The Senate

Economics Legislation Committee

Treasury Laws Amendment (Consumer Data Right) Bill 2019 [Provisions]

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Senate Economics Legislation Committee

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Table of Contents

Abbreviations and acronyms

ABA	Australian Banking Association
ACCAN	Australian Communications Consumer Action Network
ACCC	Australian Competition and Consumer Commission
ADI	Authorised deposit-taking institution
API	Application programming interface
APPs	Australian Privacy Principles
ARCA	Australian Retail Credit Association
BCA	Business Council of Australia
the bill	Treasury Laws Amendment (Consumer Data Right) Bill 2019
the committee	Economics Legislation Committee
CCA	*Competition and Consumer Act 2010*
CDR	Consumer Data Right
COAG	Council of Australian Governments
COBA	Customer Owned Banking Association
CSIRO	Commonwealth Scientific and Industrial Research Organisation
EDR	External Dispute Resolution
EM	Explanatory Memorandum
FRLC	Financial Rights Legal Centre
GDPR	General Data Protection Regulation
Law Council	Law Council of Australia
OAIC	Office of the Australian Information Commissioner
PIA	Privacy impact assessment
Privacy Act	*Privacy Act 1988*
PC	Productivity Commission
UK	United Kingdom
US	United States

Chapter 1

Introduction

1.1 On 13 February 2019, the Treasury Laws Amendment (Consumer Data Right) Bill 2019 (the bill) was introduced into the House of Representatives. In accordance with the Selection of Bills Committee *Report No. 15 of 2018* as amended and adopted by the Senate on 6 December 2018, the provisions of the bill were referred to the Economics Legislation Committee (the committee) for inquiry and report by 18 March 2019.[1] On 6 March 2019, the committee tabled a progress report and requested an extension of the reporting date to 21 March 2019.

Conduct of the inquiry

1.2 The committee advertised the inquiry on its website. It also wrote to relevant stakeholders and interested parties inviting submissions by 28 February 2019. The committee received 31 submissions, which are listed at Appendix 1.

1.3 The committee held public hearings in Melbourne on 5 March 2019, and Sydney on 6 March 2019. The names of witnesses who appeared at the hearings are at Appendix 2.

1.4 The committee thanks all individuals and organisations that contributed to the inquiry.

1.5 Committee Hansard references throughout this report relate to the Proof Hansard. Please note that page numbering may differ between the Proof and Official Hansard.

Overview of the bill

1.6 In brief, the bill creates a Consumer Data Right (CDR). This gives individuals and businesses a right of access to specified data about them which is held by businesses. The bill also allows consumers to authorise secure access to the data by certain third parties. The CDR also requires businesses to publish certain information about goods or services they provide, which should allow for more informed choice by consumers and more competition.

1.7 Creation of the National Consumer Data Right was announced in the 2018–19 Budget. As well as an implementation cost to the budget of $45 million from 2018–19 to 2021–22, the measure will increase compliance costs in the banking sector and for accredited parties by about $87 million per year, and in the energy sector by about $10 million per year. There will be impacts on other sectors as they are designated for inclusion by the Minister.[2]

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1 *Journals of the Senate No. 137*, 6 December 2018, p. 4483.

2 *Explanatory Memorandum*, p. 3.

Background and consultation

Inputs to the policy

1.8 The bill was introduced into the House of Representatives on 13 February 2019. The date of effect of the earliest measures in the bill is 1 July 2019.[3]

1.9 Notwithstanding the tight timelines for passage of the bill, there has been a good deal of consultation, both about the CDR and specifically on the draft legislation.[4]

1.10 In 2017, the Productivity Commission (PC) was given a reference arising from both the Financial System Inquiry, which recommended that the government should investigate improving the use of data, and the Harper Review of Competition Policy, which recommended that consumers should have access to data which facilitates informed choice.

1.11 The resulting PC report on data availability and use noted the potential for better outcomes for consumers, business and government of better use of the vastly increased amounts of data being generated and stored. It recommended the creation of a system 'based on transparency and confidence in data processes, treating data as an asset and not a threat'.[5]

1.12 In June 2017, the *Independent Review into the Future Security of the National Electricity Market* noted that better access to information about their own energy use as well as products offered by energy companies would enable consumers to manage their demand and thus improve the functioning of the electricity market. It recommended that the Council of Australian Governments (COAG) Energy Council should facilitate measures to remove complexities and improve consumers' access to, and rights to share, their energy data.[6]

1.13 In July 2017, the government commissioned a review of open banking. Before that review reported, the government responded to the PC review in part by

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3 *Explanatory Memorandum*, p. 3.

4 The Treasury, *Timeline*, at https://treasury.gov.au/consumer-data-right/; The Treasury, *Treasury Laws Amendment (Consumer Data Right) 2018 Bill*, https://treasury.gov.au/consumer-data-right-bill/ (accessed 27 February 2019).

5 Productivity Commission, *Data Availability and Use: Report No. 82*, March 2017, p. 2, https://www.pc.gov.au/inquiries/completed/data-access/report/data-access.pdf (accessed 27 February 2019).

6 Alan Finkel, *Independent Review into the Future Security of the National Electricity Market: Blueprint for the future*, June 2017, pp. 8 and 25, https://www.energy.gov.au/sites/g/files/net3411/f/independent-review-future-nem-blueprint-for-the-future-2017.pdf (accessed 28 February 2019).

announcing that it would create a CDR which would be applied initially in the banking, energy and telecommunications sectors.[7]

1.14 The review of open banking made 50 recommendations on the regulatory framework for the CDR, and how to implement it in the banking sector.[8] In May 2018, the government agreed to the recommendations of the open banking review, and, in August 2018, COAG announced that it would progress consumer access to energy data through CDR mechanisms.

1.15 Europe, the United Kingdom (UK), and states of the United States (US) including California have also moved towards data accessibility and portability.

1.16 The European Union has established and implemented data portability under Article 20 of the General Data Protection Regulation (GDPR). The measure was agreed to in 2016, and implemented in May 2018. Among other features, the regime lists specific rights such as the right to data erasure and the right to be forgotten, requires that requests for consent must be intelligible and easily accessible, and provides for fines of up to €20 million for infringements.[9]

1.17 The UK adopted the GDPR in 2018 with modifications for the UK environment.[10]

Consultation and timing

1.18 Consultations on two exposure drafts of this bill were conducted by Treasury from August 2018. The Australian Competition and Consumer Commission (ACCC) consulted on a Rules Framework for a CDR in the banking sector. Data61, hosted by CSIRO, has been appointed as technical adviser to the Data Standards Body and is developing common technical standards.[11]

1.19 In December 2018, the government published a timeline for introduction of the CDR. The first requirement would be for the big four banks to publish product data for credit and debit cards, deposit accounts and transaction accounts, and they would begin testing consumer, account and transaction data access information

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7 The Hon Angus Taylor MP, Assistant Minister for Cities and Digital Transformation, 'Australians to own their own banking, energy, phone and internet data', *Media release*, 26 November 2017, https://ministers.pmc.gov.au/taylor/2017/australians-own-their-own-banking-energy-phone-and-internet-data (accessed 28 February 2019).

8 Scott Farrell, *Review into Open Banking in Australia: Final Report*, December 2017, https://static.treasury.gov.au/uploads/sites/1/2018/02/Review-into-Open-Banking-_For-web-1.pdf . See also *Consumer Data Right*, May 2018, https://static.treasury.gov.au/uploads/sites/1/2018/05/t286983_consumer-data-right-booklet.pdf (accessed 28 February 2019).

9 EU GDPR.org, *GDPR Key Changes*, https://eugdpr.org/the-regulation/ (accessed 14 March 2019).

10 IT Governance, *The EU General Data Protection Regulation (GDPR)*, https://www.itgovernance.co.uk/data-protection-dpa-and-eu-data-protection-regulation (accessed 14 March 2019).

11 Data61, *Consumer Data Standards*, https://data61.csiro.au/en/Who-we-are/Our-programs/Consumer-Data-Standards (accessed 1 March 2019).

systems before introducing live access. The same processes would then be followed for mortgage accounts, and later for personal loans. Other banks would follow. The big four banks' systems were to have been completed by July 2020, but the deadline for the first consumer access has already been pushed out by eight months, so presumably the other deadlines could also be somewhat later.

1.20 The energy and telecommunications sectors will follow. The ACCC published a consultation paper setting out three options for data access in the energy sector on 25 February 2019.[12] The ACCC notes that, while there will be common features of the data access regimes in the three sectors, there will also be differences. It points out that people commonly have more than one provider of energy, so that CDR obligations may be imposed on more than one provider.[13]

Content of the bill

Schedule 1, Part 1

1.21 Part 1 contains the main amendments to the *Competition and Consumer Act 2010* (CCA).

Division 1—preliminary

1.22 Part 1 of Schedule 1 of the bill amends the CCA by inserting Part IVD—Consumer Data Right. Subdivision A sets out the object of this part, which is to enable consumers to require information relating to them to be disclosed 'safely, efficiently and conveniently' to them or to accredited data receivers; and to enable any person to access information about products, in order to create more choice and competition (section 56AA).

1.23 Subdivision B enables the Minister (in this case the Treasurer) to designate sectors of the economy to participate in the CDR regime, and to designate what information consumers will have access to. The ACCC will review the designation instrument in a process requiring public consultation (section 56AE).

1.24 At present, the *Privacy Act 1988* (Privacy Act), through the Australian Privacy Principles (APPs), governs the handling of consumer data held by companies, and the bill provides (section 56AF) that the Australian Information Commissioner will review the Minister's instrument designating a sector.

1.25 The Minister can also specify which information a fee can be charged for. The Minister must take economic factors into account (section 56AD(2)(c)).

1.26 Subdivision C defines CDR data to include 'data, directly or indirectly derived', which means that data to which companies have added value may be included. This is discussed further below. This subdivision also defines CDR

12 ACCC, *Energy CDR: Consultation on energy data access models,* https://www.accc.gov.au/focus-areas/consumer-data-right-cdr/energy-cdr/consultation-on-energy-data-access-models (accessed 1 March 2019).

13 ACCC, *Energy CDR: project overview*, https://www.accc.gov.au/focus-areas/consumer-data-right-cdr/energy-cdr (accessed 1 March 2019).

consumer, data holder, accredited data recipient, and CDR participant (a data holder or an accredited data recipient). It also discusses designated gateways and chargeable and fee-free CDR data, which will be referred to later.

Division 2—Consumer data right

1.27 Subdivision A provides that the ACCC may make consumer data rules which determine how the CDR applies in each sector. These rules are legislative instruments. Consumer data rules may be made on all aspects of the CDR regime, including accreditation of an entity, use, storage, disclosure and accuracy of CDR data, the Data Standards Body, and the format of CDR data and the data standards.[14]

1.28 There are limitations on what the rules can cover, such as limitations on the kinds of product data that must be disclosed.

1.29 Subdivision B deals with compliance.

1.30 Subdivision C deals with the process for making consumer data rules, including a requirement to consult and the need for Ministerial consent.

1.31 Subdivision D deals with fees for disclosing CDR data. Fees must reflect the reasonable costs incurred in disclosing the data. Some data is fee-free, but that is not dealt with in the bill itself. Charging a fee for fee-free data is a contravention.

Division 3—Accreditation

1.32 There is to be a Data Recipient Accreditor, an Accreditation Registrar, and a register of Accredited Persons.

1.33 Accredited data recipients do not have to be in a designated sector. For example, a retailer might be able to receive banking data.[15]

Division 4—External dispute resolution

1.34 The ACCC may recognise external dispute resolution (EDR) schemes for one or more designated sectors. Section 56 DA(3) sets out the matters the ACCC must consider before recognising an EDR scheme.

