



Australian Government
The Treasury

TSY/AU

Privacy Impact Assessment

Consumer Data Right

December 2018

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Manager
Media and Speeches Unit
The Treasury
Langton Crescent
Parkes ACT 2600
Email: medialiaison@treasury.gov.au

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Glossary

Abbreviation	Definition
ACCC	Australian Competition and Consumer Commission
AFCA	Australian Financial Complaints Authority
AIC Act	<i>Australian Information Commissioner Act 2010</i>
API	Application Programming Interface
APPs	Australian Privacy Principles
CALD	Culturally and linguistically diverse groups of people
CC Act	<i>Competition and Consumer Act 2010</i>
CDR	Consumer Data Right
CDR system	The regulatory system of legislation, rules and standards that creates and enlivens the rights of CDR consumers
Code	<i>Privacy (Australian Government Agencies – Governance) APP Code 2017</i>
DSB	Data Standards Body
EDR	External Dispute Resolution
GDPR	General Data Protection Regulation
OAIC	Office of the Australian Information Commissioner
OBRR	Open Banking Review
ICCPR	The International Covenant on Civil and Political Rights
NERs	National Energy Rules
NERRs	National Energy Retail Rules
PC	Productivity Commission
PC Report	The Productivity Commission's Data Availability and Use Inquiry Report
PIA	Privacy Impact Assessment
Privacy Act	<i>Privacy Act 1988 (Cth)</i>
Rules	Consumer Data Rules
Standards	Consumer Data Standards
Taskforce	Data Availability and Use Taskforce

Executive Summary

Consumer Data Right background

The Consumer Data Right (CDR) provides individuals and businesses with a right to access data relating to them held by businesses (for example, raw bank transaction data); or to authorise secure access to this data by accredited third parties. The right does not enable businesses that hold data to transfer or use data without the customer's consent.

The application of the CDR to the banking sector is referred to as Open Banking. It is intended that improved consumer driven access to data will support better price comparison services, taking into account Australians' actual circumstances, and promote more convenient switching between products and providers. Improved access to data will also enable the development of better and more convenient products and services, customised to individuals' needs. Improved competition and data-driven innovation will support economic growth and create new high value jobs in Australia. Better access to data will also support more efficient processes for businesses, with savings flowing through to Australian consumers.

However, the CDR is not merely an economic right. The CDR supports individuals' fundamental human right to privacy by enhancing their rights to access and obtain assistance in understanding the personal data held on them by businesses. The CDR also enhances the privacy protections for data subject to its data portability regime.

The CDR is scheduled to commence in the banking sector on 1 July 2019. Open Banking will be phased in, with all major banks initially making generic product data available on credit and debit card, deposit and transaction accounts; then mortgages; with data on all remaining products recommended by the Open Banking Review then being made available. Remaining banks will be given 12-month delays on timelines compared to the major banks.

CDR will then be implemented in the energy and then telecommunications sectors, with additional sectors to follow.

Faster, more efficient and more convenient data access, in particular by third parties, can introduce new privacy risks and exacerbate existing risks.

The CDR framework therefore places a key focus on protecting individuals against privacy and security risks to their data.

The CDR framework provides for a principal role for the Office of the Australian Information Commissioner (OAIC) in advising on and enforcing privacy protections, and introduces a range of avenues for individuals to seek meaningful remedies for breaches. Data that is transferred under the CDR will be subject to Privacy Safeguards, contained in the primary CDR legislation, which set minimum privacy protections. CDR data must also be provided in a manner which complies with consumer data rules (Rules) developed and enforced by the Australian Competition and Consumer Commission (ACCC) and mandated consumer data standards (Standards), which deal with matters such as information security.

PIA Methodology and Stakeholder Consultation

This Privacy Impact Assessment (PIA) for the CDR was prepared by the Treasury in accordance with the *Privacy (Australian Government Agencies – Governance) APP Code 2017* (Code).¹ The PIA includes a detailed analysis of the risks involved with the implementation of the CDR and mitigation strategies, to support better management of those risks.

