches by data holders and recipients¹⁷⁶ serve as further tools to mitigate and manage risks associated with the sharing of customer data with third parties.

The extent to which these measures will prove sufficient to tackle security threats associated with the use of APIs remains to be seen, however. Existing data suggests that APIs are certainly not a panacea. According to the 2019 Application Security Risk Report by Micro Focus – one of the world’s largest enterprise software providers – 35% of web applications inspected in 2018 displayed API abuse issues, more than double the level in 2015 (16%). In mobile applications examined in 2018, the same problem arose in 52% of cases.¹⁷⁷ Of note, every Big Five tech behemoth – Amazon, Apple, Facebook, Google and Microsoft – capable of affording the best talent to oversee security has at some point made headlines because of API vulnerabilities and resulting safety breaches.¹⁷⁸ From the Cambridge Analytica scandal¹⁷⁹ to, most recently, a leak of the personal information of 533

¹⁷² Reverse engineering is a process in which software is deconstructed to extract design information. See Syeda Warda Asher et al, ‘Reverse Engineering of Mobile Banking Applications’ (2021) 38(3) *Computer Systems Science and Engineering* 265.

¹⁷³ Treasury, *Review into Open Banking* (n 19) x, 5.

¹⁷⁴ ‘State of Open Banking in Australia’ (n 60). See also below, Part V(D).

¹⁷⁵ CDR Booklet (n 41).

¹⁷⁶ CCA (n 1) s 56ED(2)(b) and div 5 sub-div G.

¹⁷⁷ These conclusions stem from the analysis of over 11,000 web applications and more than 700 mobile applications. Microfocus, *Application Security Risk Report* (Report, 2019) <<https://www.microfocus.com/en-us/assets/security/application-security-risk-report>> 2, 21–24.

¹⁷⁸ For example, researchers have identified that nearly two dozen APIs across 16 different **Amazon** Web Services (AWS) offerings are open to abuse, see Jai Vijayan, ‘Nearly Two Dozen AWS APIs Are Vulnerable to Abuse’, *Dark Reading* (online, 17 November 2020) <<https://www.darkreading.com/cloud/nearly-two-dozen-aws-apis-are-vulnerable-to-abuse/d-id/1339471>>. See also Abeerah Hashim, ‘Researcher Discovers Critical Vulnerability and Was Awarded \$100,000’, *LHN* (online, 31 May 2020) <https://latesthackingnews.com/2020/05/31/researcher-discovers-critical-vulnerability-and-was-awarded-100000/>; Catalin Cimpanu, ‘Facebook Bug Exposed Private Photos of 6.8 Million Users’, *ZDNet* (online, 14 December 2018) <https://www.zdnet.com/article/facebook-bug-exposed-private-photos-of-6-8-million-users/>; and Catalin Cimpanu, ‘Google Shuts Down Google+ After API Bug Exposed Details for Over 500,000 Users’, *ZDNet* (online, 8 October 2018) <<https://www.zdnet.com/article/google-shuts-down-google-after-api-bug-exposed-details-for-over-500000-users/>>. See also Lindsey O’Donnell, ‘Some Microsoft Applications Are Vulnerable to an Authentication Issue That Could Enable Azure Account Takeover’, *ThreatPost* (online, 2 December 2019) <<https://threatpost.com/microsoft-oauth-flaw-azure-takeover/150737/>>.

¹⁷⁹ Cambridge Analytica gained access to personally identifiable information of up to 87 million Facebook users due to (amongst other factors) developer abuse of APIs – specifically, the ability of the

million Facebook users,¹⁸⁰ poor API design or management have been a source of problems.