Division 5—Privacy safeguards

1.35 Privacy safeguards protect CDR data that relates to an identifiable CDR consumer, including data not currently protected by the APPs. They work with the consumer data rules, but the privacy safeguards override the rules if there is an inconsistency. Subdivision A sets out the relationship between the CDR privacy safeguards and the Privacy Act.

1.36 The privacy safeguards apply more broadly than the APPs. In particular, they also apply to small businesses.[16]

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14 *Explanatory Memorandum*, p. 9.

15 Australian Banking Association, *Submission 16*, p. 2.

16 Australian Banking Association, *Submission 16*, p. 3.

1.37 Subdivision B sets out how the safeguards are operationalised, providing for CDR data to be managed in an open and transparent way. CDR holders, accredited data recipients, and designated gateways for CDR data must have policies that set out how they manage CDR data.

1.38 Subdivision C is about collecting CDR data in ways that preserve privacy, and how CDR consumers are to be notified of the collection of data. Unsolicited data is to be destroyed by the holder.

1.39 Subdivision D deals with use and disclosure of CDR data. In particular, it limits the use of CDR data for direct marketing and notifying when data has been disclosed.

1.40 Subdivision E deals with the integrity of CDR data: its accuracy, currency and completeness; and security of data. It includes what is to be done if it is found that data that has been disclosed is incorrect, and that redundant data is to be destroyed or de-identified.

1.41 Subdivision F deals with correction of CDR data at the request of consumers.

1.42 Subdivision G is about compliance with the privacy safeguards, and, among other things, provides that the Information Commissioner may conduct an assessment relating to the management and handling of CDR data. It provides for enforcement, and gives individual consumers a right to bring an action for loss or damages

Division 6—Data standards etc.

1.43 This division provides for the Minister to appoint a Data Standards Body, which can be the Department (in this case the Treasury) or another Commonwealth entity. It sets out the responsibilities of the Data Standards Chair to make data standards (for example, about format and description of data) and to publish them. Data standards are binding, and failure to comply with them may be pursued in court.

Division 7—Other matters

1.44 This division sets out the CDR functions of the Information Commissioner, among other things.

Schedule 1, Parts 2 and 3

1.45 Parts 2 and 3 contain other amendments to the CCA and to the *Australian Information Commissioner Act 2010* and the Privacy Act.

Other information

Financial impact

1.46 The *Explanatory Memorandum* (EM) states that the amendments in the bill will have a budget impact of $45 million from 2018–19 to 2021–22 [17]

1.47 The measure will increase compliance costs in the banking sector and for accredited parties by an average of $86.6 million per year, and in the energy sector by

17 *Explanatory Memorandum*, p. 3.

an average of $9.9 million per year, on an annualised basis (with common accreditation costs not duplicated in the latter figure). The regulatory impact for other sectors, including the telecommunications sector, will be considered on a sector by sector basis both when designating those sectors and when writing rules for those sectors.[18]

Human rights implications

1.48 The EM states that the bill is compatible with human rights, and to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.[19]

18 *Explanatory Memorandum*, p. 3.

19 *Explanatory Memorandum*, p. 87.

Chapter 2

Views on the bill

General support for the CDR

2.1 Most submissions and witnesses were positive about the proposal to create a consumer data right (CDR), recognising that there is already a huge amount of data held on individuals and businesses and that it is important that they have full access and greater control over how it is used.

2.2 For example, CHOICE submitted that it:

> …is strongly supportive of the spirit and the intention of the [CDR]. The CDR was conceived to empower consumers through improved access to their data, and to facilitate consumer mobility between products and services.[1]

2.3 The Consumer Policy Research Centre also supported the intention of the legislation:

> The Consumer Policy Research Centre are strong supporters of creating a trusted environment for greater sharing and use of consumer data. Through our research, we have highlighted the significant benefit to consumers of having greater access to and portability of their data to make easier comparisons of products and services and to switch to better deals. We've been supportive of the establishment of a consumer data right and other reforms for these reasons.[2]

2.4 Visa noted that the need for legislation would only increase:

> Continued advances in artificial intelligence (AI) and cloud technologies, together with growth in connectivity through the proliferation of Internet of Things devices, could have profound impacts on global commerce, creating new use cases for payments and Visa technology. In such an environment, common understanding about the treatment of personal data is essential.[3]

2.5 The Financial Rights Legal Centre (FRLC) noted that consumer data is already used for targeted marketing, which makes consumers with few resources vulnerable. It saw the potential for a CDR to benefit consumers:

> Having banks proactively identify whether someone is experiencing financial hardship in order to offer them a free basic banking account would also be a good outcome. Stopping payday lenders from screen scraping would be another good outcome from this reform…We want to see the development of not just a consumer data portability right but a holistic

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1 CHOICE, *Submission 23*, p. 2.

2 Ms Lauren Solomon, Chief Executive officer, Consumer Policy Research Centre, *Committee Hansard*, 6 March 2019, p. 1.

3 Visa, *Submission 18*, p. 2.

> consumer data right that provides effective protections to all Australians and empowers them in the use of their data.[4]

2.6 The Australian Privacy Foundation supported the bill in principle.[5] It argued that the current privacy settings are not effective, and that a new legislative framework such as the CDR was needed to fix it. It argued that current settings were deficient because Australia did not have the explicit rights which are created in the United Kingdom (UK) Human Rights Act and the General Data Protection Regulation (GDPR), and it did not have an adequately funded, active and tough privacy regulator. The Australian Privacy Foundation argued that these deficiencies should be remedied before the bill is considered.[6]

2.7 Other submissions emphasised the benefits to the economy more generally. A precondition for a competitive market is that consumers are fully informed about alternative products. The CDR creates the possibility not only of making product information available so that consumers can make informed choices, but also of providers or third parties being able to assess, from consumer data, the best product 'fit' for a particular consumer. This is particularly important with products that are inherently complex, or where product differentiation has been used as a competitive strategy.

2.8 The Australian Retail Credit Association (ARCA) observed:

> ARCA supports the concept of the consumer data right on the basis that, with consumer consent, making more data available to a broad range of entities for a wide range of services is good for competition and for consumers.[7]

2.9 The Business Council of Australia (BCA) also emphasised the benefits for competition and for individual consumers:

> Data portability has the potential to benefit customers through greater competition—driving businesses to offer new, better or cheaper goods and services—and by making information available about the performance of specific products applicable to the requesting individual, enabling better choices to be made on what products best suit customers' needs.[8]

2.10 Illion suggested that better use of data also contributes to business efficiency:

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4 Mr Drew MacRae, Policy and Advocacy Officer, Financial Rights Legal Centre, *Committee Hansard*, 6 March 2019, p. 18.

5 Australian Privacy Foundation, *Submission 26*, p. 1.

6 Australian Privacy Foundation, *Submission 26*, p. 2.

7 Mr Michael Laing, Australian Retail Credit Association, *Committee Hansard*, 5 March 2019, p. 27.

8 Business Council of Australia, *Submission 9*, p. 1.

> Our data assets combined with our broad product portfolio and data analytics capabilities enable us to deliver trusted insights to our customers and to facilitate confident and accurate decision-making.[9]

2.11 Meanwhile, new combinations and uses of data are the source of new products and services and a driver of innovation in the economy. For example, Xero noted that:

> Born in the cloud, Xero connects businesses with the accounting tools, apps and the thousands of data points business owners need in one place, available at any time, on any device.[10]

2.12 Similarly, TrueLayer submitted that:

> At TrueLayer, we build universal APIs [application programming interfaces] that allow entities to securely and efficiently access their customers' bank accounts to share financial data, make payments and validate their identity.[11]

2.13 The financial services industry is one of Australia's fastest growing industries.[12] Industry participants argue that a framework for data use is essential for growth. For instance, FinTech Australia expressed the view that:

> The Bill is critical to the key role that Australia's fintech industry will play in pioneering innovation. With the proposed framework Australian fintechs will be in a position to compete not only in Australia, but also globally. In addition, the Bill includes a globally leading proposition of a [CDR] which encompasses other industries, and will propel Australia as an international market and aid our companies' export opportunities.[13]

The overall design of the scheme

2.14 The CDR legislation is to be a framework, with much of the detail set out in rules and data standards. As Treasury described it:

> …the idea was that we should design a principles based legal framework that sets up the structures and sets up the principles but has a rule-making power that's flexible enough to adapt to changing business models and the changing digital economy, but with significant parliamentary oversight of that being a disallowable instrument.[14]

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9 Mr Steven Brown, Director, Bureau Engagement, illion, *Committee Hansard*, 5 March 2019, p. 28.

10 Xero, *Submission 24*, p. 1.

11 Truelayer, *Submission 19*, p. 1.

12 Reserve Bank of Australia, *Chart Pack: Industry share of output*, March 2019, https://www.rba.gov.au/chart-pack/regions-industry.html (accessed 18 March 2019).

13 FinTech Australia, *Submission 17*, p. 5.

14 Mr Hamish McDonald, Division Head, Structural Reform Division, Treasury, *Committee Hansard*, 6 March 2019, p. 60.

2.15 The scheme for the CDR is being developed on several fronts simultaneously. Treasury is responsible for drafting the legislation, and will be responsible for continuing co-operation among those responsible for developing the system.[15] The ACCC is working on the rules framework, and will be the lead regulator. The Interim Data Standards Body is developing technical standards. Also involved are the Australian Information Commissioner, and Data61 in the CSIRO.[16]

2.16 Some contributors to the inquiry have argued that the bill should not be passed until it is clear how it will operate on the ground. Ms Lauren Solomon of the Consumer Policy Research Centre told the committee:

> Without an end-to-end view of the reforms, it's very difficult to assess the consumer impact and the impact on privacy.[17]

2.17 CHOICE argued that the links between the various components are not clear:

> No clear overarching framework has been provided to connect the technical standards to the ACCC Rules and policy intent of the reform.[18]

2.18 ID Exchange, which sells privacy enhancing technologies and data sharing platforms, noted that a large amount of the detail of how the scheme will operate is still unspecified. It also complained that, despite the creation of a number of new entities, there is no body responsible for overseeing the CDR scheme as a whole.[19]

2.19 Others have argued that too much is being left to the rules, including matters which should be legislated.[20]

2.20 On the other hand, Experian, a multinational credit reporting company, applauds keeping the legislative framework broad, so that it will not only fit the initial application to the banking sector, '…but is also future proofed for further adoption of [CDR] across other industries and sectors'.[21]

2.21 The Law Council of Australia (Law Council) argued that problems are created by the dual intentions of the bill. The right to privacy has different implications from the intention to influence the structure of a market by encouraging competition and

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15 Mr Hamish McDonald, Division Head, Structural Reform Division, Treasury, *Committee Hansard*, 6 March 2019, p. 58.

16 Mr Scott Gregson, Executive General Manager, Merger and Authorisation Review Division, ACCC, *Committee Hansard*, 6 March 2019, p. 17.

17 Ms Lauren Solomon, Chief Executive officer, Consumer Policy Research Centre, *Committee Hansard*, 6 March 2019, p. 2.

18 CHOICE, *Submission 23*, p. 4.

19 ID Exchange, *Submission 29*, p. 9.

20 See, for example, Ms Elizabeth Molyneux, General Manager, Energy Markets Regulation, AGL Energy, *Committee Hansard*, 6 March 2019, p. 49; ID Exchange, *Submission 29*, p. 9.

21 Experian, *Submission 15*, p. 1.

innovation.[22] Treasury's analysis is that better consumer information was the mechanism for driving competition and hence innovation.[23]

Privacy

2.22 Privacy standards in Australia are established by the Australian Privacy Principles (APPs) arising from the *Privacy Act 2009*. There are also state and territory based privacy arrangements, and general consumer protections where the entities holding data are too small to be covered by the APPs. The bill will introduce a new set of principles called the Privacy Safeguards that need to be adhered to when it comes to CDR data.