The PIA reflects the privacy impact analysis conducted as part of the development of the CDR policy including the outcomes of stakeholder consultations on privacy and information security issues. Stakeholders were heavily engaged at each stage of the CDR development, including through consultations run by the Productivity Commission (PC), the Taskforce which developed the Government’s response to the PC’s 2017 *Data Availability and Use Inquiry Report* (PC Report), the Open Banking Review (OBR), the Government’s consultations on the report of the OBR and via the Government’s consultation processes on the legislation for the CDR. The design of the CDR is heavily influenced by a range of views from consumer and privacy groups on the design of the CDR.

Given the fundamental importance of the right to privacy and other human rights to the operation of society, extensive consideration has been undertaken of the effects of the CDR on an individual’s right to privacy during these phases of consultation.

¹ *Privacy (Australian Government Agencies – Governance) APP Code 2017* (Code), available at: <https://www.oaic.gov.au/privacy-law/privacy-registers/privacy-codes/privacy-australian-government-agencies-governance-app-code-2017>.

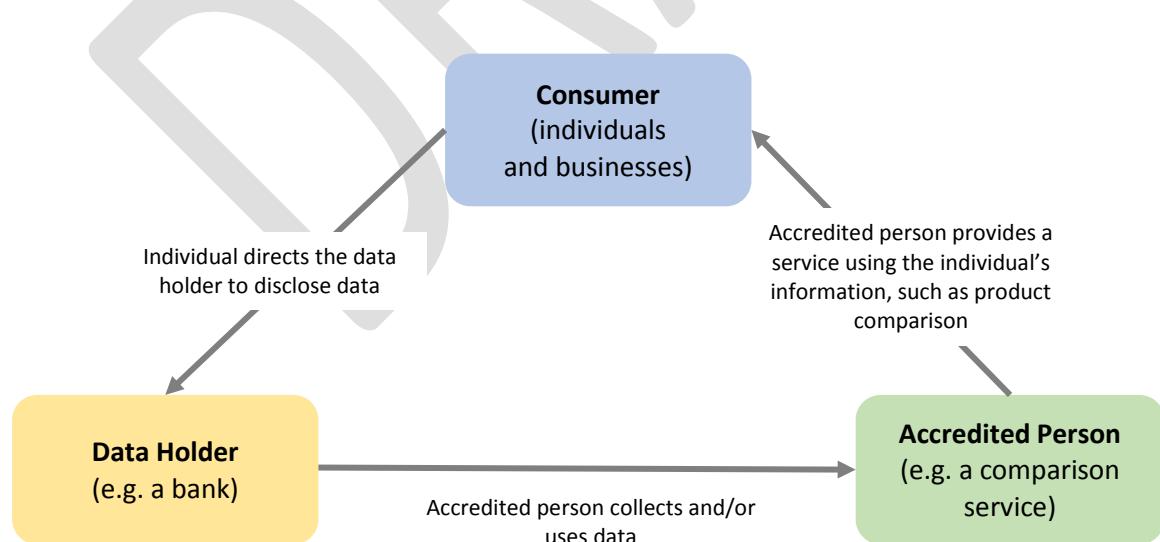
This PIA has been developed based on the proposed regulatory framework for the CDR, and will be updated prior to consideration by Parliament to incorporate key design decisions as part of rulemaking and standard setting processes, and any public feedback on this version of the PIA.

Further privacy assessments will be required as part of future sector designation and rulemaking processes.

Mapping Personal Information

The transfer of an individual's personal data in the CDR involves multiple stages. A way to conceptualise the CDR is a simple model with an individual, a data holder and a data recipient.

The CDR information flow begins with a consumer engaging with a service provider who is an accredited data recipient. The consumer authorises them to collect data from a data holder. The consumer then authorises their data holder to disclose the data to that data recipient. The data recipient can then access the data in accordance with the terms of the access consented to. The data recipient can only use, hold or disclose the data in accordance with any permissions given by the consumer. The data holder and recipient must comply with privacy and information security requirements set out by the CDR regime. When all use permissions are spent, the data must be destroyed or de-identified.



There may be many more participants involved in the CDR system who add further complexity to the simple model outlined above.² These include intermediaries such as financial advisors, API providers, cloud storage services, data processing or filtering services, designated gateways and other accredited or non-accredited parties who may be operating domestically or internationally.

