

## Where to now for the Consumer Data Right?

May 2019

The re-election of a Coalition government means that organisations should remain focussed on their Open Banking change program, as this continues to have the potential to be one of the most important changes in financial services in a generation.

There are three components to the legislative framework for Open Banking:

- The Consumer Data Right (CDR) Bill, which was finally introduced into the Australian Parliament on 13 February 2019;
- The Rules – an Exposure Draft for the Consumer Data Rules was released by the Australian Competition and Consumer Commission (ACCC) on 29 March 2019; and
- The Standards – Data61 has led ongoing work to develop standards for APIs, information security, consumer experience and, recently, engineering.

While not all of the standards have been finalised – a source of frustration for some financial institutions – the pathway is sufficiently clear for organisations to be well progressed.

### Timing

Even before the CDR Bill was introduced into Parliament, concerns had been raised about the tight timeline for implementation. At the Australian Retail Credit Association (ARCA) Conference in November 2018, Deloitte global Open Banking partner, Kasper Peters, expressed concern at the tight timeline that Australia was adopting for the implementation of Open Banking. Peters commented, “The experience from the launch of Open Banking in the UK and Comprehensive Credit Reporting (CCR) in Australia show that the current timelines for Open Banking are probably overambitious.” This concern was echoed by a number of other presenters at ARCA. The Australian Labor Party (Labor) was reported as describing the timeline as “exceptionally unreasonable”.<sup>i</sup>

Subsequently, the implementation timeline was amended so that sharing of consumer, account and transaction data for credit and debit cards, deposit accounts, and transaction accounts for the big four banks was deferred from 1 July 2019 to “no later than 1 February 2020”.<sup>ii</sup>

The CDR Bill was referred by Parliament to the Senate’s Economic Legislation Committee.<sup>iii</sup> The Senate Committee’s report noted concerns with the ability of the Minister, by legislative instrument, to designate a sector of the Australian economy as a sector to which the CDR applies. While noting the “the extensive consultation obligations” that the Bill imposed, the report concluded that where the Parliament delegates its legislative power, compliance with the consultation obligations should be a specific requirement for a designation instrument to be valid.<sup>iv</sup>

Although the Senate Committee had recommended that the CDR Bill be passed, it lapsed at the dissolution of the Parliament on 11 April 2019.

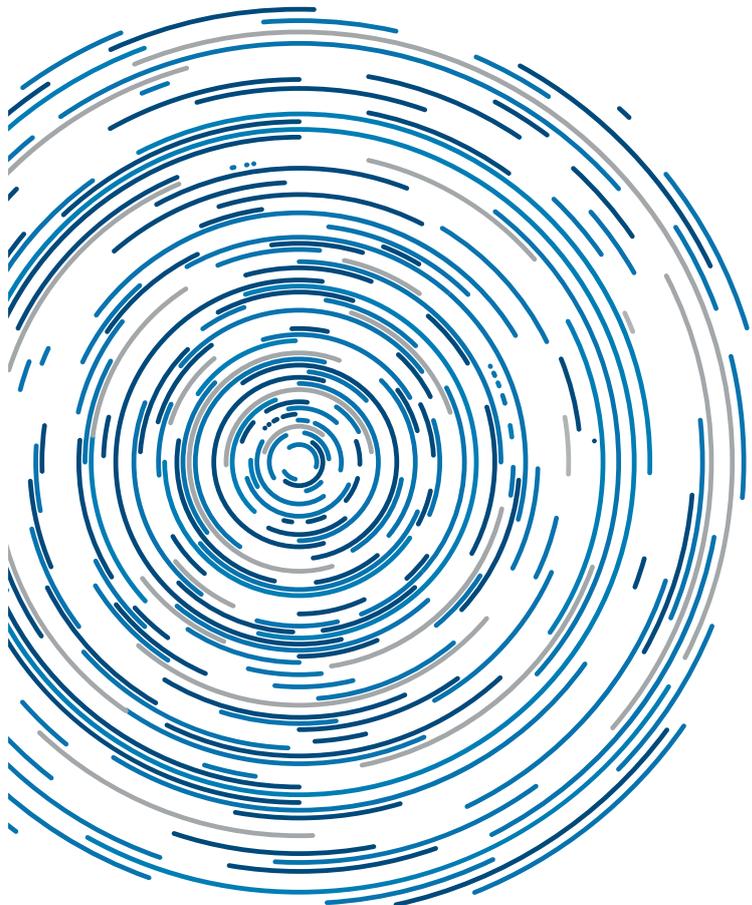
## What does the new Parliament mean for the introduction of the Consumer Data Right in Australia?