2.23 Witnesses argued that the existing privacy laws are inadequate, and that new laws about data should not be introduced until the privacy regime was reformed. For example, the Australian Privacy Foundation noted that the CDR is to some extent modelled on the UK's introduction of open banking, but that:

> …the UK has the General Data Protection Regulation, the Human Rights Act and a well resourced active privacy regulator. We do not have any of these protections…
>
> We urge the committee to recommend that this legislation does not proceed until we review the privacy laws to make sure that they are adequate…[24]

2.24 Similarly, the Financial Rights Legal Centre (FRLC) pointed out that the European Union has established a list of 20 data protection rights, including rights to access, deletion and rectification, that apply across the whole economy. Sectoral standards and safeguards were being developed as well. While the FRLC welcomed the stronger safeguards in the bill, it believed they should apply across the whole economy.[25] The APPs should be reviewed, as they:

> …stand as a relic of a former time and are in no way fit to address community expectations with respect to the use, security and protection of their data. [26]

2.25 AGL, too, asked why the APPs could not have been amended to accommodate the CDR. It considered that the Privacy Safeguards were confusing to business and consumers and it was unclear how they would interact with the APPs.[27]

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22 Law Council of Australia, *Submission 2*, p. 1.

23 The Treasury, *Consumer data right*, May 2018, p. 2, https://static.treasury.gov.au/uploads/sites/1/2018/05/t286983_consumer-data-right-booklet.pdf (accessed 18 March 2019).

24 Ms Kat Lane, Vice-Chair, Australian Privacy Foundation, *Committee Hansard*, 6 March 2019, pp. 2 and 3.

25 FRLC, *Submission 14*, p. 10.

26 FRLC, *Submission 14*, p. 12.

27 Ms Elizabeth Molyneux, General Manager, Energy Markets Regulation, AGL Energy, *Committee Hansard*, 5 March 2019, p. 49.

2.26 The Law Council argued that the privacy provisions in the bill would create unnecessary complexity, through the establishment of a second legislative regime. Different classes of privacy protection would operate depending on whether the relevant data was CDR data under the Privacy Safeguards or only personal information under the APPs.[28]

2.27 It was also argued that there would be confusion between the Privacy Safeguards in the bill and the APPs. The Australian Banking Association (ABA) noted that data recipients are generally subject to the Privacy Safeguards in the bill, while data holders are subject to certain Privacy Safeguards with the APPs remaining the primary privacy regime for those entities. The ABA remarked:

> For data recipients who are also data holders, there will be some complexity in determining which set of privacy obligations apply. To assist compliance, the ABA recommends that the obligations are aligned as much as possible, where there is no compelling reason for discrepancy between the Privacy Safeguards and APPs.[29]

2.28 The ABA pointed out that the APPs require organisations to destroy or de-identify unsolicited personal information as soon as practicable if it is lawful and reasonable to do so, but that Privacy Safeguard 4 did not contain the qualification 'lawful and reasonable'. The ABA argued that, given that there could be complexities about destroying some electronic data, the two should be aligned: both should include the qualification.[30]

2.29 Data Exchange firm Verifier believed that the complex system would put small firms at a disadvantage:

> The complexity of this approach will significantly increase the cost (and time) of implementing the open banking data sharing environment, and will disproportionately disadvantage emergent market participants who cannot marshal teams of internal legal and compliance professionals to enable the required business outcomes.[31]

2.30 The Australian Information Commissioner, who is also the Privacy Commissioner, was of the view that:

> There are sound reasons for creating a separate legislative framework, for the handling of information within the consumer data right scheme at this time—for example, to allow more specific privacy obligations and security safeguards…in the context of encouraging increased information flows…[32]

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28 Law Council of Australia, *Submission 2*, p. 4.

29 Australian Banking Association, *Submission 16*, p. 3.

30 Australian Banking Association, *Submission 16*, p. 3.

31 Verifier, *Submission 13*, p. 3.

32 Ms Angelene Falk, Australian Information Commissioner, *Committee Hansard*, 6 March 2019, p. 47.

2.31 The Information Commissioner pointed out that there are additional privacy safeguards in other contexts, such as the My Health Record and the Unique Student Identifier. She believed that continued protection outside the CDR system was necessary. However, she also suggested that the CDR initiative was an occasion for enhancing privacy protections generally.[33]

2.32 Officers of the Attorney-General's Department observed that the APPs provide a higher level of protection because they cover even more sensitive data, like health records. They did not see particular risks in the dual system, but saw that guidance and education would be necessary in the implementation of the scheme.[34]

2.33 The Privacy Safeguards in the bill were criticised. For example, AGL submitted that:

> The introduction of new Privacy Safeguards remains unnecessarily confusing, complex and a potential risk to consumer privacy and have not been given appropriate consideration or stakeholder consultation.[35]

2.34 In particular, the Law Council expressed concern about the potential misuse of CDR data, including de-identified aggregated CDR data, for direct marketing purposes. It suggested that a new requirement for 'valid consent' could be included.[36]

2.35 There was concern that re-identification remained possible. The Australian Communications Consumer Action Network (ACCAN) commented that:

> ACCAN also calls for the legislation to ban the use of CDR data for re-identification of individuals in order to prevent consumers facing undue loss of privacy and health and safety risks as a result of malicious parties having access to detailed information about their habits and movements.[37]

2.36 The Law Council proposed that holders of de-identified CDR data should be prohibited from cross-matching that information with other databases where it would allow re-identification.[38]

2.37 The Communications Alliance described the dual regime as 'devilishly complex', partly because data can 'drift in and out of the CDR'. Data would be protected while it was CDR data, but if, for example, it was transformed and sold to an entity outside the CDR sectors it would not be.[39]

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33 Ms Angelene Falk, Australian Information Commissioner, *Committee Hansard*, 6 March 2019, p. 48.

34 Ms Joanna Virtue, Assistant Secretary, Attorney-General's Department and Mr Christopher Malone, Legal Officer, Attorney-General's Department, *Committee Hansard*, 6 March 2019, p. 55.

35 AGL, *Submission 22*, pp. 2 and 4.

36 Law Council of Australia, *Submission 2*, p. 4.

37 Australian Communications Consumer Action Network, *Submission 7*, p. 1.

38 Law Council of Australia, *Submission 2*, p. 4.

39 Mr John Stanton, Chief Executive Officer, Communications Alliance, *Committee Hansard*, 5 March 2019, p. 39.

2.38 On the other hand, the Customer Owned Banking Association (COBA) saw it as a strength that the legislation both 'hardwired' the Privacy Safeguards in the bill and also allowed for the ACCC to make further rules as new privacy risks emerged.[40]

2.39 The Law Council suggested that the bill should be amended to provide that any future rules made by the ACCC were subject to a privacy impact assessment (PIA).[41]

2.40 The Australian Information Commissioner suggested that the ACCC should be required to make rules rather than have discretion to make them. She noted that the ACCC was required to consult the Information Commissioner about the privacy impacts of the rules it intends to make. She proposed that that requirement should be strengthened to require the Office of the Australian Information Commissioner (OAIC) to have regard to ACCC's submissions, and to require the Minister to be satisfied that any privacy concerns raised by the Information Commissioner have been addressed before consenting to the rules.[42]

2.41 There was some debate about the privacy impact assessment which had been conducted for the bill. Witnesses complained that they had received the document on 21 December 2018, with a response date of 18 January 2019. They said this was not a realistic time to review a 149 page document, given the holiday period.[43]

2.42 Treasury argued that this was in fact a release for public comment of content that had been through several iterations with consultation at each point, and that they did not actually expect substantive comment at this stage.[44] A revised version of the PIA incorporating the public feedback has been released recently.[45]

2.43 Perhaps more importantly, there were suggestions that the PIA should have been conducted by a party external to Treasury.[46] The new version of the PIA incorporates feedback from an external consultant.

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40 Mr Tommy Kiang, Senior Policy Manager, Customer Owned Banking Association, *Committee Hansard*, 6 March 2019, p. 14.

41 Professor Peter Leonard, Member, Media and Communications Committee, Law Council of Australia, *Committee Hansard*, 6 March 2019, p. 23.

42 Ms Angelene Falk, Australian Information Commissioner, *Committee Hansard*, 6 March 2019, p. 47–48. See also Office of the Australian Information Commissioner, answers to questions on notice, 6 March 2019 (received 13 March 2019).

43 See, for example, Mr John Stanton, Chief Executive Officer, Communications Alliance, *Committee Hansard*, 5 March 2019, p. 38; Ms Kat Lane, Vice-Chair, Australian Privacy Foundation, *Committee Hansard*, 6 March 2019, p. 2.

44 Mr Hamish McDonald, Division Head, Structural Reform Division, Treasury, *Committee Hansard*, 6 March 2019, p. 67.

45 The Treasury, *Privacy Impact Assessment – Consumer Data Right*, 1 March 2019, https://treasury.gov.au/publication/p2019-t361555/ (accessed 14 March 2019).

46 Ms Kat Lane, Vice-Chair, Australian Privacy Foundation, *Committee Hansard*, 6 March 2019, p. 2.

2.44 Submissions from several small technology companies suggested that there would not be issues with privacy. MoneyBrilliant observed:

> We acknowledge that privacy and security are incredibly important to the success of the Consumer Data Right regime…The Consumer Data Right Bill provides the opportunity to put in place a rigorous, standardised set of privacy and security controls. Without this it is likely that alternate, ungoverned, non-standardised solutions to these problems will continue to evolve haphazardly.[47]

2.45 FinTech Australia acknowledged the possibility of some confusion between the two privacy schemes, but argued:

> Australian fintech businesses are aligned to the needs of the customer and thus privacy and security are core operating principles. Therefore…we broadly support the [PIA] and the privacy and security measures contemplated in the Data61 consultation; however, the Bill must pass for additional pilots and consultation to occur. In that way, delaying the Bill on the basis of privacy concerns is misguided; it actually undermines the delivery of certainty required to alleviate the privacy concerns shared by all parties.[48]

Consumer issues

2.46 Ms Lauren Solomon, of the Consumer Policy Research Centre, set out three elements that were necessary for an effective CDR regime: transparency, comprehension and agency. Consumers need to know what data is being shared, what it is being used for and how it is being collected. Consumer testing has to be conducted to ensure that consumers understand the risks and benefits of the data sharing arrangements they are entering into. Consumers should have ultimate say over what happens to their data.[49]

2.47 Several contributors to the inquiry raised questions around consent. Mr Danny Gilligan of Data Republic outlined an existing problem:

> …the fact that, today, nobody reads the terms and conditions, no-one reads the privacy policy and we don't have a mechanism to educate consumers about what they're giving consent to at the time they give consent.[50]

2.48 ACCC set out its principles:

> Our principles for consent are that it's voluntary, express, informed, specific as to purpose, time limited and able to be withdrawn. We're not allowing

47 MoneyBrilliant, *Submission 20*, p. 2.

48 FinTech Australia, *Submission 17*, p. 6.

49 Ms Lauren Solomon, Chief Executive Officer, Consumer Policy Research Centre, *Committee Hansard*, 6 March 2019, pp. 1–2.