B Consumer Consent

A poorly thought-through consent architecture poses yet another hurdle to user acceptance and engagement with CDR. CDR requires valid, ie express and genuine, consumer consent to the use of their data.¹⁸¹ However, ensuring that consent is genuinely informed and given freely is becoming increasingly difficult in the ‘big data’ and digital age.¹⁸² It is common place for consumers – overwhelmed by the detail and extent of terms and conditions of service – to choose ‘I agree’ without any real understanding of what they are agreeing to and with no real choice but to agree if they are to receive the desired service.¹⁸³ The Final Report on the Review into Open Banking therefore urged this problem be addressed by ensuring that consumer’s consent is explicit, fully informed and permitted or constrained according to the consumer’s instructions.¹⁸⁴ As a result of this recommendation, the current version of the *CDR Rules* mandates that consumers must not be forced to share their data, cannot be deemed to have provided an ‘implied’ or ‘open ended’ consent, must understand what they are consenting to, and must be able to revoke their consent to data sharing.¹⁸⁵

These explicit regulatory goals are commendable. The problem, however, lies in finding how to meaningfully translate them into practice. As mentioned, the current CDR framework – at the minimum as it applies to the banking sector – is perceived as highly complex. Apart from the range of entities that may be accredited to collect and use CDR data (see below, Part V(D)), it establishes a complex typology of consents that are required

developer to access each user’s friends list and their friends’ data with the consent of just one user. See Dan Patterson, ‘Facebook Data Privacy Scandal: A Cheat Sheet’, *TechRepublic* (online, 30 July 2021) <<https://www.techrepublic.com/article/facebook-data-privacy-scandal-a-cheat-sheet/>> and Ronnie Mitra, ‘How the Facebook API led to the Cambridge Analytica Fiasco’, *APIacademy* (online, 15 June 2018) <<https://apiacademy.co/2018/06/how-the-facebook-api-led-to-the-cambridge-analytica-fiasco/>>.

¹⁸⁰ In April 2021, Facebook experienced a data leak (including information about phone numbers, name, gender, location, relationship status, employer and email addresses) of 533 million users from 106 jurisdictions due to an API vulnerability. While Facebook had officially discontinued API access to those fields as of 2018, meaning that the data released into the public domain was over two years old, it contained many identifiers which do not change frequently and represented a major ongoing breach of privacy rights. See ‘Easter’s Facebook Revelations’, *Auscert* (Blog Post, 6 April 2021) <<https://www.auscert.org.au/blog/2021-04-06-easters-facebook-revelations>>. See also Kari Paul, ‘Facebook Says a Breach That Hit 533m Is Old News. Experts Disagree’, *The Guardian* (online, 7 April 2021) <<https://www.theguardian.com/technology/2021/apr/06/facebook-breach-data-leak>>.

¹⁸¹ See *CCA* (n 1) s 56BC; see also CDR Explanatory Memorandum (n 35) [1.135].

¹⁸² Treasury, *Review into Open Banking* (n 19) 51.

¹⁸³ Ibid. See also Productivity Commission, *Data Availability* (n 9) 194.

¹⁸⁴ Treasury, *Review into Open Banking* (n 19) xvi [Recommendation 4.5 (‘Customer Control’)].

¹⁸⁵ *CDR Rules* (n 3) r 4.9.

to be requested from CDR consumers,¹⁸⁶ along with detailed modalities applicable to amendments and revocation of consent.¹⁸⁷ While this complexity stems from the desire to offer more flexibility for accredited persons and greater and more granular control options for consumers,¹⁸⁸ it has been argued it subjects consumers to ‘information overload’.¹⁸⁹ While businesses may risk non-compliance, where they fail to ensure appropriate specificity and detail in framing requests for consent, consumers may find the latter overly burdensome, choose to skip over or bypass the content and, ultimately, miss information aimed at protecting them. The calls for consumer research to identify the most appropriate volume of information and the ways to present it to consumers are certainly timely.¹⁹⁰ These calls are, however, yet to be acted upon.

C Transparency Within the Regulatory Framework

Ensuring transparency and coherence in a regulatory framework is essential for its effective implementation. Where law is too complex or overly detailed, the risk of confusion on the part of regulated entities, misinterpretation, and, as a result, non-compliance, is high. The more complex a legal regime the more expensive it is for users to engage with it, as compliance costs arise well before law is translated into practice – they emerge whenever efforts are directed at understanding law in the first place.