The CDR Bill will need to be re-introduced into Parliament. This is more likely to happen sooner under a Coalition government than if Labor had been elected, given Labor had noted that Open Banking “wouldn't necessarily...be an immediate priority”.<sup>v</sup>

The CDR Bill will also need to pass the Senate, which is still being finalised following the general election. If the CDR Bill is not passed by Parliament before 1 July 2019, the start date, and possibly the implementation timeline, would need to be extended.

There are four specific concerns that have been raised by Labor which are likely to be the focus of the Senate when the Bill is reintroduced into Parliament:

- 1 Treasury's oversight of the privacy impact assessment process
- 2 The potential for customers to be charged for data access
- 3 The impact of risk based pricing on low-income borrowers
- 4 The inclusion of 'derived data'.



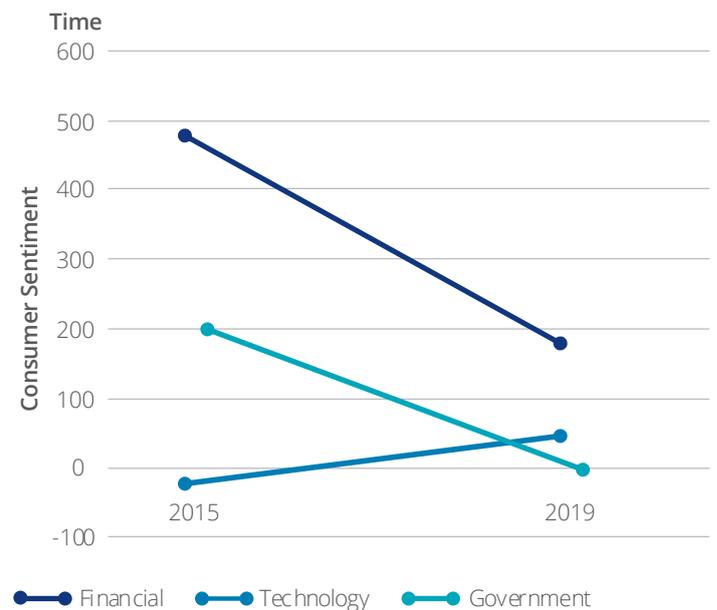
## Privacy

Open Banking will result in more entities accessing banking data, and banking data being transferred more often – increasing the possibility that data privacy is compromised.<sup>vi</sup>

At the same time, Open Banking is being introduced in an environment where individuals increasingly want confidence that their information is securely handled.<sup>vii</sup> In the last five years, Australians have become more concerned about privacy.<sup>viii</sup>

Confidence in the privacy safeguards in the CDR will be critical to the adoption and success of Open Banking in Australia. Fortunately, despite declines in people's trust that banks have their best interests at heart, people do still trust financial service entities to keep their personal information safe, although this has declined in the last five years.

Figure 1 – Trust in privacy over five years



Source: Deloitte Australian Privacy Index 2019.

Note: Deloitte's Privacy Index tracks which brands consumers trust with their privacy. Those results are then aggregated across industry sectors.

Financial services has seen the biggest loss in trust in privacy over the last five years. But more consumers still trust rather than distrust financial services brands with their personal information.