Impacts on Privacy and Risk Mitigation Strategies

As there are multiple stages and players involved in the CDR system, there are a number of potential privacy risks associated with the system. These risks may have consequences for the rights and wellbeing of individuals and businesses. These risks are broadly categorised into identification risks; transfer risks; collection, use or disclosure authorisation (genuineness) risks; authorisation (compliance) risks; holding risks; and data quality risks.

Within these categories, key privacy issues include: the risk of accredited entities not obtaining genuine consent; the risk of hacking activities or other cybercrimes; and the risk that entities will intentionally or unintentionally misuse the individual's personal data. Each of these critical risks may have consequences such as psychological and other physical harm, emotional distress, and financial or reputational loss. The likelihood and severity of these costs, however, will vary from case to case.

The CDR framework introduces a number of risk mitigation mechanisms to manage the potential risks. The CDR legislation, the Treasury Laws Amendment (Consumer Data Right) Bill 2018 (the Bill), expands on current privacy and security protections available under the *Privacy Act 1988* (Cth) (Privacy Act). These protections include: new Privacy Safeguards; applying the obligation to provide protections to a broader number of persons and datasets; powers for the OAIC and ACCC to ensure they can advocate for privacy and consumers, technical Standards, Rules providing for genuine consent and use restrictions, an accreditation register, external dispute resolution and direct rights of action. Protections in the CDR are intended to provide a higher level of privacy protection than those existing under the Australian Privacy Principles (APPs) and the Privacy Act.

² In this document, references to a CDR participant mean anyone taking part in the CDR – it is not limited to the technical definition of CDR participant which is included in the Treasury Laws Amendment (Consumer Data Right) Bill 2018.

Recommendations & Conclusion

This PIA highlights a range of privacy risks. Some of these risks could lead to substantial financial, personal and emotional loss. However, the Government has developed privacy protections to mitigate these privacy risks. The CDR simultaneously offers individuals corresponding benefits to privacy, competition, convenience and choice.

The PIA makes a number of recommendations in respect of the implementation of the proposed mitigants, to ensure key elements of the CDR system that protect individuals' privacy and security meet its objectives. The recommendations are summarised in the table below.

Table 1: Privacy Impact Assessment Recommendations

Recommendation	Description
Recommendation 1	<p>The ACCC, the OAIC and the Data Standards Body should continue to incorporate behavioural research in the design of the CDR system to ensure that the system works effectively and takes into account <i>actual</i> consumer preferences and behaviours regarding the exercise of their privacy rights.</p> <p>Proposed consumer testing by the Data Standards Body should have particular regard to vulnerable consumer groups. Test groups should be of sufficient size and diversity to provide justified confidence in the safety of consent processes.</p>
Recommendation 2	<p>The ACCC, the OAIC and the Data Standards Body should ensure that their annual reporting includes reporting on the operation of the CDR, particularly relating to privacy, to provide assurance that rules and practices continue to appropriately handle privacy risks.</p> <p>To facilitate this, the ACCC may consider compiling a consolidated annual CDR report, based on the reporting of relevant agencies' CDR functions.</p>

Recommendation 3	The ACCC should continue to work with the OAIC to ensure that the Rules create a consent framework that ensures consent is genuine, and protects vulnerable individuals.
Recommendation 4	<p>When designing and implementing the Rules and data security and transfer Standards, the ACCC and the Data Standards Body should seek to avoid placing undue weight on the benefits of competition and innovation at the expense of protecting privacy.</p> <p>It is noted that there is not always a trade-off between these objectives. Strong privacy protections will drive confidence in the system – which is a necessary prerequisite for realising all other objectives.</p>
Recommendation 5	The ACCC and the Data Standards Body should continue to work with the OAIC to ensure that the privacy related Rules and Standards remain largely consistent across designated sectors, with tailoring to particular privacy risks where necessary.
Recommendation 6	The Treasury, the ACCC, the OAIC and the Data Standards Body should continue to coordinate their activities, and put in place information sharing arrangements and memoranda of understanding as appropriate.
Recommendation 7	The CDR education program should include a focus on raising CDR participant awareness of privacy risks and rights.
Recommendation 8	<p>The post-implementation assessment of Open Banking, and the CDR for future designated sectors, should report specifically on privacy relevant metrics such as privacy related complaints and data breaches.</p> <p>Arrangements should be put in place at commencement so that the post-implementation assessment can be conducted with the</p>

benefit of a robust evidence base.