The role of a given regime within a larger (national) regulatory system must equally be clear. While CDR focuses on secure and efficient data sharing, it has major implications for competition, consumer protection, and information privacy, to name just a few other areas – making it vital for legislators and regulatory authorities to ensure that the relationship between CDR and other applicable laws and regulations is comprehensible to users.¹⁹¹

¹⁸⁶ The *CDR Rules* currently distinguish between collection consents, use consents relating to the goods or services requested by the CDR consumer, direct marketing consents, de-identification consents, AP disclosure consents, see *ibid* r 1.10A.

¹⁸⁷ See *Ibid* div 4.3.

¹⁸⁸ See Australian Competition and Consumer Commission, *CDR Rules Expansion Amendments* (Consultation Paper, September 2020) 44

<<https://www.accc.gov.au/system/files/CDR%20rules%20expansion%20amendments%20-%20consultation%20paper%20-%2030%20September%202020.pdf>>.

¹⁸⁹ Maddocks, *Update 2 to Privacy Impact Assessment Update* (Report, 8 February 2021) 8, 62 <[fgacc.gov.au/system/files/CDR%20v2%20Rules%20-%20Update%202%20to%20Privacy%20Impact%20Assessment.pdf](https://www.accc.gov.au/system/files/CDR%20v2%20Rules%20-%20Update%202%20to%20Privacy%20Impact%20Assessment.pdf)> (*‘PIA Update 2 Report’*) (with references to the views expressed by OAIC, Office of Victorian Information Commissioner, CBA, AGL Energy Limited, NAB, Regional Australia Bank and the Financial Rights Legal Centre which all can be found here: ‘Consumer Data Right (CDR): Consultation on Proposed Changes to the Consumer Data Right Rules’, *Australian Competition and Consumer Commission* (Web Page, 18 November 2020) <<https://www.accc.gov.au/focus-areas/consumer-data-right-cdr-0/consultation-on-proposed-changes-to-the-consumer-data-right-rules>>).

¹⁹⁰ *Ibid*.

¹⁹¹ To borrow from the report on the Future Directions for Consumer Data Right, the regime ‘has not been designed to regulate the lending of money, even though data shared by consumers through it can be used in applying for or providing loans. Data used by lenders may come from many sources in addition to

Criticisms of the lack of transparency or precision of the CDR framework and its relationship with other legislative and regulatory instruments have been voiced at various stages of the consultative process on the scope and substance of CDR.¹⁹² Perhaps, the most prominent critique concerns the relationship between the CDR privacy safeguards¹⁹³ and the general information privacy law framework, especially the *Privacy Act* with its 13 APPs.¹⁹⁴ The drafters of CDR saw the APPs and CDR privacy safeguards as operating in tandem.¹⁹⁵ It has been argued, however, that at various times the applicability of each regime may be unclear, in effect leading to ‘twin privacy regimes’ and requiring regulated entities to implement a two-tiered risk management process to conscientiously comply with both.¹⁹⁶

There are also fears that CDR may weaken the application of Australia’s broader information privacy laws framework¹⁹⁷ although some safeguards under CDR, for instance in relation to consent, are greater than under the *Privacy Act*.

As a result, so runs the argument, Australians are facing the situation where the very concept of ‘privacy’ may soon be commonly viewed as an attribute of data portability, rather than – as is the case in other jurisdictions (eg, the member States of the EU) – considered on its own merits.¹⁹⁸ This argument is not one we support. In the modern world of citizens’ interactions with BigTechs, privacy is such an important topic to many people that, for what it is worth, we don’t see privacy being subsumed within data portability.