However, the CDR Bill is designed to apply to a range of designated sectors, not just to banking. Additionally, a range of entities, not just banks, could become Accredited Data Recipients. There is a risk that the 'opt-out' approach adopted for MyHealth, rather than the consumer directed approach to data sharing in the CDR Bill, has undermined consumer confidence in data sharing. The Exposure Draft for the Consumer Data Rules was intended, in part, to provide additional information on the rules framework which would support the privacy safeguards in the CDR Bill. Any additional review of the CDR Bill by the new Parliament could clarify how Accredited Data Recipients meet an appropriate level of privacy, without compromising other objectives of consumer choice and increasing competition in a designated sector.

## Charges for data access

One of the core principles of the CDR is that consumers have the right to control *their* data. Another is that transfers of consumer-provided data and transaction data should be free of charge.

However, although the majority of designated data sets under the CDR are expected to be made available for free, the draft CDR Bill does contemplate that consumers may be charged a fee for access to *certain* data sets. The draft CDR Bill lists specific factors that the Minister must consider before the “rare circumstances” in which a data set would be designated as a chargeable data set.<sup>ix</sup>

One of the circumstances outlined in the Farrell Report, in which it was contemplated that a fee could be charged, was where a data holder shared, at the customer’s direction, the outcome of an identity verification assessment.

Given that the CDR Bill is designed to apply to a range of designated sectors, not just to banking, any additional review by the new Parliament could clarify the type of other data sets and circumstances in which a fee could be charged.

## Risk based pricing

The provision of additional information under Open Banking (as well as comprehensive credit reporting) will have two impacts on pricing.

Firstly, the broader range of information available to a larger range of competitors should, *prima facie*, result in greater price competition and see the pricing curve shift down as financial institutions face competitive pressure to reduce interest rates and fees across all of the credit facilities they provide to customers.<sup>x</sup>

However, secondly—and of greater impact—financial institutions will be able to assess, price, and manage the risk associated with each customer individually. This can occur at origination and throughout the life of a loan. It also lets a financial institution adjust the price according to the depth of the relationship, on whether the customer wants a single product or multiple products and their loyalty. When these factors are correlated with customer risk and customer lifetime value, you have risk-based pricing.

However, as noted by Peters, “As is sometimes the case with regulatory-led reforms, unintended policy consequences can create collateral damage”.

By varying pricing to more accurately reflect a customer’s risk, rather than their bargaining power, risk based pricing lowers the cost of credit for lower risk customers, while higher risk borrowers are provided credit, albeit at a higher price.<sup>xi</sup>

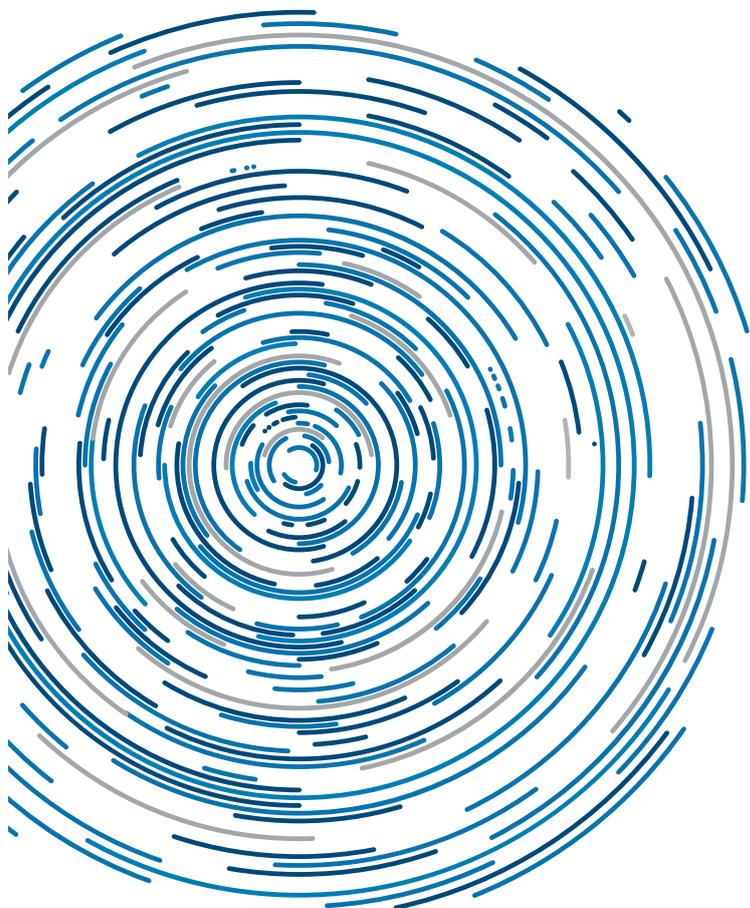
Labor has expressed concern about the distribution of the benefits of Open Banking, noting that CDR should not be “a reform that reinforces benefits for high net worth individuals”.<sup>xii</sup>