50 Mr Danny Gilligan, Chief Executive Officer, Data Republic, *Committee Hansard*, 5 March 2019, p. 58.

> consent to be bundled, so you're being very clear about the consent you're given.[51]

2.49 There was support for simplified and standardised consent forms. For example, ARCA suggested:

> ARCA has proposed that for some high-volume, complex and sensitive applications we create a number of standardised consents which set out the form of consent, the types of data included and the purposes for which the data is used—for example, a standardised consent for responsible lending.[52]

2.50 The Energy Consumers Association suggested that the bill should indicate that the ACCC should have regard to standardised forms of consent in developing the rules.[53]

2.51 Mr Gilligan observed that developing a simple consent mechanism was difficult, but worth doing.[54]

2.52 Mr Warren Bradey of Data61 noted that there had been consumer research about whether people in financial hardship understood what they were consenting to, and that more consumer testing was proposed for the period from July 2019 to February 2020.[55]

2.53 Treasury noted that this attention to consent is necessary because the centrality of consent is what distinguishes the CDR from the existing privacy principles.[56]

2.54 Alternative data collection methods such as the use of screen scraping were seen as a consumer issue by some. Screen scraping has been described thus:

> …screen scraping allows third party companies to access financial transaction data by logging into digital portals on behalf of a financial institution's customers. Typically screen scraping involves the third party company creating a mirrored login page, which looks and feels similar to a bank or credit card online login page. The customer enters their login details, passwords and additional security measures like memorable name, which the third party can use to log in as the customer. Once logged into the

51 Mr Scott Gregson, Executive General Manager, Merger and Authorisation Review Division, ACCC, *Committee Hansard*, 5 March 2019, p. 19.

52 Mr Michael Laing, Executive Chairman, ARCA, *Committee Hansard*, 5 March 2019, p. 27.

53 Mr David Havyatt, Senior Economist, Energy Consumers Australia, *Committee Hansard*, 5 March 2019, pp. 48–49.

54 Mr Danny Gilligan, Chief Executive Officer, Data Republic, *Committee Hansard*, 5 March 2019, p. 58.

55 Mr Warren Bradey, Executive Manager, CSIRO, *Committee Hansard*, 5 March 2019, p. 7.

56 Mr Hamish McDonald, Division Head, Structural Reform Division, Treasury, *Committee Hansard*, 6 March 2019, p. 61.

> account as the customer, screen scraping tools copy available data to an external database and can be used outside of the financial institution.[57]

2.55 Data analytics firm, illion, noted that banks should not have the ability to block screen scraping, because data provided under the CDR would probably be less timely. illion claimed that screen scraping helped firms meet their responsible lending obligations. Consumers could decline to take part if they did not like the process, and if open banking worked perfectly it would become obsolete. Illion argued that screen scraping should be allowed to continue, because it allows for:

> …real-time data provision; simplicity of customer onboarding; level and quality of data availability; and provides a redundancy fail-safe, for example, in a period during which an ADI's API is offline.[58]

2.56 The FRLC said that information gained in this way did not involve transparency or consumer control and was used in predatory marketing. It argued that the practice should be banned. A ban would also improve the incentive for firms to get involved in the CDR system.[59]

2.57 ACCAN raised the possibility that the data made available under the CDR would make targeting of consumers and price discrimination easier. It proposed penalties for such conduct.[60] CHOICE expressed similar concerns, and suggested that the bill should be amended to ensure that data relating to a product or service within the CDR cannot be used to the detriment of consumers.[61]

2.58 Mr Andrew Stevens, of the Data Standards Body, summarised the impact of the bill on consumers:

> The consumer data right is about making a data transfer safer and fully consent based, and there's nothing to indicate that there's any harm, when compared to the 'as is', in anything that we've seen. The consent regime would be stronger, and the protections would be greater, than consumers enjoy today.[62]

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57 FinExtra website, *Open Banking vs. Screen Scraping: looking ahead in 2019*, https://www.finextra.com/blogposting/16494/open-banking-vs-screen-scraping-looking-ahead-in-2019 (accessed 14 March 2019).

58 Illion, *Submission 27*, p. 3. See also Mr Steven Brown, Director, Bureau Engagement, illion, *Committee Hansard*, 5 March 2019, p. 28.

59 Mr Drew MacRae, Policy and Advocacy Officer, FRLC, *Committee Hansard*, 6 March 2019, pp. 18, 21, and 22.

60 ACCAN, *Submission 7*, p. 7.

61 CHOICE, *Submission 23*, p. 10.

62 Mr Andrew Stevens, Interim Chair, Data Standards Body, *Committee Hansard*, 6 March 2019, p. 38.

Sectoral coverage

2.59 The CDR scheme is intended to apply 'widely across the whole economy' in the long run.[63] It is initially being applied to the big four banks, and then will be extended to the energy and telecommunications sectors. These three sectors hold a great deal of customer data, and are also historically areas where there has been attention on consumer access to that data in usable forms.

2.60 Communications Alliance was concerned that the system was essentially being designed for the banking sector. The telecommunications sector already has considerable data requirements under the *Telecommunications (Consumer Protection and Service Standards) Act 1999*, and that the requirements under CDR may be inconsistent.[64] It was not clear how these might interact with the requirements in this bill.

2.61 The Interim Chair of the Data Standards Body responded to this concern:

> …the reality is that this is not an open banking regime that we're implementing, nor is it an open energy or an open telco regime; it's an economywide consumer data right regime that we are in the process of implementing and, therefore, there naturally will be some systemwide or economywide impacts there. There is no template that we're developing for banking that will be picked up and somehow forced to fit into telco, energy or anything else for that matter.
>
> We've been very mindful of differences in different sectors around some of the outcomes that could materialise from the standards.[65]

2.62 COBA suggested that, for competitive neutrality, coverage should not be confined to Approved Deposit-Taking Institutions, but should include the wider financial sector.[66]

2.63 ID Exchange argued that the notion of sectors should be removed so that the regime applies across the whole economy. It submitted that, apart from anything else, the intention initially is to designate the big four banks, not the banking industry or the financial sector, which suggests that the system will not apply sectorally at all.[67]

2.64 Some argued that coverage by sectors was not realistic. With reference to complaints mechanisms, the example was given of a consumer authorising the release of data by an energy provider, but the energy entity might also be a fintech.[68]

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63 The Hon. Josh Frydenberg, Treasurer, *House of Representatives Hansard*, 13 February 2019, p. 13172.

64 Communications Alliance, *Submission 6*, p. 2.

65 Mr Andrew Stevens, Interim Chair, Data Standards Body, *Committee Hansard*, 6 March 2019, p. 40.

66 Customer Owned Banking Association, *Submission 11*, p. 2.

67 ID Exchange, *Submission 29*, p. 2

68 Ms Cynthia Gebert, Energy and Water Ombudsman, Victoria, *Committee Hansard*, 6 March 2019, p. 28.

2.65 The ABA noted that the Productivity Commission recommended an economy wide regime be implemented. Designation of sectors would mean that businesses in some sectors would be required to provide data, but would have no right to receive data from other sectors. The ABA suggested that a solution might be found by providing for reciprocal data sharing.[69]

Reciprocity

2.66 'Reciprocity' is mentioned only in one minor heading in the bill, in the section defining a data holder.[70] However, the *Explanatory Memorandum* includes a short section on reciprocity. It notes that:

> The consumer data rules may provide that a consumer can direct an accredited data recipient to provide access to certain CDR data to the consumer or other accredited persons. This is known as the principle of reciprocity.[71]

2.67 The Law Council observed:

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

2.68 The Law Council questioned whether there is a need for 'reciprocity' as an element of the framework.

2.69 The ABA noted that accredited entities outside the designated sectors can receive CDR data where a customer consents. However, in return, they will only need to expose data to the extent it is designated data. For example, a retailer receiving banking data does not need to reciprocate with retail data, it merely has the obligation to pass CDR (banking) data on if the customer asks. In particular, the ABA was concerned that many large companies would be able to obtain significant data from bank customers, without any obligation to make data available relating to their services:

> This will mean that in the initial stages of the Bill's operation, data will likely flow from designated sectors to non-designated sectors (subject to the consumer's consent).[72]

2.70 Treasury accepted these concerns, but pointed out that the data that is to be subject to the CDR is to be designated, data set by data set. Thus there will inevitably be some data sets designated early, and required to be shared, but it is not practical to

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69 Australian Banking Association, *Submission 16*, p. 2.

70 Section 56AJ, heading to subsection (3).

71 *Explanatory Memorandum*, p. 25.

72 Australian Banking Association, *Submission 16*, p. 2.

say that the recipient must share reciprocally, because their data sets may not yet have been designated.[73]

2.71 On the other hand, Xero opposed 'mandatory two-way data sharing' because it would possibly remove the competitive advantage gained by improving the data. It quoted the ACCC as emphasising the consumer focus of the CDR. Xero also pointed out that many firms do not store the original data received because the cost is prohibitive, so that if it were to pass on data it would be in its improved form and this would endanger the value added.[74]

Value added data

2.72 The bill also covers data that is derived from CDR data, and there was concern that this could include data which had, in effect, been transformed into another product, in which a data holder had an investment. Some witnesses suggested that this threat to the intellectual property in a new data analysis could slow down innovation by reducing incentives.[75] The Communications Alliance pointed out that the Productivity Commission had recommended against the inclusion of such data for this reason.[76]

2.73 Illion argued that the issue is complicated, because the value adding happens incrementally and there could be a judgement required as to when the data has been transformed enough to make it a new product.[77] AGL noted that it was unclear whether data that is the product of further analytics and proprietary algorithms was captured, and that the definitions in the bill had changed since previous drafts.[78]

2.74 COBA also questioned just what derived data might be covered:

> Our concern [is] around very complex sets of derived data. For instance, what if someone builds a model around this data? Does that mean the model itself is up for grabs as well? I think our main concern around that is that the scope for data under open banking is a little bit open-ended at the moment.[79]

2.75 The data sets, including the derived data that are subject to the CDR will be specified in a designation instrument. The ABA suggested that there should be criteria

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73 Mr Hamish McDonald, Division Head, Structural Reform Division, Treasury, *Committee Hansard*, 6 March 2019, p. 58.

74 Xero, *Submission 24*, [p. 3].

75 See, for example, Communications Alliance, *Submission 6*, pp. 3-4*;* Business Council of Australia, *Submission 9*, pp. 2–3; Australian Banking Association, *Submission 16*, p. 4; ID Exchange, *Submission 29*, p. 4; Customer Owned Banking Association, *Submission 11*, p. 3.

76 Ms Christiane Gillespie-Jones, Director, Program Management, Communications Alliance, *Committee Hansard*, 5 March 2019, p. 39.

77 Illion, *Submission 27*, p. 2.

78 Mr Tony Chappel, General Manager, Government, Media and Community Relations, AGL Energy, *Committee Hansard*, 5 March 2019, pp. 50–51.

79 Customer Owned Banking Association, *Committee Hansard*, 6 March 2019, p. 13.

which the Minister must take into account, including an analysis of the costs and benefits of sharing the particular data.[80]

2.76 The Law Council thought that derived data should be excluded, but if it was included, designation should only be after the consideration of objectively stated factors to be taken into account, with the possibility of independent review.[81]

Chargeable data and fees

2.77 The EM also introduces the idea of 'chargeable data'. This is data that a person discloses, as required by the bill, where the Minister has stated in the designation instrument that specific persons can charge a fee, either for the use or disclosure of the data, or both.[82] Comments about fees and charges included uncertainty about what could be charged for (see value added data above).

2.78 Adjunct Professor George Newhouse expressed concern that:

> …some parties may use demands for exorbitant fees and charges (or expensive or unavailable preconditions before granting access to data) as artificial barriers to restrict full and fair participation in the CDR scheme. CDR participants may need rules to cover such matters and a venue in which to dispute them.[83]

Ministerial discretion

2.79 Concerns were raised in a number of submissions that too much was left to Ministerial discretion. The Law Council was particularly concerned:

> The bill as currently drafted has extremely broad ministerial discretions, and we consider that that is poor legislative practice. This parliament has the capability to give much better structure and limits to those discretions…
>
> The particular concern around the ministerial discretion is that currently the default is set to 'completely open'.[84]

2.80 The BCA observed that the framework is intended to apply to the whole economy. It expressed concern about the process of designating sectors, and suggests that the Minister should be accountable to Parliament for such designations.[85]

2.81 Suggestions for limiting this power, particularly with respect to derived data, were discussed in a previous section.

