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SUBMISSION TO THE REVIEW OF THE CONSUMER DATA RIGHT ON HOW AUSTRALIA MIGHT BEST RETAIN ITS GLOBAL LEAD IN CONSUMER DATA SHARING

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Summary

This submission proposes four suggestions regarding the development and implementation of the Consumer Data Right ('CDR') regime in Australia; and suggests the expansion of 'direct to consumer data sharing' obligations is not yet timely.

Specifically, we submit:

1. Australia's data-sharing framework is world leading. It is vital for the development of Australia's digital economy that this leadership is maintained.
2. the foremost priority in the development of the CDR should be the implementation of 'action initiation', aka 'write access'. The CDR regime without action initiation is inchoate and largely limited in functionality to the role of a comparison website.¹
3. data-sharing should continue to be extended to even more economic sectors as this is essential to realise the CDR's objectives of benefitting consumers, increasing competition, and driving innovation.

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¹ 'Comparison websites' are 'sites that generally compare products across a product category offered by a range of suppliers, according to specific characteristics provided by the consumer', see Treasury, Australian Government, *Inquiry into Future Directions for the Consumer Data Right* (Report, October 2020) 215 <<https://treasury.gov.au/sites/default/files/2021-02/cdrinquiry-final.pdf>> ('*Inquiry into Future Directions*').

4. measures, including extensive consumer education, will be needed in due course to raise awareness of the regime across public and private sectors.
5. expanding CDR to support the sharing of consumer data in machine-readable form may be postponed until consumers get accustomed to, and realise the value of, their data being safely shared between CDR participants under the existing framework.

This submission briefly outlines our views. More comprehensive arguments are in our articles [here](#) and [here](#).

Our Views on the Essential Next Steps in the CDR's Design and Implementation

1. The Importance of Maintaining Our Lead

Today, CDR is quite simply world leading. The successful development of the digital economy in Australia requires that Australia maintains this lead. Competitors in data-driven innovation are many and increasing. UK's National Data Strategy projects a future in which the UK is 'a world leader in data' and 'a nation of digital entrepreneurs, innovators and investors, the best place [globally] to start and grow a digital business, as well as the safest place in the world to go online'.² The EU's ambition, by 2030, is for 'the EU to become the most attractive, most secure and most dynamic data-agile economy in the world – empowering Europe with data to improve decisions and better the lives of all of its citizens.'³

The task of maintaining leadership among digital economies is challenging. First, it requires finding a delicate balance: devising a data sharing regime which rigorously protects consumer data and ensures the system's trustworthiness without imposing regulatory burdens that could deter new market entrants and stifle innovation. Second, it calls for an exceptional readiness to learn and adapt in an environment where changes in consumer and business preferences and innovations in technology will both routinely outpace new regulatory and governance measures. As with most transformative innovations regulation of data-sharing processes must be a continuous 'learning by doing' exercise. Regardless of which sectors are involved in the domestic data sharing framework, the framework must be "living", constantly ready to admit its errors and change.

² UK Government, Department for Digital, Culture, Media & Sport, 'National Data Strategy' (Policy Paper, 9 December 2020) <www.gov.uk/government/publications/uk-national-data-strategy/national-data-strategy>. See also UK Government, Department for Digital, Culture, Media & Sport, 'Consultation Outcome: Government Response to the Consultation on the National Data Strategy' (*GOV.UK*, 18 May 2021) <<https://www.gov.uk/government/consultations/uk-national-data-strategy-nds-consultation/outcome/government-response-to-the-consultation-on-the-national-data-strategy>>.

³ European Commission, 'A European Strategy for Data' (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2020) 66 final, 19 February 2020) 6 <https://ec.europa.eu/info/sites/default/files/communication-european-strategy-data-19feb2020_en.pdf>.

These challenges are real but not insurmountable. We are well placed to maintain our position as the frontrunner. Australia has made ongoing improvements by repeatedly engaging with constructive critique provided by stakeholders. We must continue doing so to ensure that the system continues to adapt to serve its users. Once again we are lucky. The constant adaptation of legislative and regulatory frameworks in response to consumer and industry demands is far easier for a mid-sized economy like ours than for regulatory behemoths like the US or the EU.