The implementation of strategic pricing, including risk-based pricing, raises potential fairness questions, particularly if certain customer segments experience significant increases in their price of borrowing, or are unable to access credit altogether. Credit providers need to ensure their strategic pricing programs will not provide credit, or alter the terms of an existing credit facility, such that repayments impose substantial hardship on the customer.<sup>xiii</sup>

Labor is also reported to be concerned that Open Banking would “leave less wealthy, lower margin people stranded with higher fees because few institutions want their business”.<sup>xiv</sup>

At the ARCA conference, Peters noted that, in addition to the increased use of risk-based pricing, “Open Data will not only be used for the direct benefit of consumers (e.g. in the case of price comparisons) but could also be indirectly used “against” the consumer, for example, when access to credit or insurance is restricted if transaction data is not provided. Consumers can theoretically refuse to consent to sharing their data, but this mean they are unable to access credit or other financial service products from some suppliers.

“As Open Data spreads to other industries, the risk of unintended consequences will only become larger. The consumer risks standing naked in front of big companies. Compared to Australia this risk seems lower in Europe, where the General Data Protection Regulation (GDPR) puts more emphasis on protecting privacy than on data sharing based on consent.”



## Derived Data

The concept of 'derived data' was one of the issues which received attention in the submissions on the draft legislation and rules framework and resulted in the scope of 'derived data' being changed following the consultation process in 2018.

The definition of 'CDR data' in the CDR Bill includes information that is "directly or indirectly derived" from CDR data.<sup>xv</sup> This was done so that the Privacy Safeguards in the Bill continued to apply to CDR data that relates to a consumer, even if it had been subsequently transformed in the hands of an accredited data recipient.<sup>xvi</sup>

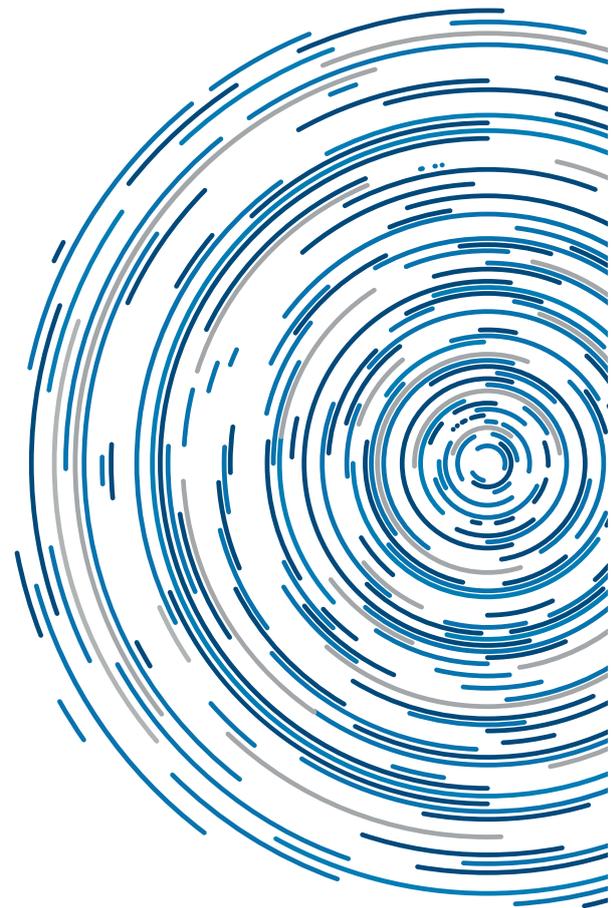
A number of the submissions, including submissions from outside the banking sector, expressed concern that the definition of "directly or indirectly derived" would capture commercially valuable 'value-added' data, such as tailored pricing and personal financial management insights. Some submissions expressed concerns that including "directly or indirectly derived" data in the definition of the CDR data shared with a consumer could amount to a breach of intellectual property rights. Others, including some fintechs, noted that the provision of "directly or indirectly derived" data to consumers was their core business, and that including it in the definition of CDR data would reduce, rather than increase, competition.