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80 Ms Denise Hang, Policy Director, Australian Banking Association, *Committee Hansard*, 5 March 2019, p. 8.

81 Ms Olga Ganopolsky, Chair, Privacy Law Committee, Law Council of Australia, *Committee Hansard*, 6 March 2019, p. 19; Law Council of Australia, *Submission 2*, p. 3.

82 *Explanatory Memorandum*, p. 26.

83 Adjunct Professor George Newhouse, *Submission 3*, p. 2.

84 Professor Peter Leonard, Member, Media and Communications Committee, Law Council of Australia, *Committee Hansard*, 6 March 2019, p. 25.

85 Business Council of Australia, *Submission* 9, p. 3.

2.82 There was also criticism of the amount of discretion left to the ACCC in devising rules. According to the Minister's Second Reading Speech:

> The ACCC will be the primary regulator of the consumer data right. In addition to advising what sectors should be added and writing rules, the ACCC will be responsible for accrediting new participants, overseeing a new data standards body, and enforcing serious and systemic breaches of consumers' rights.[86]

2.83 ID Exchange referred to 'the conferral of law-making powers on the ACCC'.[87] The BCA also expressed concern that significant powers are delegated to the ACCC, not only about operational aspects (including the pricing of data) but also fundamental design features.[88]

2.84 Suggestions included redrafting the bill so that many more of the details were established in law.[89] However, Treasury argued that the explicit intention is to have a principles based framework with a flexible rule making power.[90]

Timing

2.85 A number of contributors to the inquiry complained about the haste with which the bill was being introduced. However, as discussed in Chapter 1, there has been a good deal of discussion of the various elements over a number of years. Treasury noted that it is exceptional to have two rounds of consultation on a draft bill.[91]

2.86 There were various comments about timing of implementation including whether enough time was available to the banks, especially if there were any delays in finalising rules or technical standards.[92]

2.87 On the other hand, several submissions called for the bill to be passed without undue delay.[93]

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86 The Hon. Josh Frydenberg, Treasurer, *House of Representatives Hansard*, 13 February 2019, p. 13172.

87 ED Exchange, *Submission 29*, p. 9.

88 Business Council of Australia, *Submission* 9, p. 3.

89 See, for example, Ms Elizabeth Molyneux, General Manager, Energy Markets Regulation, AGL Energy, *Committee Hansard*, 6 March 2019, p. 49; ID Exchange, *Submission 29*, p. 9.

90 Mr Hamish McDonald, Division Head, Structural Reform Division, Treasury, *Committee Hansard*, 6 March 2019, p. 60.

91 Mr Hamish McDonald, Division Head, Structural Reform Division, Treasury, *Committee Hansard*, 6 March 2019, p. 57.

92 See, for example, Australian Banking Association, *Submission 16*.

93 See, for example, Customer Owned Banking Association, *Submission 11*, p. 1; MoneyBrilliant, *Submission 20*, p. 3; Energy Consumers Australia, *Submission 25*, p. 11.

Committee view

2.88 The committee notes the general support for the introduction of the CDR. At the very least, it will improve on current arrangements; and it has the potential to protect and empower consumers and drive competition and innovation. The committee particularly welcomes the endorsement of the bill from innovative high technology companies.

2.89 The committee understands that the bill creates a broad legislative framework with a rules making facility. The scheme is to be led by the ACCC with technical assistance from Data Standards Body and with the Privacy Safeguards to be overseen by the OAIC and the ACCC. The Minister will designate sectors to be covered, and it is intended that the scheme will begin on 1 July 2019 with access to product information of the big four banks.

2.90 In one sense, the CDR is actually an enhanced privacy regime. The committee notes the concerns about the privacy arrangements in the bill. However, it also notes the views of the Australian Privacy Commissioner and the Interim Chair of the Data Standards Body that the bill at the very least is an expansion of current protections.

2.91 The committee notes there are a number of consumer issues which require vigilance. However, most of those exist in the present arrangements. The rules making facility under the bill offers the possibility of addressing problems as they arise.

2.92 The committee has heard some reservations expressed about the sectoral coverage of the bill. It notes that the earliest sectors to be covered are where there is already a good deal of data collected and formal arrangements for handling it. It welcomes the assurances of the ACCC and the Interim Chair of the Data Standards Body that data standards and other requirements will be tailored to fit specific industries and data types.

2.93 With regard to value added data, the committee appreciates the concerns of the holders in intellectual property in data. It notes that the ACCC will advise on what data is designated, and also on fees and charges for the data. It is possible for the extension of the scheme to be very gradual and nuanced in those areas.

2.94 The committee is comfortable with the degree of Ministerial discretion allowed by the bill. It welcomes the flexibility provided by the general structure of the arrangements.

2.95 The committee notes that the timing of the initial roll out has been adjusted to allow for more time for consumer testing in the period from July 2019 to February 2020. With that in mind, the committee is confident that the timing for the implementation of the CDR is feasible.

Recommendation 1

2.96 The committee recommends that the bill be passed.

Senator Jane Hume
Chair

Additional comments by Labor Senators

1.1 Labor Senators want to make sure that we get the details right in this legislation. Given this legislation is framework legislation, enacting policies that will eventually cover the entire economy, it is important that the bill is thoroughly reviewed.

1.2 What is clear is that this bill has undergone a truncated development process. Labor Senators believe all those involved in working on the legislation, rules and standards have given their best efforts, but are working to deadlines set by government. Labor Senators believe it is politics, not policy that are driving these compressed timeframes, a government desperate to get a headline, but have failed to deliver the substance behind the headline.

1.3 Due to the short timeframe involved in the Senate inquiry, just over five weeks, Labor Senators are not in a position to outlined detailed amendments in these additional comments. Labor Senators will set out key concerns with this legislation and will continue to work with stakeholders to find ways to improve the legislation and give those involved with the consumer data right project sufficient time to get the details right.

1.4 The concerns outlined in these comments are:

- The rushed policy development process;
- The nature of the policy work occurring in parallel;
- The lack of consumer testing, and the results of the testing that has occurred;
- Possible impacts on vulnerable cohorts of people;
- The consultation processes in the banking, energy and telecommunications industries;
- The Privacy Impact Assessment process;
- Consumer privacy protections;
- The lack of funding and details on a consumer education campaign;
- Intellectual property concerns; and
- The application of reciprocity.

The rushed policy development process

1.5 Stakeholders from across the spectrum criticised the rushed nature of the policy development process.

1.6 The Australian Privacy Foundation in their submission to the inquiry stated that:

> We remain concerned that the move to introduce CDR is simply too fast. The consultations and the sheer amount of information to look at has meant that the consultation process is not working effectively. We agree with the announced delay and the decision to pilot the system.

> It is unclear why there is a rush. The equivalent system in the United Kingdom has had a very slow take up and has not delivered any competition or financial revolution to date. This should be expected as trust needs to be built over time.
>
> The introduction of the CDR Bill into Parliament is yet another rushed process. We strongly recommend that the Committee have further time to consider the complex issues in this matter so a detailed list of issues to be considered can be made.
>
> Despite the significant changes proposed and the potential detrimental impact to legitimate commercial conduct and market operation, the government has overseen a rushed drafting process.[1]

1.7 The Business Council of Australia, noting the complexities involved in both the policy itself and the policy development process raised its own concerns for implementation timeframes:

> Given the difficulty other jurisdictions have had in implementing similar schemes, the Committee should consider carefully the timelines for implementation.[2]

1.8 The Law Council of Australia said that debate on the bill should not proceed until it is sufficiently improved and that subordinate work can continue in the background:

> There's a lot of subordinate work that, as you know, Senator, is already underway and which is critical to enable implementation of this bill. That work can and should continue, regardless of how this bill is addressed in the parliament. We don't see a pressing urgency for this bill to proceed, on the basis that the subordinate work should continue as it is, and the changes that we would recommend for consideration to this bill can occur in the parliament whilst that subordinate work continues. So we don't, as it were, advocate setting a pause, but we do advocate sensible revisions to the bill to address its deficiencies.[3]

1.9 The Communications Alliance saw the 1 July start date (now for the pilot program) as artificial:

> I guess from the outset we've always seen an artificiality about the 1 July deadline. The work of Data61, commendable as it is, has always been focused on, 'We have to implement by that date, come hell or high water.' There's been a heavy reliance on the UK standards, for example, because that was a faster way to get there. From the telco industry's perspective, we see there are already lower barriers to consumers shifting between providers. This has seemed like a good idea and a worthy objective, but not

1 Australian Privacy Foundation, *Submission 26*, p. 2.

2 Business Council of Australia, *Submission 9*, p. 2.

3 Professor Peter Leonard, Member, Media and Communications Committee, Law Council of Australia, *Committee Hansard*, 6 March 2019, p. 22.

> one to rush because the potential for unintended consequences is pretty huge here. The privacy implications are large. The overall security questions need to be addressed and a balance needs to be struck as to who gets the data and what it contains.[4]

1.10 AGL Energy also expressed concerns about the timeframes involved:

> I don't understand why the legislation appears to be rushed. It would seem that we are rushing this legislation to allow banking to be implemented as quickly as possible. That's my only possible understanding of why this legislation should be as rushed as it should be. We completely agree energy should be a priority, but I don't think rushing through legislation that will probably have some unintended consequences is a sensible outcome.[5]

The nature of the policy work occurring in parallel

1.11 This legislation was drafted in parallel to the Consumer Data Right rules which will be administered by the ACCC and the technical standards which are overseen by Data61 and the Data Standards Body. Not only were these three streams conducted in parallel, but the banking Privacy Impact Assessment consultation and consultation on the sector designation instruments have also occurred at the same time, over a very short period.

1.12 While there are benefits to conducting this work in tandem, notably collaboration and adaption between the work groups, it is far from clear that sufficient time has been given to ensure that each of the work streams complements the others and that a coherent regulatory framework will be an end product. The structure of the consultations, all in parallel, also place significant requirements on stakeholder groups who have to prepare submissions for each work stream concurrently.

1.13 The Business Council of Australia expressed concern that stakeholder had not had sufficient opportunity to understand the interlinkages between tranches of work:

> But the Business Council remains concerned about the preparedness of all stakeholders involved in implementation. This is because the objectives and structure of the scheme have evolved significantly - from a scheme about simple transactional data portability for consumers to one that covers performance information, derived data and includes businesses' transaction data as well as personal consumer data - with short consultation periods at each stage. In addition, multiple, complex, interlinked tranches of work have progressed concurrently while the framework was developed (the development of the CDR Bill, CDR Rules Framework and CDR Rules for the Energy Sector, for example, have all progressed on their own separate but concurrent tracks) and continues to develop through the parliamentary process.[6]

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4 Mr John Stanton, Chief Execuive Officer, Communications Alliance, *Committee Hansard*, 5 March 2019, p. 42.

5 Ms Elizabeth Molyneux, General Manager, Energy Markets Regulation, AGL Energy, *Committee Hansard*, 5 March 2019, p. 52.