Recommendation 9 All significant changes to the CDR legislation or Rules should be accompanied by further PIAs, conducted in accordance with the OAIC *Guide to undertaking privacy impact assessments* and following engagement with privacy and consumer representatives.

The Consumer Data Right

The CDR seeks to give individuals and businesses the right to safely access data about them held by businesses. Through the CDR, individuals and businesses will also be able to direct that a data holder release their data to an accredited data recipient. The scope of the CDR will therefore encompass data relating to an individual who is identifiable or reasonably identifiable, as well as data that does not relate to an identifiable or reasonably identifiable CDR consumer, for example product data.

While provision of access to data and data sharing is already occurring in various sectors, the objective of the CDR is to provide a framework that makes data sharing easier and safer in designated sectors. Work is already underway to implement the CDR in the banking sector following the OBR, and the Government has announced that energy and telecommunications will be the next sectors to have the CDR applied. Over time, the CDR will be applied to further sectors on a sector-by-sector basis.

Background and Rationale for Consumer Data Right

Data access and use rights have been explored in Australia through multiple reviews and inquiries. The 2014 *Financial System Inquiry*,³ the 2015 *Competition Policy Review*,⁴ the 2016 House of Representatives Standing Committee on Economics' *Review of the Four Major Banks: First Report* (Review of the Four Major Banks),⁵ and the 2017 *Independent Review*

³ David Murray, Kevin Davis et al, 'Financial System Inquiry' (2014) available at: <http://fsi.gov.au/>.

⁴ Ian Harper, Peter Anderson et al, 'Competition Policy Review' (2015) available at: <http://competitionpolicyreview.gov.au/>.

⁵ House of Representatives Standing Committee on Economics, 'Review of the Four Major Banks: First Report' (2016) available at:

https://www.aph.gov.au/Parliamentary_Business/Committees/House/Economics/Four_Major_Banks_Review/Report.

into the Future Security of the National Electricity Market: Blueprint for the Future (Finkel Review)⁶ all recommended that Australia examine or develop improved arrangements for individuals to access and transfer their information in a useable format.

Table 2: Background to the Consumer Data Right

Inquiry	Recommendation
Financial System Inquiry	Recommendation 19: Data access and use <ul style="list-style-type: none"> Review the costs and benefits of increasing access to and improving the use of data, taking into account community concerns about appropriate privacy protections.
Competition Policy Review	Recommendation 21: Informed choice <ul style="list-style-type: none"> Governments should work with industry, consumer groups and privacy experts to allow consumers access to information in an efficient format.
Review of the Four Major Banks	Recommendation 4 <ul style="list-style-type: none"> The committee recommends that Deposit Product Providers be forced to provide open access to customer and small business data by July 2018. ASIC should be required to develop a binding framework to facilitate this sharing of data, making use of Application Programming Interfaces (APIs) and ensuring that appropriate privacy safe guards are in place. Entities should also be required to publish the terms and conditions for each of their products in a standardised machine-readable format. The Government should also amend the <i>Corporations Act 2001</i> to introduce penalties for non-compliance.

⁶ Dr Alan Finkel, Karen Moses et al, 'Independent Review into the Future Security of the National Electricity Market: Blueprint for the Future' (2017) available at: <https://www.energy.gov.au/government-priorities/energy-markets/independent-review-future-security-national-electricity-market>.

Finkel Review**Recommendation 6.3**

- By mid-2020, the COAG Energy Council should facilitate measures to remove complexities and improve consumers' access to, and rights to share, their energy data.

Productivity Commission Inquiry into Data Availability and Use

The Productivity Commission provided its final report to the Government on 31 March 2017 and it was tabled in Parliament on 8 May 2017.

The PC recommended the creation of an economy-wide Comprehensive Data Right (Recommendation 5.1). The PC considered that consumer data must be provided on request to consumers or directly to a designated third party in order to exercise a number of rights. This was summarised as the 'Comprehensive Right to access and use digital data' (Comprehensive Right), which would enable consumers to:

- share in perpetuity joint access to and use of their consumer data with the data holder;
- receive a copy of their consumer data;
- request edits or corrections to it for reasons of accuracy;
- be informed of the trade or other disclosure of consumer data to third parties; and
- direct data holders to transfer data in machine-readable form, either to the individual or to a nominated third party.