Given the number of submissions on this topic, it is not surprising that it was one of the issues which had been flagged by Labor, and which is likely to receive additional review when the CDR bill is reintroduced into Parliament.

## Last word

Open Banking continues to be one of the biggest changes in financial services in a generation, impacting strategy, customers, pricing, Application Programming Interfaces (APIs), data analytics, data architecture, privacy, conduct, cyber security and ecosystems.<sup>xvii</sup>

The re-election of a Coalition government is likely to result in the re-introduction of the Consumer Data Right Bill into the new Parliament. Although the Bill may be modified in the Senate, organisations should remain focussed on their Open Banking change program – both on the compliance requirements, and on the strategic opportunities it presents.



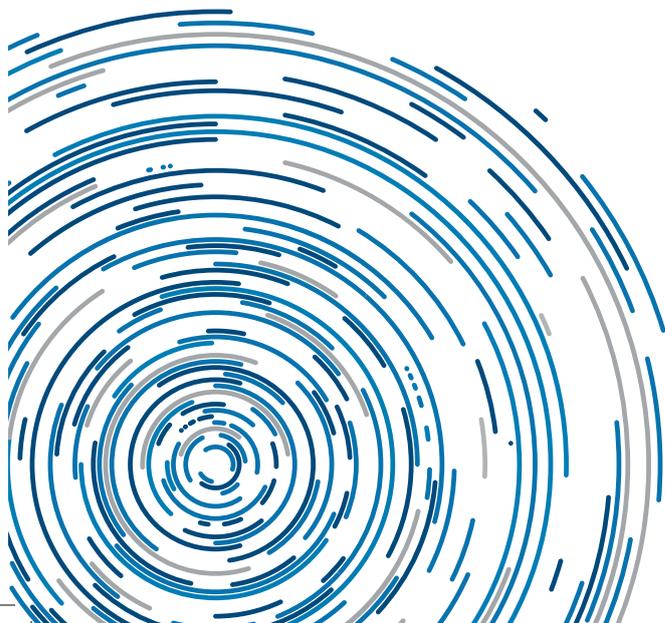
**Figure 2:** Revised timeline for Open Banking announced 21 December 2018

If the CDR Bill is not passed by Parliament before 1 July 2019 the start date, and possibly the implementation timeline, would need to be extended.