6 Business Council of Australia, *Submission 9*, p. 2.

1.14 The Consumer Policy Research Centre expressed its concern about the inability to assess the work in an end-to-end manner:

> The process has been quite complex and unusual, with the legislation, rules and data standards all being drafted in parallel. This has resulted in a very challenging environment for those involved to analyse, assess and provide advice on the varying instruments, all of which interact with each other. Without seeing the interaction of these elements end to end, it has been quite difficult to provide on potential consumer outcomes. A key example of this interconnected nature particularly relates to one of our key concerns around consumer comprehension, which will be impacted not only by the design and the grouping of customer payloads or data batches but also the level of specificity required by the ACCC rules, when it comes to articulating use and the use of redundant data defined in the legislation. Without an end-to-end view of the reforms, it's very difficult to assess the consumer impact and the impact on privacy. We remain strongly committed to these reforms and supportive of their intent; however, we are encouraging policymakers to take the time to get this right, because if poorly implemented it may well undermine the confidence in future data reforms and innovation to come.[7]

1.15 AGL indicated similar concerns:

> There's been a concurrent or parallel process across legislation, rules, data standards and the privacy impact assessment. Normally, we would see a sequential process undertaken, which would have greater consideration of the concept and then a higher scrutiny on the impacts of changes to concepts as new elements are created. Instead, stakeholders and decision-makers are facing a cascade of redrafts and reframing under each part as adjustments are made.[8]

1.16 CHOICE in its submission made a recommendation that Treasury provide more clarity on how the system will work, an indication that that the current approach makes it difficult for stakeholders to carry out an informed assessment of the design of the scheme:

> Treasury must provide clarity on the interaction between the standards, Rules and legislation with regard to comprehension, privacy, design of the payloads or data batches, accreditation and authorisation.[9]

The lack of consumer testing, and the results of the testing that has occurred

1.17 Consumer testing will be an important element in both the design and testing of the consumer data right legislation, rules and standards.

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7 Ms Lauren Solomon, Chief Executive Officer, Consumer Policy Research Centre, *Committee Hansard*, 6 March 2019, p. 2.

8 Ms Elizabeth Molyneux, General Manager, Energy Markets Regulation, AGL Energy, *Committee Hansard*, Tuesday 5 March 2019, p. 49.

9 CHOICE, *Submission 23*, p. 4.

1.18 Consumer group CHOICE in its submission to the committee reiterated the need for adequate consumer testing:

> Treasury should fund additional consumer research. This should be undertaken prior to the ACCC Rules being finalised. Attention should be given to examining processes around revoking consent, managing consent, and the re-authorisation process.[10]

1.19 The Consumer Policy Research Centre took a similar view:

> The second element that we think is critical is comprehension. We have some concerns that the consumer testing is not sufficient to inform the rules surrounding the development of the consent standard. We would strongly support increased resources being allocated to consumer testing to ensure that, in the setting of the consent rules and standards, we have a high degree of confidence that consumers understand the risks and benefits of the sharing arrangements they're being asked to enter into. Usability was a key concept added to the data standards body principles and was included to ensure that consumers must be able to both comprehend and control what's happening to their data. However, it is unclear from the evidence provided to date that consumers are experiencing both of those goals.[11]

1.20 Data61 recently published outcomes of recent consumer testing, which included the following excerpts (emphasis added):

> The research undertaken was designed to a fixed release date in July. This time constraint created a number of limitations:
>
> - Number of participants (and diversity achieved e.g. overweighted with financial distress, underweighted with disabilities and ESL)
> - Consumer awareness of the Consumer Data Right / Open Banking.[12]
>
> …
>
> Participants were especially averse to data sharing when it was unclear what would happen to their data. This lack of clarity led to consumers imagining the worst, commonly invoking examples of data breaches or information being on-sold for marketing.[13]
>
> …

10 CHOICE, *Submission 23*, p. 10.

11 Ms Lauren Solomon, Chief Executive Officer, Consumer Policy Research Centre, *Committee Hansard*, 6 March 2019, p. 1.

12 Data61, *Design to Thrive, Design to Bias*, February 2019, p. 95, https://consumerdatastandards.org.au/wp-content/uploads/2019/02/Consumer-Data-Standards-Phase-1_-CX-Report.pdf (accessed 21 March 2019).

13 Data61, *Design to Thrive, Design to Bias*, February 2019, p. 41, https://consumerdatastandards.org.au/wp-content/uploads/2019/02/Consumer-Data-Standards-Phase-1_-CX-Report.pdf (accessed 21 March 2019).

> More than 52% of surveyed participants ranked 'who their data will be shared with' as the most important thing to know before sharing their information. Some participants during research were especially concerned that their transaction data would be shared with Centrelink (31%), ATO (60%) or a marketing agency (33%).[14]
>
> …
>
> Participants would not generally consent if they didn't understand why data was being requested. This finding was further supported by the survey. Some participants didn't feel some kinds of information needed to be shared, while others felt entire use cases were unjustified.[15]
>
> …
>
> The survey demonstrated that respondents had an insufficient understanding of what can be inferred from their financial data, as well as how it may be used to tailor products and pricing.
>
> Less than half of the respondents thought, for example, that gender or age could be inferred from transactional data.
>
> Whilst the majority of respondents understood that financial data could be used to affect the outcome of an application process for credit, far fewer thought it would affect an insurance policy, the outcome of an application process for insurance, or the results of prices you get when you shop online.[16]

1.21 Given this evidence, it is far from clear that adequate consumer testing has been carried out. Consumers will only exercise their rights under the Consumer Data Right if they understand both what the purpose of the scheme is and are satisfied with the level of consumer and privacy protections. Given the current evidence base already indicates significant concerns, it is important that sufficient time be given to address any current and future shortcomings.

Possible impacts on vulnerable cohorts of people

1.22 One concern with the Consumer Data Right is that while the scheme may leave many people better off, there could be vulnerable cohorts of people who could stand to be worse off.

1.23 As stated by the Financial Rights Legal Centre:

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14 Data61, *Design to Thrive, Design to Bias*, February 2019, p. 42, https://consumerdatastandards.org.au/wp-content/uploads/2019/02/Consumer-Data-Standards-Phase-1_-CX-Report.pdf (accessed 21 March 2019).

15 Data61, *Design to Thrive, Design to Bias*, February 2019, p. 43, https://consumerdatastandards.org.au/wp-content/uploads/2019/02/Consumer-Data-Standards-Phase-1_-CX-Report.pdf (accessed 21 March 2019).

16 Data61, *Design to Thrive, Design to Bias*, February 2019, p. 50, https://consumerdatastandards.org.au/wp-content/uploads/2019/02/Consumer-Data-Standards-Phase-1_-CX-Report.pdf (accessed 21 March 2019).

> Increased economic inequality and financial exclusion: Risk segmentation, profiling for profit, price discrimination and the delivery of poor, unsuitable products are all likely outcomes of greater access to consumer data by FinTechs. Those experiencing financial hardship are often very profitable to debt management firms and fringe financial service providers and therefore most vulnerable to exploitation. Those in more precarious financial situations are more likely to be unfairly charged higher amounts or pushed to second tier and high cost fringe lenders.[17]

1.24 The Energy and Water Ombudsman of New South Wales indicated in that in their experience, vulnerable consumers sometimes do not benefit from new technology and services that lower prices for services they require::

> **Senator KETTER**: You particularly identified consumer detriment in the case of people who are financially disadvantaged. Could you just elaborate on why you think that's the case.
>
> **Ms Young**: I guess what all of our officers have seen over the past couple of years in the rollout of solar and the introduction of storage batteries is that that's great for those who can actually afford and buy into those products, but, for those who are at the other end of the socioeconomic spectrum, that's just a dream. People at that end of the socioeconomic spectrum generally have poor-quality housing, whether it's social housing, community housing or private rental; therefore they have higher energy bills. They consume more, but they're not the type of customer to whom companies are really going to want to market new products and services that perhaps could alleviate those. On the other hand, we're seeing some good programs where some retailers are working with government departments, state based, to roll out solar on community housing and things like that.
>
> Sixty per cent of complaints to my office are about billing; 20 per cent are about credit. The biggest concern is vulnerable customers. They seem to be on the receiving end of what doesn't go right, and they don't get the benefits of new technology that might drive prices down.[18]

1.25 Labor Senators have also noted in Additional Comments for the inquiry into the *National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018* that care must be taken in evaluating new systems that have claims to benefit consumers.

1.26 Increased access to customer data has the potential to enable private sector businesses to segment markets into profitable and less profitable cohorts. For less profitable cohorts, this may mean increases in costs or decreases in services available to them. There is significant risk that vulnerable customers could be directly or indirectly excluded from essential services. Labor Senators are yet to be convinced that the government's proposed policy framework adequately responds to these very real risks.

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17 Financial Rights Legal Centre, *Submission 14*, p. 3.

18 *Committee Hansard*, 6 March 2019, p. 36.

The consultation processes in the banking, energy and telecommunications industries

1.27 The committee heard evidence that the consultation on the banking sector designation instrument is still ongoing, that some stakeholders believed that consultation on the designation instrument for the energy sector is not up to a suitable standard and that to date, the telecommunications industry have had insufficient opportunity to provide input into a framework that is expected to apply to them in the not too distant future.

1.28 The Australian Bankers Association outlined that consultation for the banking designation is not yet complete, despite a 1 July 2019 go live date for the so-called 'pilot project':

> **Senator KETTER**: Just coming back to the consultation period: the explanatory memorandum explains that banking will be the first sector and that consultation has been carried out on the draft designation instrument. You'd agree with that?
>
> **Ms Hang**: Yes, although we're yet to see the next version of the designation instrument. Our understanding is that that will be up for consultation too.
>
> **Senator KETTER**: When do you expect to see that?
>
> **Ms Hang**: I think that's a question for Treasury.
>
> **Senator KETTER**: You haven't been given any expectation as to when you'll be able to see that?
>
> **Ms Hang**: No.[19]

1.29 AGL indicated that there has been no specific consultation on the designation instrument for the energy sector to date. Instead, the government appears to be relying on a report issued on 1 December 2017. AGL argues that this report is not fit for purpose in designating the energy sector to comply to the consumer data right framework:

> **Senator KETTER**: The explanatory memorandum says that the consultation with the energy sector has already been carried out. What's your response to that?
>
> …
>
> **Ms Molyneux**: Yes, I think that is referring to the HoustonKemp report.
>
> …
>
> **Ms Molyneux**: The HoustonKemp report was done essentially to entrench data access under Power of Choice, which is a very significant reform in the energy industry. That was effective 1 December 2017. That was the purpose of that report. We believe that that report is actually not fit for purpose for the consumer data right. The consumer data right is a much more extended data access right regime than what was under Power of

19 *Committee Hansard*, 5 March 2019, p. 13.

> Choice. The energy industry does have data access as a fundamental right of customers. The consumer data right appropriately extends that. It's really a matter of implementation to make sure that customers get the true benefits of it.
>
> **Senator KETTER**: What's your understanding about consultation in respect of the designated instrument for the energy sector?
>
> …
>
> **Mr Chappel**: Our experience would be that it has not been a sufficiently rigorous process, that it's been very difficult, particularly given all of the other legislative proposals that have been made in the last few months for our industry, to give it the sufficient attention in the limited time that's been allowed.
>
> **Senator KETTER**: This is a pretty fundamental part of the rollout of the CDR, to determine the designation of particular sectors. You seem to be a bit unaware of where the consultation is up to at the moment. Is that right?
>
> **Ms Molyneux**: I don't think there has been any consultation on the designation instrument. The ACCC rules are out for consultation, but, to my knowledge, there is no designation instrument out for consultation.
>
> **Senator KETTER**: So there's no consultation at this point?
>
> **Ms Molyneux**: That's correct.[20]

1.30 Communications Alliance also explained their concerns about the opportunities for the telecommunications sectors to contribute and that the framework may not operate very well in the telecommunications sector (emphasis added):

> **Mr Stanton**: … The other thing that is a theme in our submissions is the fact that we are very concerned about not having a banking-centric template imposed on the telecommunications industry. They are very different sectors with very different characteristics, for example around customer mobility. We've had a world-leading mobile number portability framework in place for well over 10 years in Australia. We are required to make available to consumers already, under things like the Telecommunications Consumer Protections Code, a whole range of data about their usage going back over a period of six years.
>
> …
>
> **CHAIR**: What's your understanding as to when the full effects of this legislation will be felt in your sector as opposed to banking?
>
> **Mr Stanton**: We haven't yet been given advice on that. Quite recently the Treasury produced a discussion paper about potential models for applying CDR to the energy sector. I contacted the Treasury at the time and said: 'That's good. I would assume that at some point you are going to produce one for the telecommunications sector. We'd like to be involved and engage with you on the content of that paper.' They said, 'Yes, but we don't have a

20 *Committee Hansard*, 5 March 2019, pp. 52–53.