2. Introducing ‘Action Initiation’

In our opinion, action initiation, aka ‘write access’, lies at the heart of the CDR and truly drives the process. Action initiation is the petrol in the engine – the essential fuel source for the entire system. It places the consumer at the centre of our data ecosystem, encourages competition, and promotes innovation, efficiency and fairness. Under today’s CDR framework, consumers are only able to share data with third parties – a functionality known as ‘read access’. ‘Action initiation’ is designed to give third parties the right to act on a consumer’s behalf with the consumer’s consent, for example, initiate payments or change product or service providers.

With the introduction of action initiation, changing providers may become a matter of a few clicks on a computer or a mobile device. Energy and telecommunications illustrate this point well. Consumers pay too much for electricity and mobile phone plans because when someone rings to offer a better energy or mobile plan, they tend not to respond. They are often too busy to take such calls, and if they did, rightly tend to think that comparing different offers would be difficult. But once CDR applies to the energy and telecommunications,⁴ consumers will not have to answer unsolicited phone calls to change providers. Clicking one link will direct their data to a potential new provider. Clicking another link will serve to accept the new provider’s offer and authorise the new provider to action the change in suppliers. This will deny the current provider the opportunity to reclaim customers by offering a better deal when they call to cancel their contract. The current provider will only learn that customers have shifted providers after the fact, at least in sectors in which changing a provider is simple and swift. Providers will thus be forced to treat customers

⁴ The designation instrument for the energy sector was signed on 26 June 2020, *Consumer Data Right (Energy Sector) Designation 2020* (Cth). On 12 November 2021, the government released rules expanding CDR to the energy sector, *Competition and Consumer (Consumer Data Right) Amendment Rules (No. 2) 2021* (Cth), dated 12 November 2021. It is anticipated that product information data will be shared from October 2022 and consumer data from November 2022, see Senator the Honourable Jane Hume, ‘Consumer Data Right Rolled Out to the Energy Sector’ (12 November 2021) <<https://ministers.treasury.gov.au/ministers/jane-hume-2020/media-releases/consumer-data-right-rolled-out-energy-sector#:~:text=Introducing%20the%20CDR%20in%20the,better%20comparisons%20of%20energy%20plans.>>>.

On 24 January 2022, the government announced the designation of telecommunications – the third sector to which CDR applies, see *Consumer Data Right (Telecommunications Sector) Designation 2022* (Cth). Consultations will start soon on developing telecommunications specific rules and standards, see Campbell Kwan, ‘Planning for Telecommunications CDR Rules and Open Finance Are Underway’ *ZDNet* (25 January 2022) <<https://www.zdnet.com/article/telecommunications-sector-officially-designated-for-cdr-and-open-finance-is-underway/>>>.

fairly upfront – or risk losing them. No one can predict the impact of this change on how businesses behave towards existing customers, but we expect it to be large.

Action initiation thus should drive out loyalty penalties and reinstitute a commercial morality, a basic fairness, that modern businesses no longer seem to prioritise. Thirty years ago, most Australian businesses operated on the understanding that charging current customers more than new customers was inappropriate.⁵ A guiding principle in commerce was that the same price be offered to all customers. Today, however, those standards of behaviour seem to have fallen by the wayside.⁶

To illustrate, many Australians with home loans in place for many years continue to pay significantly higher interest rates than borrowers with home loans entered into more recently, thereby over time paying a potentially very substantial penalty for their loyalty.⁷ As highlighted in a recent ACCC report, staying with their existing lender, instead of switching to a new one, costs many borrowers much.⁸ Someone with a variable rate home loan over four years old is typically paying \$1,000 more each year in interest, for every \$250,000 outstanding on their loan, than they need to be paying.⁹ The situation in the energy sector is the same, with many participants criticising energy companies for not offering their existing customers the same good deal offered to new customers unless the existing customers threaten to leave their provider.¹⁰ Even where some benefits have been introduced, the ACCC remains concerned about consumers being misled and subject to opaque or unfair loyalty contract terms.¹¹

In its response to the *Final Report of the Inquiry into Future Directions for the Consumer Data Right*, the government announced it would ‘expand the functionality of the CDR regime to include support for consumer-directed third-party action initiation’ in the banking sector (enabling third party ‘payment initiation’ as well as ‘general action initiation’, including switching between

⁵ Prior to 1995, section 49 of the *Trade Practices Act 1974* (Cth) prohibited price discrimination – businesses could not ‘discriminate between purchasers of goods of like grade and quality in relation’ to, inter alia, price. See also Russell Miller *Miller’s Australian Competition Law & Policy* (Thomson Reuters, 3rd ed, 2018) [3.170] and [3.260].