The PC recommended that where a transfer is requested outside of an industry (such as from a medical service provider to an insurance provider) and the agreed scope of consumer data is different in the source industry and the destination industry, the scope that applies would be that of the data sender.

The Comprehensive Right was directed at improving consumer outcomes by enabling individuals to better assess the value of prospective and existing services and encourage switching.

On 26 November 2017, in response to the PC's recommendation, the Government announced that the CDR would be implemented as a measure for individuals to harness their digital data, initially in the banking, energy and telecommunications sectors, with its design to be informed by the OBR.

On 1 May 2018, in its full response to the PC's report, the Government reiterated its commitment to the creation of the CDR.

Review into Open Banking in Australia

In the 2017-18 Budget the Government announced that it would introduce an open banking regime in Australia. On 20 July 2017, the Treasurer commissioned an independent review, headed by Mr Scott Farrell, to recommend the best approach to implement such a regime.

This review made 50 recommendations in relation to the legal and regulatory arrangements for the economy-wide CDR, and more specifically, how it should be applied to banking data.

On 9 May 2018, the Government announced its plan for Open Banking and the CDR, accepting the OBR's recommendations regarding the design of the CDR, with implementation to be phased in from July 2019.

Current practices

Community attitudes to privacy

A summary of key findings of the OAIC 2017 Australian Community Attitudes to Privacy Survey (ACAPS) and the Consumer Policy Research Centre's Report 'Consumer data & the digital economy' (CPRC data report) is provided below.⁷ Both reports were influential in the CDR policy design process. At a high level, these reports suggest Australians are concerned about their privacy, and the way their personal information is being used, but many have an incomplete understanding of Australian privacy law and frameworks, and few consistently read the privacy policies of the organisations with which they engage.

⁷ Jayne Van Souwe, Patrick Gates, et al , 'Australian Community Attitudes to Privacy Survey 2017' (2017), Office of the Australian Information Commissioner, available at: <https://www.oaic.gov.au/engage-with-us/community-attitudes/australian-community-attitudes-to-privacy-survey-2017>; Phuong Nguyen and Lauren Solomon, 'Consumer data and the digital economy: Emerging issues in data collection, use and sharing' (2018), Consumer Policy Research Centre, page 4, available at: <http://cprc.org.au/2018/07/15/report-consumer-data-digital-economy/>.

2017 ACAPS

The OAIC conducts the ACAPS approximately every 5 years. The 2017 survey allowed respondents to select different types of personal information they would be reluctant to provide. This resulted in the survey finding that 42 per cent of respondents were reluctant to provide their financial status information to organisations, and 34 per cent of respondents were reluctant to provide their contact information. Both of these are data sets that are expected to be included in the CDR.

Of the respondents who indicated they were reluctant to provide personal information, 17 per cent were mainly reluctant due to the fear that doing so would lead to financial loss or allow people to access their bank account, 16 per cent for privacy preservation reasons, 15 per cent due to the fear that the information would be misused or passed on without their knowledge, and 13 per cent due to security concerns.

Only 11 per cent of respondents were comfortable with businesses sharing their information, though young respondents were more comfortable than older respondents. Perceived misuses of information included: organisations that respondents hadn't dealt with directly getting hold of their personal information (87 per cent); an organisation revealing one customer's information to other customers (87 per cent); information being used by an organisation for purposes that are different to what the information was given to the organisation for (85 per cent); organisations monitoring respondents' activities online (84 per cent); organisations seeking information that is not relevant to the purpose of the transaction (81 per cent); and sending data overseas (74 per cent).

It is clear that Australians' trust in organisations which hold their data differs based on the organisation. 83 per cent of respondents think there are greater privacy risks dealing with organisations online. 59 per cent of respondents in 2017 considered financial institutions to be trustworthy with regard to how they protect or use personal information, 34 per cent considered organisations providing technology products to be trustworthy, and 12 per cent considered the social media industry to be trustworthy.

Though Australians are concerned about their privacy, only 37 per cent of respondents were aware they could access their personal information from government and businesses, only 18 per cent responded that they always read privacy policies, and only 13 per cent refuse to deal with an organisation because of privacy concerns.