Constructive critique of the continuously developing CDR framework is neither likely to subside, nor should it, particularly where it serves to enhance the regime.¹⁹⁹ Yet, particularly given the aspirations of the government to position Australia at the centre of international data sharing standards and global digital trade, the pressure to respond to criticisms by ‘getting the law right’ remains high.

the CDR, and there are specific laws and regulations designed to protect consumers during the lending process’, see Treasury, *Inquiry into Future Directions* (n 36) xiv (Recommendation 1.2), 8–9.

¹⁹² For a list of regulatory issues requiring further clarification, see Maddocks, *PIA Update 2 Report* (n 142) 6–7 and 59 ff. See also Treasury, *Treasury Laws Amendment (Consumer Data Right) Bill* (n 34).

¹⁹³ CCA (n 1) div 5; *CDR Rules* pt 7.

¹⁹⁴ *Privacy Act 1988* (Cth) sch 1.

¹⁹⁵ See *CDR Explanatory Memorandum* (n 35) [1.26] (‘Comparison of Key Features of New Law and Current Law’).

¹⁹⁶ Burdon and Mackie, ‘Australia’s Consumer Data Right’ (n 3) 19–23. See also Goggin et al, ‘Data and Digital Rights’ (n 3).

¹⁹⁷ Burdon and Mackie, ‘Australia’s Consumer Data Right’ (n 3) 27–28.

¹⁹⁸ *Ibid* 28.

¹⁹⁹ The need to ensure ongoing improvements of the CDR regime was implicit in the recommendation to allow for competing approaches to open banking, see Treasury, *Review into Open Banking* (n 19) xii and 10 (Recommendation 1.1 [‘Allowing for Competing Approaches’]).

D Accreditation Hurdles

Another hurdle to effective realisation of CDR lies in the accreditation requirements. Under CDR, only accredited trusted recipients – included in the electronic Register for Accredited Persons²⁰⁰ – are allowed access to data.²⁰¹ Designed conservatively to secure optimum levels of data safety for consumers, the current version of the *CDR Rules* sets out one general level of accreditation – the ‘unrestricted’ level²⁰² – which provides access to *all* CDR data within scope for banking.²⁰³ To receive accreditation, an applicant must:

- Be a fit and proper person or organisation;²⁰⁴
- Have processes in place to adequately protect data;²⁰⁵
- Have internal dispute resolution processes;²⁰⁶
- Belong to a relevant external dispute resolution scheme;²⁰⁷
- Hold adequate insurance due to the risk of CDR consumers not being properly compensated for losses that might reasonably be expected to arise from a breach of obligations under the CDR framework;²⁰⁸
- Have an Australian address for service.²⁰⁹

Applicants holding an unrestricted Authorised Deposit-taking Institution (‘ADI’) licence can benefit from a streamlined accreditation process, meaning they will automatically be able to access accreditation at this level.²¹⁰ Non-ADIs, including the vast majority of FinTechs, can join the CDR participant group, provided they meet the requirements specified above.

²⁰⁰ The Register – required under *CCA* (n 1) s 56CE – is currently under development: ‘Consumer Data Right Register’, *GitHub* (Web Page, 2021) <<https://cdr-register.github.io/>>. See ‘cdr-register/register’, *GitHub* (Web Page, 28 May 2021) <<https://github.com/cdr-register/register>>.

²⁰¹ ‘Accredited data recipient’ is defined in *CCA* (n 1) s 56AK.

²⁰² See *CDR Rules* pt 5 div 5.2.

²⁰³ *CDR Booklet* (n 41) 8. See also Treasury, *Inquiry into Future Directions* (n 36) 118, noting that unrestricted accreditation ‘is designed to be suitable for full access to all banking sector designated data sets and all operating models with their associated potentially high levels of risk’.

²⁰⁴ *CDR Rules* rr 1.9, 5.12(2)(a).

²⁰⁵ *Ibid* r 5.12 (1)(a).

²⁰⁶ *Ibid* r 5.12 (1)(b).

²⁰⁷ *Ibid* r 5.12 (1)(c).