⁶ Productivity Commission, *Competition in the Australian Financial System* (Inquiry Report No 89, 29 June 2018) 13.

⁷ *Ibid.*

⁸ Australian Competition and Consumer Commission, *Home Loan Price Enquiry* (Final Report, November 2020) 5 <<https://www.accc.gov.au/system/files/Home%20loan%20price%20inquiry%20-%20final%20report.pdf>>.

⁹ The Australian Government the Treasury, ‘Implementation of an Economy-wide Consumer Data Right: Strategic Assessment (Consultation Paper, July 2021) 24 <<https://treasury.gov.au/sites/default/files/2021-08/c2021-182135-strat.pdf>>.

¹⁰ See, for example, Australian Energy Market Commission (AEMC), *Consumer Research for Nationwide Review of Competition in Retail Energy Markets* (Research Report, June 2014) 20, 62 <<https://www.aemc.gov.au/sites/default/files/content/736bde30-3ded-4343-8bf5-0e7511801b24/Consumer-Research-for-Nationwide-Review-of-Competition-in-Energy-Retail-Markets-Newgate-Research.pdf>>.

¹¹ Australian Competition and Consumer Commission, *Customer Loyalty Schemes* (Final Report, December 2019) iv-v, 114 <<https://www.accc.gov.au/system/files/Customer%20Loyalty%20Schemes%20-%20Final%20Report%20-%20December%202019.PDF>>.

products and services).¹² Commencing with banking for the implementation of CDR in Australia was entirely understandable. However, for the reasons outlined above we suggest that the implementation of action initiation in energy and telecommunications will be even more impactful as provider change is far simpler.¹³

3. Extending Data-sharing to Other Economic Sectors

The rollout of CDR in banking is nearly complete, in energy well underway and in telecommunications is commencing. Expanding data sharing beyond these sectors will extend the benefits of increased competition, innovation, new employment and business opportunities and efficiency gains across a far broader spectrum of economic activities. The government has been wise indeed to conceive of this as an economy-wide reform as the silo-isation of data does not tend to serve consumers. Data from one sector yields its greatest impact when supported to dance and interact with data from other sectors.

4. Raising Awareness of CDR in Australia

CDR will flourish when the advantages it seeks to provide are widely recognised and appreciated. The breadth of Australia's approach to data-sharing is unique. Other nations – including those that have adopted data-sharing as part of open-banking¹⁴ – are beginning to look to Australia for lessons around national cross-sectoral CDR models.¹⁵ Remarkably, despite CDR being announced and in development since 2017, knowledge of it here remains severely limited and misconceptions abound, with many Australians perceiving it as confined to open banking.

When we discuss CDR with most people in Australia we are typically met with indifference. When we discuss it with experts abroad, the response is often one of excitement and enthusiasm for its scope and ambition. Is the regime's name too dull? Do Australians simply not believe a

¹² 'Government Response to the Final Report of the Inquiry into Future Directions for the Consumer Data Right', *Australian Government* (Government Response, 14 December 2021) 2 <<https://treasury.gov.au/publication/p2021-225462>>.

¹³ Moving one's energy or mobile phone account is typically much easier than changing banks. It is difficult to envisage how a consumer could change one's current bank without considerable interaction with it and a proposed new bank. Besides, this interaction will provide one's current bank with the opportunity to retain one as a customer by offering better terms.

¹⁴ As well as the EU and UK, the list currently includes US, Canada, China, India, Japan, New Zealand, Hong Kong, Singapore, South Africa, United Arab Emirates, and Mexico. See Norton Rose Fulbright, *Open Banking Around the World: A Global Comparative Guide* (July 2020) [Redacted by Editors]. See also Oana Ifrim, 'Open Banking – A Very Global Business', *The Paypers* (Web Page, 19 December 2019) <<https://thepaypers.com/expert-opinion/open-banking-a-very-global-business--1240033>> and Treasury, *Report of the Review into Open Banking: Giving Customers Choice, Convenience and Confidence* (Report, December 2017) appendix C ('Review into Open Banking') <https://treasury.gov.au/sites/default/files/2019-03/Review-into-Open-Banking-_For-web-1.pdf>.