	Original Implementation Timeline	Revised Implementation Timeline	Change
1 July 2019	<p><b>Big Four Banks:</b></p> <ul style="list-style-type: none"> <li>• Access to <b>consumer, account and transaction data</b> for credit and debit cards, deposit accounts, and transaction accounts.</li> <li>• Access to <b>product data</b> for credit and debit cards, deposit accounts and transaction accounts.</li> </ul>	<p><b>Big Four Banks:</b></p> <p>Access to <b>product data</b> for credit and debit cards, deposit accounts and transaction accounts.</p> <p><i>This date may be extended if the CDR Bill is not passed before 1 July 2019.</i></p>	Limited to disclosure of product information
	<p><b>Other banks and ADRs:</b></p> <ul style="list-style-type: none"> <li>• Able to provide access to <b>consumer, account and transaction data</b> for credit and debit cards, deposit accounts and transaction accounts if they wish.</li> <li>• Able to provide access to <b>product data</b> for credit and debit cards, deposit accounts and transaction accounts if they wish.</li> </ul>	<p><b>Other banks and ADRs:</b></p> <p>Able to provide access to <b>product data</b> for credit and debit cards, deposit accounts and transaction accounts if they wish.</p> <p><i>This date may be extended if the CDR Bill is not passed before 1 July 2019.</i></p>	Limited to disclosure of product information
No later than 1 February 2020		<p><b>Big Four Banks:</b></p> <p>Access to <b>consumer, account and transaction data</b> for credit and debit cards, deposit accounts, and transaction accounts.</p>	Delayed by up to 7 months
		<p><b>Other banks and ADRs:</b></p> <p>Able to provide access to <b>consumer, account and transaction data</b> for credit and debit cards, deposit accounts, and transaction accounts if they wish.</p>	Delayed by up to 7 months
1 February 2020	<p><b>Big Four Banks:</b></p> <ul style="list-style-type: none"> <li>• Access to <b>consumer, account and transaction data</b> for mortgage accounts.</li> <li>• Access to <b>product data</b> for mortgages.</li> </ul>	<p><b>Big Four Banks:</b></p> <ul style="list-style-type: none"> <li>• Access to <b>consumer, account and transaction data</b> for mortgage accounts.</li> <li>• Access to <b>product data</b> for mortgages.</li> </ul>	No change
	<p><b>Other banks and ADRs:</b></p> <ul style="list-style-type: none"> <li>• Able to provide access to <b>consumer, account and transaction data</b> for mortgage accounts if they wish.</li> <li>• Able to provide access to <b>product data</b> for mortgage accounts if they wish.</li> </ul>	<p><b>Other banks and ADRs:</b></p> <ul style="list-style-type: none"> <li>• Able to provide access to <b>consumer, account and transaction data</b> for mortgage accounts if they wish.</li> <li>• Able to provide access to <b>product data</b> for mortgage accounts if they wish.</li> </ul>	No change

	Original Implementation Timeline	Revised Implementation Timeline	Change
1 July 2020	<p><b>Big Four Banks:</b></p> <ul style="list-style-type: none"> <li>• Access to <b>consumer, account and transaction data</b> for personal loan and other accounts.</li> <li>• Access to <b>product data</b> for personal loan and other accounts.</li> </ul>	<p><b>Big Four Banks:</b></p> <ul style="list-style-type: none"> <li>• Access to <b>consumer, account and transaction data</b> for personal loan and other accounts.</li> <li>• Access to <b>product data</b> for personal loan and other accounts.</li> </ul>	No change
	<p><b>Other Banks and ADRs:</b></p> <ul style="list-style-type: none"> <li>• Access to <b>consumer, account and transaction data</b> for credit and debit cards, deposit accounts, and transaction accounts.</li> <li>• Access to <b>product data</b> for credit and debit cards, deposit accounts, and transaction accounts.</li> <li>• Able to provide access to <b>consumer, account and transaction data</b> for personal loan and other accounts if they wish.</li> <li>• Able to provide access to <b>product data</b> for personal loan and other accounts if they wish.</li> </ul>	<p><b>Other Banks and ADRs:</b></p> <ul style="list-style-type: none"> <li>• Access to <b>consumer, account and transaction data</b> for credit and debit cards, deposit accounts, and transaction accounts.</li> <li>• Access to <b>product data</b> for credit and debit cards, deposit accounts, and transaction accounts.</li> <li>• Able to provide access to <b>consumer, account and transaction data</b> for personal loan and other accounts if they wish.</li> <li>• Able to provide access to <b>product data</b> for personal loan and other accounts if they wish.</li> </ul>	No change
February 2021	<p><b>Other Banks and ADRs:</b></p> <ul style="list-style-type: none"> <li>• Access to <b>consumer, account and transaction data</b> for mortgage products.</li> <li>• Access to <b>product data</b> for mortgage products.</li> </ul>	<p><b>Other Banks and ADRs:</b></p> <ul style="list-style-type: none"> <li>• Access to <b>consumer, account and transaction data</b> for mortgage products.</li> <li>• Access to <b>product data</b> for mortgage products.</li> </ul>	No change
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Source: Adapted from Australian Government, The Treasury, Consumer Data Right, Timeline, extracted 15 May 2019. Refer also to <https://treasury.gov.au/consumer-data-right>