In respect of incidents of identity theft, 11 per cent of respondents reported that they had been a victim of identity fraud or theft in their lifetime.

It is worth noting that for many of the above results, education levels were influential in the likelihood that a respondent would either be aware of their privacy rights, or would take steps to protect their own privacy.

CPRC data report

The CPRC was established by the Victorian Government in 2016 as an independent research organisation, to undertake research to inform policy reform and business practice changes to improve outcomes for consumers. The CPRC data report analyses a range of data practices in Australia today. As part of this report, the CPRC commissioned Roy Morgan to survey a nationally representative sample of 1004 Australians understanding of consent to data collection, use and sharing when accessing products and services. Consumers were asked questions relating to their online behaviour, knowledge and attitudes regarding data collection practices, and their expectations around consumer protection and data control.⁸

Key findings of this research include that 91 per cent of respondents are aware that companies have the ability to follow their activities across websites, 88 per cent are aware that companies exchange information about their customers with third parties for purposes other than delivering the product or service. Six per cent of respondents reported that they read the Privacy Policies or Terms & Conditions for all the products and services they signed up to in the past 12 months, and 33 per cent reported that they never read these documents in the past 12 months.

Of the 67 per cent of respondents who reported having read a Privacy Policy or Terms and Conditions in the past 12 months, 67 per cent indicated that they signed up to receive the product or service even though they did not feel comfortable with the policies.

⁸ Phuong Nguyen and Lauren Solomon, 'Consumer data and the digital economy: Emerging issues in data collection, use and sharing' (2018), Consumer Policy Research Centre, page 4, available at: <http://cprc.org.au/2018/07/15/report-consumer-data-digital-economy/>.

Reasons given included that it was the only way to access the product or service (73 per cent), that they trusted the company would not misuse their data (23 per cent), that they believed Australian law would prevent the misuse of their data (20 per cent), and that nothing bad has happened to them in the past (18 per cent).

Similarly to the 2017 ACAPS, this research indicates that trust may vary depending on the company, with participants in focus groups suggesting they are less likely to read these documents when dealing with larger and more reputable companies.

Similarly to the 2017 ACAPS, the CPRC report found that at least 61 per cent of respondents were uncomfortable with most types of information being shared with third parties for secondary purposes. 61 per cent were uncomfortable with their name being shared, 69 per cent were uncomfortable with their purchase history being shared, and 86 per cent and 87 per cent respectively were uncomfortable with their messages and phone contacts being shared.

The CPRC report asked respondents a range of questions about data use and expectations of companies that were not asked in the 2017 ACAPS.

While all findings were influential, key findings include that 95 per cent of respondents agreed that companies should give options to opt out of certain types of information they collect, how it can be used, and/or what can be shared, 92 per cent agreed companies should be open about how they use data to assess eligibility for products or services, 91 per cent agreed that companies should only collect information currently needed for providing their product or service, and 77 per cent disagreed with the statement ‘If I trust a company, I don’t mind if it buys information about me from database companies without asking me’.

Impact on policy design

The above results led to the following key high-level assumptions, which influenced design decisions throughout the CDR policy design process:

- a sizeable proportion of Australians are concerned about the privacy of their personal information, and are particularly concerned where that information is financial information;

- privacy for the sake of privacy is of value to an equal proportion of Australians as privacy for the sake of prevention of financial loss;
- in allowing information to be shared through the CDR, it is possible that information will be disclosed from a data holder who is considered trustworthy by the majority of Australians, to a data recipient who is not considered trustworthy;
- very few Australians consistently read privacy policies or have a great deal of awareness of their Privacy rights;
- many Australians do not fully understand what types of information are currently being collected and shared about them, but they want to be enabled to understand and have a voice in the decision making process; and
- persons with lower levels of education, persons who are members of culturally and linguistically diverse (CALD) groups, or persons who experience intellectual disabilities are less likely to be aware of their privacy rights and to take actions to protect their privacy.

More detailed findings of these reports were also highly influential in relevant sections.

It should be noted that a healthy cynicism by consumers regarding the potential uses and safety is itself a significant privacy risk mitigant, provided that the proposed data portability gives them genuine informed control over their data.

Data sharing

Data sharing is not a new practice in Australia – in particular in the banking and energy sectors.