²⁰⁸ *Ibid* r 5.12 (2)(b). ADIs that are not restricted ADIs are exempt from this insurance requirement: *ibid* sch 3 cl 7.4(2). What is considered to be ‘adequate’ insurance will vary depending on the specific circumstances of the applicant. Australian Government, *Consumer Data Right – Supplementary Accreditation Guidelines: Insurance* (Guidelines, 25 May 2020) 5 <<https://www.cdr.gov.au/sites/default/files/2020-06/CDR%20-%20Supplementary%20accreditation%20guidelines%20insurance.pdf>>

²⁰⁹ *Ibid* r 5.12(d)(e).

²¹⁰ *Ibid* sch 3, cl 7.3. See also Select Committee on Financial Technology and Regulatory Technology (n 114) 136 [5.25].

The accreditation model has been heavily criticised for unfairly benefitting large incumbent financial institutions.²¹¹ Above all, the costs of the accreditation process have been pointed to as prohibitively high for smaller players in the market, such as non-ADIs.²¹² For example, the expenses of building a data storage centre capable of hosting CDR data to the required security standards have been estimated to be from \$50,000 to \$70,000.²¹³ Lamenting that the accreditation process is too ‘stringent’ and lengthy, involving review after review, some warn that interested parties may have to be ready to spend an average of \$250,000 to secure their ADR status.²¹⁴

There may be a need for better balance between the requirements for accreditation and security of data sharing.²¹⁵ In the first six months after the roll-out of CDR in open banking, only nine data holders were registered – CBA, Westpac, NAB, ANZ, International Netherlands Group (‘ING’), Australian Mutual Provident Society (‘AMP’), Regional Australia Bank, Beyond Bank, and Community First Credit Union – and only six data recipients were granted accreditation. Of these six, the only bank is Regional Australia Bank, joined by five FinTech companies, such as Ezidox, Frollo, Intuit, and two entities of illion.²¹⁶ Many others keen to create innovative solutions for consumers – financial planning firms, accounting companies, brokers – remain currently unable to do so in a cost-effective manner.²¹⁷ However, rigorous accreditation standards will be central to the success of any data-sharing regime as consumers are unlikely to use a regime which fails to protect data about them; and typically with rigour comes expense. In this context, it is far from clear whether the current costs of accreditation deserve the criticism they have attracted. The regime undoubtedly will benefit from less expensive routes to holding ADR status, but is unlikely to flourish unless data transferred to ADRs is kept very safe.

²¹¹ See Raiz Invest Limited, *Submission to the Select Committee on Financial Technology and Regulatory Technology* (Submission No 29, 24 December 2019) 6 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Financial_Technology_and_Regulatory_Technology/FinancialRegulatoryTech/Submissions?main_0_content_1_RadGrid1ChangePage=2_20v>.

²¹² Select Committee on Financial Technology and Regulatory Technology (n 114) 137 [5.27]. See also Raiz Invest Limited, *Submission to the Select Committee on Financial Technology and Regulatory Technology* (n 164) 6.

²¹³ Commonwealth, *Select Committee on Financial Technology and Regulatory Technology*, Senate, 27 February 2020, 11–17 (Paul Franklin, Executive General Manager, Consumer Data Right, ACCC).

²¹⁴ According to Jarrid Ohanessian, general manager of illion Open Data: see Madison Utley, ‘ACCC Amends Open Banking for Brokers – But It’s Not Enough’, *Australian Broker News* (online, 7 December, 2020) <<https://www.brokernews.com.au/news/breaking-news/accc-amends-open-banking-for-brokers--but-its-not-enough-274629.aspx>>.

²¹⁵ According to Richard Atkinson, illion’s general manager of consumer product: see Harrison Astbury, ‘“Zero Consumer Benefit” in Open Banking So Far’, *Savings.com.au* (online, 19 January, 2021) <<https://www.savings.com.au/savings-accounts/zero-consumer-benefit-in-open-banking-so-far>> (‘Zero Consumer Benefit’).