> start date for that consultation paper as yet,' and therefore they had no actual schedule for when they might envisage the telco sector joining the regime.
>
> **CHAIR**: So essentially there could be two industries that are, for want of a better expression, crash-test dummies well before it gets to the communications sector?
>
> **Mr Stanton**: Yes, except driving different vehicles and involved in different accidents, which is the point we've been trying to make—we want an opportunity to devise an appropriate solution.[21]

The Privacy Impact Assessment (PIA) process

1.31 Some of the most stinging criticism of the process was the issuing of the Privacy Impact Assessment days before Christmas, and that the Privacy Impact Assessment had not been conducted by an independent body, as advised by the Office of the Australian Information Commissioner (OAIC).

1.32 The OAIC when asked about their guidance on whether a PIA should be carried out by an independent body stated that:

> **Ms Falk**: I think that there have been some further iterations, and a third party was engaged to give some external perspective on the PIA. But I think that that's a matter that Treasury might like to give serious consideration to, in terms of the next iteration and looking at the privacy impact assessment for the rules. Certainly, the guidance that I produce does not mandate that privacy impact assessments occur through a third party. Indeed, in many cases there's merit in building capability within agencies for projects that are perhaps more businesses usual. For something as significant as this, then my guidance would suggest that serious thought should be given to independents, in the sense that that then gives, I think, the additional level of community confidence in the process.
>
> **Senator KETTER**: And it was recommended by the open banking report, wasn't it, that it be an independent body?
>
> **Ms Falk**: Thank you; I understand it was.[22]

1.33 The Communications Alliance was very critical of the release of the PIA just days before Christmas:

> We did not, I must admit, put in a submission in response to the privacy impact assessment given that was released very late in December. I will expose the committee to some of the secret workings of the telco industry. Every year we make an award for the most egregious consultative process that takes place over the Christmas and New Year period. I can't tell you the name of that award because it's not safe for Hansard. Needless to say, when Christiane and I met on 24 December, the first day we'd had a chance to look at this 149-page document, we essentially said: 'Meh. What are we going to do with this thing?' It should come as no surprise that the

21 *Committee Hansard*, 6 March 2019, pp. 38 and 40 (emphasis added).

22 *Committee Hansard*, 6 March 2019, pp. 51–52.

> Department of the Treasury took out the unnamed award for 2018. I do note what was in the Australian Privacy Foundation submission about that whole process. And it happens every year. We see it typically when a department is maybe a bit nervous about the content of what it's consulting on or just doesn't want any feedback.[23]

1.34 The Australian Privacy Foundation held similar views:

> The privacy impact assessment process conducted by the Treasury has been a complete failure. The privacy impact assessment is absolutely critical. It identifies risks, it proposes solutions for risks, and it involves extensive consultation throughout the entire process. Getting it wrong means we haven't got it. It just isn't working. I'll go through the current process that we've just been through.
>
> The privacy impact assessment was an afterthought. It was presented as a draft to consumer advocates in November 2018 as pretty much a fait accompli. All consumer advocates objected and asked for an independent, rigourous privacy impact assessment process. Four of those advocates sent a letter demanding those changes. We've never received a response to that letter. Then, shortly after, on 21 December 2018, the draft privacy impact assessment was published for consultation. I do need to point out the date—21 December 2018. A lot of people were already on leave. They'd taken leave from their jobs. I'm a volunteer; I don't get to go away. But everybody was involved in seeing their families and taking leave. It was dropped at that time. That shows complete disdain for consultation.
>
> Then, interestingly enough, there was no further consultation at all. Many people, if you read the submissions on the privacy impact assessment, said that there were serious problems with it, the risks were being underestimated and that it should have been done externally and independently. That was all ignored. The Australian Privacy Foundation received no contact at all from the Treasury regarding that process. Then the legislation was introduced in mid-February. I haven't got the exact date. It was an incredible decision, in those circumstances, to introduce legislation into parliament when there were serious concerns about the privacy impact assessment process and the results of the draft privacy impact assessment. In fact, the privacy impact assessment draft didn't really make any substantive changes, despite all these problems.[24]

1.35 In one example of a concern raised in the PIA, the ABA expressed concern that the mitigating controls for fraudulent activity would not be as effective as claimed in the PIA:

> **Senator KETTER**: You've identified that, in relation to potential privacy risk 3.2, the assessment there has been downgraded in relation to a third person posing as an accredited data recipient in order to gain access to the

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23 Mr John Stanton, Chief Execuive Officer, Communications Alliance, *Committee Hansard*, 5 March 2019, p. 38.

24 Ms Kat Lane, Vice-Chair, Australian Privacy Foundation, *Committee Hansard*, 6 March 2019, pp. 2–3.

> information. That's been downgraded from possible to unlikely. You say that that fails to consider the intentions of fraudulent and criminal actors and cybercriminals. It seems a very naive assessment to say that it's unlikely.
>
> **Ms Hang**: Yes, we would agree with that. I think a lot of the privacy impact assessments are based on the risk mitigation measures that are provided under the bill in terms of the privacy safeguards, but we believe that the privacy impact assessment needs to be more fulsome in considering how organisations actually manage operational risk and how the standards and rules will contribute to that. With that example in particular we think, particularly through the authorisation standards that are being developed by Data61, that would go some way to addressing the concerns of risk to privacy. We think all of those aspects need to be tested properly through the pilot.[25]

Consumer privacy protections

1.36 Many stakeholders expressed concern that the privacy protections provided in the current framework through both the Privacy Act and the Consumer Data Right framework are not sufficient. In addition, arguments were also made that having two concurrent schemes will make it default for business to comply with and for consumers to understand their rights.

1.37 The Australian Bankers Association expressed concern about insufficient alignment and unnecessary complexity:

> The bill establishes a parallel set of privacy safeguards that operate alongside the existing Australian Privacy Principles. Data recipients are generally subject to the bill's privacy safeguards. While some of the safeguards also apply to data holders, they are mostly subject to the Australian Privacy Principles. While we understand the rationale for the privacy safeguards in enhancing the existing privacy requirements, the two sets of obligations create some complexity for organisations, especially for data recipients who are also data holders. Where possible, it is preferable that the privacy safeguards are aligned with the Australian Privacy Principles to reduce complexity. Importantly, this will also make it easier for customers to understand their rights under the privacy regime.[26]

1.38 Furthermore, they pointed out that the Farrell report did not recommend parallel data protections:

> **Ms Hang**: I note that the Farrell review supported an enhancement to the existing Australian Privacy Principles, the existing privacy legislation, rather than a separate set of privacy safeguards through the bill.[27]

25 *Committee Hansard*, 5 March 2019, pp. 13–14.

26 *Committee Hansard*, 5 March 2019, p. 8.

27 *Committee Hansard*, 5 March 2019, p. 12.

1.39 The Law Council of Australia also expressed concerns about complexity:

> The third category of concern is the privacy safeguards and their interaction with the Privacy Act. The Law Council is concerned that it remains unclear as to how the privacy safeguards division of the bill will interact with the provisions of the Privacy Act. Unnecessary complexity, confusion and uncertainty could be created through the establishment of different classes of protection, depending on whether the relevant data is technically CDR data or only personal information under the Australian Privacy Principles of schedule 1 of the Privacy Act.[28]

1.40 The Australian Privacy Foundation expressed its concerns that the current framework for consumer privacy protections are inadequate, and therefore introducing a scheme that primarily involves more data sharing is problematic:

> The Foundation repeatedly writes submissions highlighting the major problem that we do not have adequate privacy protections in Australia. The privacy protections for Australians are vastly inferior then those in Europe and the UK. For example, in the UK people have the following privacy protections:
>
> 1. UK has adopted and complies with the General Data Protection Regulation (GDPR);
> 2. UK has a Human Rights Act; and
> 3. UK has an adequately-funded, active privacy regulator.
>
> This means that whatever legislation is introduced is built on an inadequate foundation. Further data sharing increases the risk of harm.[29]

1.41 The Financial Rights Legal Centre believes that the legislation be paused while consumer privacy protections are enhanced:

> Our submission details our concerns. I won't go into a lot of detail, but I will summarise by saying the CDR is limited in scope and the name itself is actually misleading. The consumer data right is piecemeal and expedites Australia falling behind the rest of the world; the CDR establishes multiple privacy standards, confusing consumers and placing them at risk; the CDR has the potential to facilitate the leaking of sensitive financial data to entities that provide lower privacy protections; and the CDR establishes a flawed and incomplete set of policy safeguards. The easiest solution to the problems created by the bill is to pause, review the Privacy Act and the Australian Privacy Principles, and extend to all Australians in the use of their data across the entire economy the privacy and security protections that they require in a modern data driven economy. Europe has done this with its GDPR. We should as well.
>
> I will end with this: the CDR bill we have in front of us is an explicit acknowledgement of the inadequate and antiquated nature of the Privacy

28 Ms Olga Ganopolsky, Chair, Privacy Law Committee, Law Council of Australia, *Committee Hansard*, 6 March 2019, p. 20.

29 Australian Privacy Foundation, *Submission 26*, p. 2.

> Act and the Privacy Principles. The CDR bill and the CDR rules seek to boost many of these protections in order to give consumers the protections they do not have under the Privacy Act and the APPs. This is good, but consumers are, for all intents and purposes, on their own for the rest of their financial data and any CDR data that leaks out of the system.[30]

The lack of funding and details on a consumer education campaign

1.42 The committee heard evidence that consumer education is key, and yet a meagre amount has been set aside to educate the public about this work. It is likely that if people are not aware of, and do not understand the scheme, take up could be very low.

1.43 The Australian Banking Association stressed the important of consumer education:

> It's our understanding that the ACCC will receive funding to have or run some sort of education campaign where customers would be given information about their rights under this, which we would absolutely encourage. Consumer education will be a critical part of this, remembering this is about putting the customer in the driver's seat in control of their information to authorise that sharing with another provider, so it is very much designed to benefit all customers.[31]

1.44 Yet despite the importance of consumer education, the ACCC noted that its budget for public communications is only somewhere between $100k and $200k:

> **Mr Gregson**: We have approximately $100,000 to $200,000 for public communication, and the equivalent for engagement with consumers through education methods as well, which may not sound a lot in this day and age of campaigns, but at the ACCC we're fairly adept at reaching stakeholders through our networks and through innovative ways of getting messages out. We also expect that a lot of the work we do with fintechs and service providers will provide that information to consumers and direct it back through the ACCC as the trusted brand as to the name behind the scheme. We don't want to go too early with that intense work; we think doing so a little bit closer to consumer data being available in 2020 is the time to go.
>
> **Mr Cooper**: There is additional funding that's been available both to Data61, particularly in relation to business education, and also to the Office of the Australian Information Commissioner in relation to consumer education, particularly around privacy issues. So we've been talking to both organisations about how we can make sure that our messages are aligned if not a joint approach to these things.[32]

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30 Mr Drew McRae, Policy and Advocacy Officer, Financial Rights Legal Centre, *Committee Hansard*, 6 March 2019, pp. 18–19.