¹⁵ See, 'Consumer Data Right', *Ministry for Business, Innovation and Employment, New Zealand Government* (Web Page, 9 July 2021) <<https://www.mbie.govt.nz/business-and-employment/business/competition-regulation-and-policy/consumer-data-right/>>.

government can drive a profoundly innovative and transformative program? Whatever the reason, when it comes to CDR very few Australians yet appreciate the value of what we have got.

Given the ground-breaking nature of the CDR we would have expected much more interest in it from within the academy. To date, however, there has been little scholarly analysis of the CDR legislation, its regulatory framework and its potential impact on users and the economy more broadly.¹⁶

Measures to raise awareness of the regime across public and private sectors will yield many benefits. Consumers will only be able to exercise their rights effectively once they understand them. Adequate consumer education about CDR may well be a precondition for its success. So far, consumer awareness of CDR is poor. The findings of a survey in late 2019 showed that public knowledge about Australia's sweeping open banking regime was dramatically low: 'in spite of the industry chattering away about Open Banking, more than three-quarters of Australians (77%) do not know what it is. Just one in ten (11%) know about it, and a further 12% have heard of it, but don't know what it is.'¹⁷

A quick internet search suggests these numbers are unlikely to have since changed significantly. Furthermore, the view rates of the publicly available recordings of webinars and regulatory consultation processes on CDR are very low. For example, at the time of writing, a three-minute ACCC video clip explaining how CDR works and streamed on YouTube since June 2020, has had fewer than 3,400 views.¹⁸ This apparent lack of enthusiasm about the many forthcoming benefits of economy-wide data sharing is striking, given that we are, by and large,

¹⁶ There are only a handful of legal academic papers on the subject and these are limited to the analysis of certain selected aspects of the regime. See: Anton N Didenko, 'Implications of the Consumer Data Right Framework for Trusted Advisers' [2022] UNSWLRS 6, focusing on the implications of the CDR framework for the handling of CDR data by professional advisers and their customers; J Scranton, 'The Consumer Data Right: Right for Competition in Australian Retail Energy Markets?' (2020) 27(2) *Competition & Consumer Law Journal* 107; Mark Burdon and Tom Mackie, 'Australia's Consumer Data Right and the Uncertain Role of Information Privacy Law' (2020) 10(3) *International Data Privacy Law* 222, focusing on the information privacy laws / data protection laws; Gerard Goggin et al, 'Data and Digital Rights: Recent Australian Developments' (2019) 8(1) *Internet Policy Review* 1, focusing on data privacy rights; Bruno Zeller and Andrew M Dahdal, 'Open Banking and Open Data in Australia: Global Context, Innovation and Consumer Protection' (Working Paper No 2021/001, College of Law, Qatar University, 14 January 2021), focusing on open banking. Some commentary on CDR has also been offered by other academic disciplines and can be found on SSRN.

¹⁷ Ross Buckley, in KPMG, *30 Voices on 2030: The New Reality for Financial Services* (Report, 22 February 2021) <<https://assets.kpmg/content/dam/kpmg/au/pdf/2021/30-voices-on-2030-new-reality-financial-services.pdf>> 86. Hotwire and Pureprofile, *Cracking the Code of Open Banking* (White Paper, 2020) 6 <<https://www.hotwireglobal.com/feature/cracking-the-code-of-open-banking-whitepaper>> ('*Cracking the Code*') 4.

¹⁸ See ACCC Govau, 'Consumer Data Right: How It Works' (YouTube, 29 June 2020) 00:00:00–00:03:01 <<https://www.youtube.com/watch?v=FnWzudxrTq4>>.

technologically savvy and fast adopters of new technologies, and keen users of new applications and software tools¹⁹ in finance and beyond.²⁰

This situation may in small part be due to consumers being largely left out of the consultation process. Although some organisations spoke on behalf of consumers,²¹ they were in the minority and, while raising important consumer protection issues, were rightly focused on informing and steering the regulatory debate not conducting consumer education campaigns.²²

Government and industry have ‘a mammoth communications task ahead’.²³ Community acceptance and use of the CDR regime will be boosted by timely consumer education focused on the benefits of data sharing and how to mitigate its risks and costs.²⁴ The potential of a consumer education campaign by government to alert consumers to the benefits of directing the sharing of data about them to potential new providers of banking, energy and other services is very large indeed. Given how early we are in the data-sharing journey, it is probably right that government is yet to undertake such a campaign, but certainly once data-sharing is fully available across at least two sectors, the time will be ripe for such a campaign.