For example:

- Credit providers provide information to credit reporting agencies under the regime contained in Part IIIA of the Privacy Act;
- Banks enter into bilateral agreements with select data driven service providers (such as accounting software providers) to share data;
- Third party service providers, with the consent of consumers, access data through screen-scraping technologies; and

- There are existing consumer data rights under the National Electricity Rules and National Electricity Retail Rules.

Bilateral agreements between banks and partner companies are negotiated individually between the parties. This approach can be inefficient, time-consuming and expensive for data seekers to engage in. The terms of these agreements may also lack transparency and control for the consumer.

There have also been some recent initiatives to increase data sharing between banks and FinTech companies of non-customer specific data sets, such as data on branch and ATM locations and on foreign exchange rates.

Australia's energy regulatory framework includes a rule which empower customers and authorised third parties to obtain a consumer's electricity consumption data from distribution network service providers and retailers and establishes minimum requirements related to the format, timeframes and reasonable charges for providing the data. Individuals were granted this right on 6 November 2014. This original consumer energy data right was amended in 2015 as part of changes to Chapter 7 of the National Energy Rules (NERs), to facilitate competition in metering. The energy electricity data right is set out in the NERs and the National Energy Retail Rules (NERRs), and gives individuals the right to access their metering data and a right to authorise third-party representatives to access the data on their behalf.

There are also a number of currently unregulated approaches to data sharing, of which screen-scraping is one example. Screen-scraping involves the customer providing their login credentials to a third party who uses them to access the data holder's customer-facing website. Data is then collected from the website. Concerns have been raised about heightened fraud and privacy risks associated with such unregulated methods, including during consultations conducted by the OBR.

Most of the risks identified in this PIA exist in relation to these and other existing data sharing channels. These channels will continue to exist in parallel to the CDR. The CDR is not therefore a replacement 'pipe' but is instead intended to be a safer pipe.

Data collection

Individuals' data is also already being collected in a number of ways, including via: cookies; web beacons and pixel tags; device information and tracking; 'fingerprinting' (using a combination of specific data from devices or browsers as 'fingerprints' to recognise users); and payment cards and loyalty cards.⁹ In addition, data brokers collect and aggregate information from commercial, government and other publicly available sources, from which they can derive inferred data about individuals.

Objectives of the Consumer Data Right

Benefits to privacy

Data access and portability rights have a dual nature, having both fundamental human rights and economic rights aspects.

As discussed above, access to data about oneself has been recognised internationally as a key component of an individual's human rights.

In Australia, the CDR acts as an expansion of APP 12 in respect of its provision of rights for individuals and provides a framework to make it easier for individuals to access their data in an environment with built-in privacy and security protections.

The direct right of access it affords corresponds directly with those granted under APP 12. APP 12 provides a right of access, requiring an APP entity to give an individual access to the personal information about them on the request of the individual within a reasonable period, in the manner requested by the individual if it is reasonable or practicable to do so. However, there are a number of exceptions to this right. The CDR grants additional access rights to those contained in APP 12, in relation to designated data sets. It seeks to provide greater functionality and more security than existing privacy rights. It may also apply to different kinds of data than do those rights.

⁹ Phuong Nguyen and Lauren Solomon, 'Consumer data and the digital economy: Emerging issues in data collection, use and sharing' (2018), Consumer Policy Research Centre, pages 11-15, available at: <http://cprc.org.au/2018/07/15/report-consumer-data-digital-economy/>.

However, with increasing complexity and volumes of data held on individuals, a right to directly access data may not be a *meaningful* privacy right due to limits on the ability of individuals to understand the data (or become aware of the implications for their rights of it being held).

The CDR grants additional access rights in relation to designated data sets and a broader application of existing privacy rights by enabling individuals to give direct access to their data to third parties. It is partially intended to enable the development of third party services that may enhance privacy rights, by helping individuals to understand what data is held by businesses and understand and manage collection, use and disclosure permissions.

For example, it is expected to facilitate the development of ‘data wallets’, and the UK is already investigating new consent management services under its Open Banking regime.

Consumer confidence is a prerequisite for success for data service providers in a system which depends on obtaining consumer consents to collect, use and disclose data. Data safety is a key selling point for their services. Commercial incentives may therefore strongly align with improved data safety and privacy protections.