²¹⁶ Charnley, ‘The CDR’ (n 33) and Astbury, ‘Zero Consumer Benefit’ (n 168). One year after the roll-out of CDR, the numbers remain rather low, with 16 data holders and 13 ADRs (only six ADRs have an active status), see ‘Current Providers’, *Australian Government* (Web Page, 2021) <<https://www.cdr.gov.au/find-a-provider?providerType=Data%2520Recipient&status=ACTIVE>>.

²¹⁷ Astbury, ‘Zero Consumer Benefit’ (n 168).

On 30 September 2021, further amendments were made to the *CDR Rules* to address the problem of high accreditation costs.²¹⁸ These amendments introduced the sponsored level of accreditation, which permits an unrestricted accredited person to sponsor other parties to participate in the CDR regime.²¹⁹ A representative model of CDR was also established, where representatives of ADRs offering CDR-related services can access CDR without accreditation.²²⁰ The amendments also allow consumers to share their data with trusted professional advisers, such as brokers, financial counsellors, and lawyers.²²¹

E Opposition by Businesses

Incumbent institutions were initially not supportive of CDR. In the context of open banking, for example, big banks have their own hurdles to overcome. [Redacted by Editors] For big banks to compete and flourish in the CDR ecosystem in the future, they will need to overcome three barriers: legacy systems, legacy thinking and legacy customer expectations.²²² Many banks are currently struggling to get their legacy systems ready for CDR.²²³ Yet, the need to update core banking technology to allow them to harness consumer data effectively and respond to an increasing demand for unbundled, personalised financial products and services is considerable.²²⁴ While the necessary funding and expertise are essential for these changes to occur, the changes are unlikely to succeed without strong leadership and shifts in organisational culture.

Australia's banking sector is an oligopoly where 'the major banks have significant market power that they use to protect shareholders from regulatory and market developments'.²²⁵ As mentioned, a major purpose of CDR is to challenge this market concentration. New smaller players in the ecosystem know their success is squarely dependent on being able to create a clear, differentiated proposition that delivers value to customers and is difficult for large, established financial institutions to copy quickly.²²⁶

²¹⁸ *CDR Amendment Rules 2021* (n 53); Explanatory Statement, *CDR Amendment Rules 2021*.

²¹⁹ *CDR Amendment Rules 2021* (n 53) sch 1 and r 5.1B; Explanatory Statement, *CDR Amendment Rules 2021* (n 175) 5.

²²⁰ *CDR Amendment Rules 2021* (n 53) sch 2 and r 1.10A; Explanatory Statement, *CDR Amendment Rules 2021* (n 175) 12.

²²¹ *CDR Amendment Rules 2021* (n 53) sch 3 and r 1.10C; Explanatory Statement, *CDR Amendment Rules 2021* (n 175) 18.

²²² [Redacted by Editors]

²²³ See, for example, Forrester, *The State of Open Banking in Australia* (Report, April 2020) <<https://www.forrester.com/report/The+State+Of+Open+Banking+In+Australia/-/E-RES142176>>.

²²⁴ Jonathan Porter, 'Financial Bypass Surgery Set for Legacy Banking Tech', *The Australian Financial Review* (online 19 March 2021) <<https://www.afr.com/companies/financial-services/financial-bypass-surgery-set-for-legacy-banking-tech-20210318-p57btg>>.

²²⁵ Standing Committee on Economics, *The Coleman Report* (n 35) 4.

²²⁶ Deloitte, *Open Banking: Switch or Stick? Insights into Customer Switching Behaviour and Trust* (Survey, October 2019) 5 <https://images.content.deloitte.com.au/Web/DELOITTEAUSTRALIA/%7B15b9dc7b-49eb-49b9-a7f8-3148e6ef4fb4%7D_20200330-fsi-open-banking-survey-2019-report.pdf?utm_source=eloqua&utm_medium=lp&utm_campaign=20200330-fsi-open-banking-survey-2019&utm_content=cta>.