5. Direct to Consumer Data Sharing Obligations

‘Direct to consumer data sharing’ obligations are a data holder’s obligations to give consumers access to their own data directly, in addition to the ability to do so through an accredited data recipient.²⁵ In our view, imposing these obligations is not yet timely. In principle, extending the CDR rules to support the sharing of consumer data in machine-readable form (in addition to the

¹⁹ Treasury, Australian Government, *Competition Policy Review* (Final Report, March 2015) 22 <https://treasury.gov.au/sites/default/files/2019-03/Competition-policy-review-report_online.pdf>.

²⁰ Hotwire and Pureprofile, *Cracking the Code* (n 17) 4.

²¹ For example, Consumer Action Law Centre (CALC) actively drew attention of the stakeholders to the risks of consumer data released under the CDR framework to be misused, see: Financial Rights Legal Centre and Consumer Action Law Centre, *Submission to the Select Committee on Financial Technology and Regulatory Technology* (Submission No 36, December 2019) <https://consumeraction.org.au/wp-content/uploads/2020/01/191223_FinTechInquiry_Sub_FINAL.pdf>.

²² Both the Final Report on the Review into Open Banking and the Future Directions for the Consumer Data Right Report emphasised the need for a consumer education programme, see Treasury, *Report of the Review into Open Banking: Giving Customers Choice, Convenience and Confidence* (Report, December 2017) (‘*Review into Open Banking*’) <https://treasury.gov.au/sites/default/files/2019-03/Review-into-Open-Banking_For-web-1.pdf> xviii [Recommendation 6.4 (‘Consumer Education Programme’)]; and Treasury, *Inquiry into Future Directions* (n 1) xxviii [Recommendation 7.8].

²³ Sarah Simpkins, ‘Most Australians Unaware of Open Banking’, *Fintech Business* (online, 9 December 2019) <<https://www.fintechbusiness.com/data/1605-most-australians-unaware-of-open-banking>>.

²⁴ Treasury, *Inquiry into Future Directions* (n 1) xii. See also The Paypers, *Open Banking Report 2019: Insights into the Global Open Banking Landscape* (Report, September 2019) 4 <<https://thepappers.com/reports/the-open-banking-report-2019-insights-into-the-global-open-banking-landscape-2/r780814>>.

²⁵ Australian Government, ‘Direct to Consumer Access – Frequently Asked Questions’ <<https://www.cdr.gov.au/sites/default/files/2020-12/CDR%20-%20Direct-to-consumer%20access%20FAQs.pdf>>.

existing obligations of data sharing in human-readable form) is desirable, as it gives consumers greater access to and control over their data. However, given the complexity of the CDR ecosystem and the importance of ensuring data is handled safely and securely, it is essential to first establish that the current system is functioning as intended. The roll out of CDR needs to be a step-by-step secure process.

Once CDR operates fully in several economic sectors and hard evidence is available showing it enables data participants²⁶ to share consumer data efficiently and securely, it may well be appropriate to consider expanding the regime to ‘direct to consumer data sharing’ obligations. However, until consumers have had the opportunity to experience the value flowing from the sharing of their data with other businesses, it is questionable how much benefit they will gain from direct access to their data in machine-readable form.

Conclusion

In today’s world of big data a nation can be a global leader or follower, and Australia is rightly aiming to be the real global leader. We are convinced that with its current adaptive and thoughtful approach to shaping its data ecosystem Australia is well-positioned to achieve this goal. The benefits for our nation will be many, and far more than most of us realise.

We endorse in the strongest possible terms the current intentions to implement ‘action initiation’ and extend data sharing to further economic sectors. In time, raising awareness of the scope and goals of the regime across the public and private sectors will likewise be vital. This will particularly be so among consumers to whom it may initially be counterintuitive that the road to gaining ‘more control’ over their data involves its being opened to a larger circle of interested parties.

²⁶ Under CDR, ‘data participants’ include ‘data holders’ and ‘accredited data recipients’, *Competition and Consumer Act 2010* (Cth) s 56AL (‘CCA’), inserted by the *Treasury Laws Amendment (Consumer Data Right) Act 2019* (Cth) (‘CDR Act’).