31 Ms Fiona Landis, Director, Government Relations, Australian Banking Association, *Committee Hansard*, 5 March 2019, p. 11.

32 *Committee Hansard*, 6 March 2019, pp. 13–14.

Intellectual property concerns

1.45 A wide variety of stakeholders expressed concern that some derived data sets could be mandated to be disclosed under the consumer data right framework that that this would undermine incentives for companies to invest in data analytics, particularly data sets that involve investment and effort by companies.

1.46 The Australian Bankers Association continued to express concern about derived data sets and pointed out that the Farrell report did not recommend that derived data be disclosed:

> The Farrell report recommended that in most instances derived data shouldn't be in scope in order to protect companies' intellectual property so that companies are not discouraged from investing in enhancing consumer data. The bill provides a mechanism whereby the minister can designate derived data. The ABA's past submissions have not supported including derived data within scope. We believe that moving the decision to designate derived data to the ministerial level is an appropriate move; however, there is still that potential for data to be designated, which is why we have asked for a more rigorous process in designating derived data.[33]

1.47 The Customer Owned Banking Association would like to see more detail around the parameters for disclosure of derived data and believe that the issue has not been resolved yet:

> **Mr Kiang**: It's interesting because, if you look at the bill, the explanatory memorandum says:
>
> CDR data is data outlined in the instrument designating a sector and any information that is subsequently derived from that data.
>
> My untutored interpretation of that is very much that it leaves the question open as to whether or not derived data can be included. It may very well be. As I understand from the ACCC's presentation yesterday, that's an open-ended question.
>
> **CHAIR**: Are you concerned that the bill doesn't adequately protect the IP of lenders?
>
> **Mr Kiang**: That's a good question. It very much comes down, I think, to the designation instrument itself, because the designation instrument will set out the product classes. It sets out the scope for data under open banking. It's like learning a new language. In that respect, as I understand it, the draft designation instrument as it stands doesn't—in the explanatory materials it sets out some components around account balances, for instance. Our concern isn't necessarily around that; it's more around very complex sets of derived data. For instance, what if someone builds a model around this data? Does that mean the model itself is up for grabs as well? I think our main concern around that is that the scope for data under open banking is a little bit open-ended at the moment. We'd like to see a lot more

33 Ms Denise Hang, *Committee Hansard*, 5 March 2019, p. 12.

> definition around that and a lot more ring-fencing around exactly what's in and what's out in open banking. As I understand, Treasury is looking at revising the draft designation instrument for consultation, so we're quite keen to see where Treasury lands with that.[34]

1.48 The Business Council of Australia raised similar concerns:

> A major concern that the Business Council raised during the exposure draft process, and which still remains, is the CDR Bill's inclusion of derived data, which potentially captures proprietary value-added data. A related concern is the very wide delegation to the ACCC to make rules concerning the disclosure, collection, use, accuracy, storage, security and deletion of CDR data as well as a range of other matters.
>
> Capturing value-added data in the CDR framework risks:
>
> - discouraging investment or innovation in such data
> - transferring proprietary data to competitors which could give insights into the strategic decisions of the provider; and raising contractual issues where derived data includes data (or is derived from data) obtained from a third party
> - putting Australian companies at a disadvantage to their international competitors who can innovate freely in their home jurisdiction
> - introducing questions about the requirements of the Australian Constitution for the compulsory acquisition of property to be on "just terms".
>
> None of the previous reviews into data availability or use have recommended the wholesale inclusion of value-added data in the CDR.[35]

1.49 The Law Council of Australia's concerns with broad ministerial discretion in the bill included concerns about the designation of derived data sets:

> We'd suggest it's bad legislative practice to give broad ministerial discretion, and it's especially bad legislative practice to then create the default as 'open' with respect to all derived information when all of the relevant inquiries that have led to the recommendation for legislation like this were with respect to consumer transactional data. So there is real risk.[36]

The application of reciprocity

1.50 There was disagreement among stakeholders as to whether reciprocity should be legislated and if so how it should apply.

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34 *Committee Hansard*, 6 March 2019, p. 13.

35 Business Council of Australia, *Submission 9*, p. 2.

36 Professor Peter Leonard, Member, Media and Communications Committee, Law Council of Australia, *Committee Hansard*, 6 March 2019, p. 25.

1.51 Data Republic stated that:

> reciprocity is a fundamental principle of equity in the consumer data right. Otherwise, we end up with an unequal playing field between organisations, which doesn't ultimately benefit the consumer.[37]

1.52 In contrast Xero suggested that:

> As much as we love CDR and open banking as core concepts, there is one fly in the ointment, as it were: reciprocity. We see that it has potential unintended consequences. We understand why it was introduced, but the way that it's being presented in the legislation around mandatory data share and the pass-through of information, that raw transaction information, could have really strong repercussions on the uptake by Xero but also the fintechs more widely.[38]

1.53 The Law Council of Australia also expressed the view that it would be beneficial to have reciprocity defined in the bill rather than in the explanatory memorandum or in the rules:

> The Law Council notes that, other than an indirect reference in relation to reciprocity, the bill does not address the issue as a legal concept. The explanatory memorandum describes the relevant concepts and envisages that the matter is dealt with under the rules. In the view of the Law Council, it would be beneficial if the bill addressed the matters traversed in the explanatory memorandum.[39]

Conclusion

1.54 Labor Senators are supportive of the broad policy intent of the consumer data right but do hold concerns about the government's current proposed framework.

1.55 Due to the compressed timeframes involved in this inquiry process, Labor Senators are not in a position to outlined detailed amendments at this moment. Labor Senators will continue to work with all stakeholders in order to improve the legislation should it be listed for Parliamentary debate in budget week.

Senator Chris Ketter
Deputy Chair

Senator Jenny McAllister
Senator for New South Wales

37 Mr Danny Gilligan, Chief Executive Officer, Data Republic, *Committee Hansard*, 5 March 2019, p. 58.

38 Mr Ian Boyd, Financial Industry Director, Xero, *Committee Hansard*, 5 March 2019, p. 57.

39 Ms Olga Ganopolsky, Chair, Privacy Law Committee, Law Council of Australia, *Committee Hansard*, 6 March 2019, p. 19.

Appendix 1

Submissions and answers to questions on notice

Submissions

1 Mr Melville Miranda
2 Law Council of Australia
3 Adjunct Professor George Newhouse
4 Meridian Energy Australia
5 Consumer Policy Research Centre
6 Communications Alliance
7 Australian Communications Consumer Action Network
8 Australian Retail Credit Association
9 Business Council of Australia
10 Australian Information Industry Association
11 Customer Owned Banking Association
12 Maurice Blackburn Lawyers
13 Verifier
14 Financial Rights Legal Centre
15 Experian
16 Australian Banking Association
17 FinTech Australia
18 Visa
19 TrueLayer Limited
20 MoneyBrilliant
21 Australian Finance Industry Association
22 AGL
23 CHOICE
24 Xero
25 Energy Consumers Australia
26 Australian Privacy Foundation
27 illion
28 Telecommunications Industry Ombudsman
29 ID Exchange Pty Ltd
30 Australian Energy Council
31 ThoughtWorks Australia

Answers to questions on notice

1 Communications Alliance: Answers to questions taken on notice at a public hearing in Melbourne on 5 March 2019, received 13 March 2019.

2 Australian Banking Association: Answers to questions taken on notice at a public hearing in Melbourne on 5 March 2019, received 13 March 2019.

3 Australian Information Industry Association: Answers to questions taken on notice at a public hearing in Melbourne on 5 March 2019, received 13 March 2019.

4 Data Standards Body: Answers to questions taken on notice at a public hearing in Sydney on 6 March 2019, received 13 March 2019.

5 Office of the Australian Information Commissioner: Answers to questions taken on notice at a public hearing in Sydney on 6 March 2019, received 13 March 2019.

6 Treasury: Answers to questions taken on notice at a public hearing in Sydney on 6 March 2019, received 14 March 2019.

7 Attorney-General's Department: Answers to questions taken on notice at a public hearing in Sydney on 6 March 2019, received 15 March 2019.

Appendix 2
Public hearings

Melbourne, 5 March 2019

Members in attendance: Senators Griff, Hume, Ketter.

BLYTH, Mr Michael, Head of Government, Regulatory and Industry Affairs, Australian Retail Credit Association

BOYD, Mr Ian, Financial Industry Director, Xero

BRADEY, Mr Warren, Executive Manager, Commonwealth Scientific and Industrial Research Organisation

BROWN, Mr Steven, Director, Bureau Engagement, illion

CHAPPEL, Mr Tony, General Manager, Government, Media and Community Relations, AGL Energy

COOPER, Mr Bruce, General Manager, Consumer Data Right, Australian Competition and Consumer Commission

CRAWSHAW, Ms Jacqueline, Associate Director, Advocacy and Communications Energy Consumers Australia

GILLESPIE-JONES, Ms Christiane, Director, Program Management, Communications Alliance

GILLIGAN, Mr Danny, Chief Executive Officer, Data Republic

GREGSON, Mr Scott, Executive General Manager, Merger and Authorisation Review Division, Australian Competition and Consumer Commission

HANG, Ms Denise, Policy Director, Australian Banking Association

HAVYATT, Mr David, Senior Economist, Energy Consumers Australia

LAING, Mr Michael, Executive Chairman, Australian Retail Credit Association

LANDIS, Ms Fiona, Director, Government Relations, Australian Banking Association

MOLYNEUX, Ms Elizabeth, General Manager, Energy Markets Regulation, AGL Energy

PAVAN, Ms Carmelle, General Manager, Communications, Australian Information Industry Association

STANTON, Mr John, Chief Executive Officer, Communications Alliance

STEELE, Dr John (Jack), Director, Science Impact and Policy, Commonwealth Scientific and Industrial Research Organisation

STRASSBERG, Mr Matthew, General Manager, External Relations Australia and New Zealand, Equifax

Sydney, 6 March 2019

Members in attendance: Senators Hume, Ketter.

BRADEY, Mr Warren, Program Leader, Consumer Data Standards

FALK, Ms Angelene, Australian Information Commissioner, Office of the Australian Information Commissioner

FIELD, Mr Philip, Lead Ombudsman, Banking and Finance, Australian Financial Complaints Authority

GANOPOLSKY, Ms Olga, Chair, Privacy Law Committee, Law Council of Australia

GEBERT, Ms Cynthia, Energy and Water Ombudsman, Victoria

GHALI, Ms Sarah, Principal Director, Regulation and Strategy Branch, Office of the Australian Information Commissioner

HOYLE, Mr Bart, Manager, Law Design Office, Treasury

JONES, Ms Judi, Telecommunications Industry Ombudsman

KIANG, Mr Tommy, Senior Policy Manager, Customer Owned Banking Association

LANE, Ms Kat, Vice-Chair, Australian Privacy Foundation

LEONARD, Professor Peter, Member, Media and Communications Committee, Law Council of Australia

MacRAE, Mr Drew, Policy and Advocacy Officer, Financial Rights Legal Centre

MALONE, Mr Christopher, Legal Officer, Attorney-General's Department

McAULIFFE, Mr Daniel, Senior Advisor, Structural Reform Division, Treasury

McDONALD, Mr Hamish, Division Head, Structural Reform Division, Treasury

MOLT, Dr Natasha, Director of Policy, Policy Division, Law Council of Australia

SOLOMON, Ms Lauren, Chief Executive Officer, Consumer Policy Research Centre

STEVENS, Mr Andrew, Interim Chair, Data Standards Body

VIRTUE, Ms Joanna, Assistant Secretary, Attorney-General's Department

YOUNG, Ms Janine, Energy and Water Ombudsman, New South Wales