FinTechs are getting increasingly better at this task and will continue to challenge banks even more in future, actively undermining long-standing relationships that banks have with their customers. An openness to greater diversity in banking employment structures, involving a better balance between established long-serving professionals and younger talent may call for significant shifts in a mindset today, yet is needed in banks wanting to successfully partake in the benefits of the CDR ecosystem.²²⁷

F Educational Deficits

Consumers will only be able to exercise their rights effectively once they understand them. Adequate consumer education about CDR may well be a precondition for its success. So far, however, consumer awareness of CDR has been poor. The findings of a survey of 1,000 consumers in November 2019 showed that public knowledge about Australia's sweeping open banking regime was dramatically low:

‘in spite of the industry chattering away about Open Banking, more than three-quarters of Australians (77%) do not know what it is. Just one in ten (11%) know about it, and a further 12% have heard of it, but don't know what it is.’²²⁸

A quick internet search suggests these numbers are unlikely to have changed significantly since. Despite a number of publicly available recordings of webinars and regulatory consultation processes on the CDR's application to the banking and energy sectors, the ‘hit’ rates are astonishingly low. For example, at the time of writing, a three-minute ACCC video clip explaining how CDR works and streamed on YouTube since June 2020, has had fewer than 1,600 views in over a year.²²⁹ Such a lack of enthusiasm about the many forthcoming benefits of Open Banking is striking, given that Australians are, by and large, regarded as a technologically savvy nation – they have thus far been fast adopters of new technologies (such as smart phones), and remain keen users of new applications and software tools²³⁰ in finance and beyond.²³¹

The existing situation is explainable, however – in contrast to industry participants, consumers were largely left out of the consultation process. Even though some organisations spoke on behalf of consumers,²³² they were in the minority and, while raising important consumer protection issues, focused on informing and steering the regulatory debate, rather than conducting large-scale consumer education campaigns. Nonetheless,

²²⁷ Ross Buckley, in KMPG, *30 Voices* (n 175) 68.

²²⁸ Ibid; Hotwire and Pureprofile, *Cracking the Code* (n 86) 4.

²²⁹ See ACCC Govau, ‘Consumer Data Right: How It Works’ (YouTube, 29 June 2020) 00:00:00–00:03:01 <<https://www.youtube.com/watch?v=FnWzudxrTq4>>.

²³⁰ See Treasury, *The Harper Review* (n 35) 22.

²³¹ Hotwire and Pureprofile, *Cracking the Code* (n 86) 4.

²³² For example, Consumer Action Law Centre (CALC) actively drew attention of the stakeholders to the risks of consumer data released under the CDR framework to be misused, see: Financial Rights Legal Centre and Consumer Action Law Centre, *Submission to the Select Committee on Financial Technology and Regulatory Technology* (Submission No 36, December 2019) <https://consumeraction.org.au/wp-content/uploads/2020/01/191223_FinTechInquiry_Sub_FINAL.pdf>.

while it is commendable to focus foremost on technical and legal questions, it is consumers who remain the intended beneficiaries of, and key success factor for, the economy-wide roll out of CDR.²³³

Government and industry have ‘a mammoth communications task ahead’.²³⁴ Larger community acceptance of the CDR regime is unlikely without timely consumer education focused on the benefits of data sharing and how to mitigate its risks and costs.²³⁵ We are not suggesting that consumer education should become the priority of the system’s designers today. Devising, testing and appropriately evaluating the rules and standards rightly takes precedence. Yet the ultimate success of the regime will depend upon consumers using it in their daily lives. Therefore, even if consumer education may be postponed for a while, it should not be postponed for too long.

The potential of a consumer education campaign by government to alert consumers to the potential benefits of directing the sharing of data about them to potential new providers of banking, energy and other services is very large indeed. It is understandable and probably right, given how early we are in the data-sharing journey, that government is yet to undertake such a campaign, but certainly once data-sharing is available across more than one sector, the time will be ripe for such a campaign.