## Endnotes

<sup>i</sup>Eyers, James, "Labor warns consumer data right could become second 'My Health' debacle", *The Australian Financial Review*, 18 February 2019. Refer also to <https://www.afr.com/business/banking-and-finance/labor-warns-consumer-data-right-could-become-second-my-health-debacle-20190218-h1be3u>, accessed 2019

<sup>ii</sup>The Treasury, Media Release, Consumer Data Right Rules, Standards & Timeline, 21 December 2019. Refer also to <http://jaf.ministers.treasury.gov.au/media-release/077-2018/>

<sup>iii</sup>The Treasury Laws Amendment (Consumer Data Right) 2019 Bill

<sup>iv</sup>The Senate, Standing Committee for the Scrutiny of Bills, Scrutiny Digest 2 of 2019, 28 March 2019. Refer also to [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r6281](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6281)

<sup>v</sup>Bajkowski, Julia, "Labor get set to pause open banking", IT News, 16 May 2019, quoting Mr Husic, Labor's shadow Minister for the Digital Economy. Refer also to [https://www.itnews.com.au/news/labor-gets-set-to-pause-open-banking-525238?eid=1&edate=20190516&utm\\_source=20190516\\_AM&utm\\_medium=newsletter&utm\\_campaign=daily\\_newsletter](https://www.itnews.com.au/news/labor-gets-set-to-pause-open-banking-525238?eid=1&edate=20190516&utm_source=20190516_AM&utm_medium=newsletter&utm_campaign=daily_newsletter), accessed 2019

<sup>vi</sup>Deloitte, Open Banking: Privacy at the epicentre, June 2018. Refer also to <https://www2.deloitte.com/au/en/pages/financial-services/articles/open-banking.html>, accessed 2019

<sup>vii</sup>Deloitte, June 2018, op. cit.

<sup>viii</sup>Deloitte Trust Index 2019, quoting the Australian Community Attitude to Privacy Survey which found that in 2017 69% of Australians were more concerned about Privacy than they were in 2012. Refer also to <https://www2.deloitte.com/au/en/pages/risk/articles/deloitte-australian-privacy-index.html>, accessed 2019

<sup>ix</sup>Australian Government, The Treasury, Explanatory Memorandum for the Treasury Laws Amendment (Consumer Data Right) Bill 2019, paras 1.53-1.55, page 14

<sup>x</sup>Deloitte, Open Banking: Potential Pricing implications, March 2018

<sup>xi</sup>Deloitte, March 2018, op. cit.

<sup>xii</sup>Bajkowski, op. cit., quoting Mr Husic, Labor's shadow Minister for the Digital Economy

<sup>xiii</sup>Deloitte, Open Banking: Conduct, it's everyone's responsibility, March 2018

<sup>xiv</sup>Bajkowski, op. cit.

<sup>xv</sup>The Treasury Laws Amendment (Consumer Data Right) 2019 Bill, Subdivision C, Section 56A1, Meanings of CDR Data, directly or indirectly derived and CDR consumer, page 10

<sup>xvi</sup>Australian Government, The Treasury, Explanatory Memorandum for the Treasury Laws Amendment (Consumer Data Right) Bill 2019, paras 1.113-1.114, page 23

<sup>xvii</sup>Lemon, Stephen, "Will banks catch the open-banking wave, or be engulfed by it?", *American Banker*, 29 November 2017

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