Of course, a lack of consumer awareness is not the only factor that is limiting consumer take up of this initiative, there is also the lack of consumer time. CDR is designed to make the assessment of competing service offerings by consumers far quicker and easier than it generally is today, and it does this well. However, it does not, and cannot, mean the process is instantaneous, only that it will be swift. There is no hard evidence, because with such a profoundly new framework there cannot be, that this change will be sufficient to entice consumers to be proactive in seeking out better deals in the various sectors across which CDR will be rolled out. However, the high cost of living is a constant refrain across Australia, so while we cannot be sure, we expect that a well-designed and concerted consumer education campaign will be effective in promoting consumer take up of this initiative.

²³³ Both the Final Report on the Review into Open Banking and the Future Directions for the Consumer Data Right Report emphasised the need for a consumer education programme, see Treasury, *Review into Open Banking* (n 19) xviii [Recommendation 6.4 (‘Consumer Education Programme’)] and Treasury, *Inquiry into Future Directions* (n 36) xxviii [Recommendation 7.8] .

²³⁴ Sarah Simpkins, ‘Most Australians Unaware of Open Banking’, *Fintech Business* (online, 9 December 2019) <<https://www.fintechbusiness.com/data/1605-most-australians-unaware-of-open-banking>>.

²³⁵ Treasury, *Inquiry into Future Directions* (n 36) xii. See also The Paypers, *Open Banking Report 2019* (n 18) 4.

VI CONCLUSION

The potential expected and claimed benefits of CDR are many. The most significant include better priced products and services for customers, enhanced competition and an opportunity to reinstitute a fairer commercial morality.

CDR is intended to stay flexible and future oriented.²³⁶ Given the fast pace of technological developments, the regime promises to remain a ‘living document’ subject to frequent revisions and updates. As we have sought to demonstrate, it is important to ensure that innovation not be stifled and yet risks be managed. Although the Australian government is determined to tackle the related regulatory challenges, progress is not going to be effortless. Regulation will need to be nuanced and involve ‘learning by doing’. The government realises that in our world of big data a nation can be a global leader or follower and it is clearly aiming for Australia to be a leader.

In this regard, it is vital the government acts on the three important recommendations in the “Future Directions for the Consumer Data Right” report of October 2020²³⁷ that (i) the government create an integrated roadmap for the implementation of the CDR, which considers the many other related assessments and reviews underway on matters ranging from privacy to competition and many others, (ii) there be a general post-implementation review for each major stage of the CDR roll out that “will provide a clear process for stakeholders to provide feedback on their experiences”; and (iii) there be a specific post-implementation assessment of action initiation and payment initiation after approximately 24 months which reports to the Minister with recommendations.²³⁸

The most important of the next steps in the development of the CDR is the implementation of action initiation. As we have highlighted above, the CDR regime without action initiation is inchoate. Action initiation gives the regime its capacity to effect change in commercial behaviour, and we are delighted its implementation is underway.

The Lord Mayor of the City of London, William Russell, has described the UK open banking system as a ‘slow burn’:

I think that is exactly what we should expect here ... [It] is not something that happens overnight. And it is also not something that customers acknowledge in a short space of time. Sometimes, there is a catch-up phase.²³⁹

²³⁶ Treasury, *Review into Open Banking* (n 19) viii.

²³⁷ *Inquiry into Future Directions* (n 36).

²³⁸ Ibid 212-3.

²³⁹ As reported in Rhys Thomas, ‘Preparing for the Consumer Data Right: Balancing Opportunity and Risk’, *Australian Energy Council* (online, 16 July 2020) <<https://www.energycouncil.com.au/analysis/preparing-for-the-consumer-data-right-balancing-opportunity-and-risk/>>.

The progress of CDR in Australia is likely to mirror that of open banking in the UK and require time to become broadly popular. Nonetheless, from a consumer perspective, the suggestion of ‘more control’ of one’s data involving its being opened to a larger circle of interested parties may seem counterintuitive. Targeted consumer education about the regime should not therefore be delayed for too long.