The expansion of access rights in this way (domestically and internationally, such as in Article 20 of the European General Data Protection Regulation (GDPR)) can be seen as part of the natural evolution of privacy rights in response to the changing nature of data holding in a digital society.

The CDR will introduce strict rules about the provision of informed, unbundled and explicit consent which may be expected to increase the level of public awareness and expectations regarding privacy consents generally.

The CDR is also intended to provide an alternative to existing data sharing methods with their associated privacy risks (for example, identity theft and fraud). It can be viewed as a safer ‘pipe’ for data portability.

In relation to this third party data access, the reforms impose an enhanced privacy framework beyond that which would ordinarily apply, directed at preventing inappropriate collection, disclosure, holding and use of data. Further details on the features of the CDR that seek to protect privacy and mitigate privacy risks are provided in the Risk Mitigation section below.

Finally, the CDR expands the application of the Privacy Act to entities who are accredited under the CDR. This narrows the current exemption in the Privacy Act for small to medium enterprises and expands the scope of participants accountable for data protection.

Benefits to information security

The CDR is intended to achieve stronger privacy protections by improving information security in data sharing practices. The CDR regulatory framework involves the development of technical Standards that will require the use of API technology, digital identification of data recipients and encryption for data transfer. It will also impose privacy and information security obligations on data recipients for data received.

The CDR will therefore encourage the development of new data technologies and systems that are likely to increase the safety of data flows and holdings.

As outlined above, data is already being shared via unregulated methods, such as screen-scraping. The use of API technology implies fewer security risks than many of these existing methods.

Economic benefits

In addition to the increases in privacy and security protections outlined above, the CDR is expected to generate economic benefits via increased competition, convenience and individual choice.

The economic character of data rights arises in part because availability of information about oneself aids informed economic decisions.

By improving access to data, the CDR is aimed at simplifying product comparisons and increasing an individual's ability to either negotiate better offers with their current providers or switch products. Such practices encourage efficient switching behaviour and deliver economic benefits in the form of increased competition, and potentially lower prices, in designated sectors.

Over the longer term, improving customer control, choice and convenience is intended to promote a customer-centric data sector that will support the development of products and services that are tailored to individuals' needs. The development of this new sector could

help drive innovation, economic growth and employment, and improve the suite of services available to individuals and businesses.

Improvements in existing products and services will help to inform individuals about the best offers available to them, make everyday transactions more convenient, and contribute to consumer literacy. Some examples of expected improvements include:

- comparison tools for credit cards and mortgages, with product recommendations tailored to individuals' actual spending and repayment patterns;
- budgeting tools that show individuals all their financial products on one screen and help them better manage their finances by providing insights into current spending habits;
- analysis tools that use the level and timing of a household's energy usage to help them to determine the net benefits of investing in solar power and the size and type of system that would best suit them; and
- comparison tools that help individuals locate the best mobile phone and internet service provider deal for them, based on their actual mobile phone and internet data usage.

The CDR is also intended to reduce regulatory and security costs for individuals and businesses.

It is also intended to support improved compliance with regulations, including those directed at protecting individuals. For example, in the banking sector, it may assist credit licensees to comply with responsible lending obligations. These obligations provide that credit licensees must not enter into a credit contract with an individual, suggest a credit contract to them, or assist them to apply for a credit contract, unless the credit contract is suitable for the individual. In order to assess whether a credit contract is suitable for an individual, credit licensees must make reasonable inquiries about the individual's financial situation. By facilitating individual-driven sharing of data, the CDR may improve credit licensees' ability to verify the individual's financial situation.

The CDR's impact on economic rights may indirectly affect, and possibly promote, other human rights – such as rights to sustenance, housing and security.

Regulatory framework governing the Consumer Data Right

The CDR creates a new framework to enable individuals to more effectively use data relating to them for their own purposes.

The right can be extended to additional sectors of the economy over time, following sectoral assessments by the ACCC in conjunction with the OAIC.

The framework will enable individuals to direct the data holder to provide their data, in a CDR compliant format, to accredited entities. It will also allow individuals to access their data directly.

The CDR will provide the ACCC with the power to make Rules, in consultation with the OAIC, to determine how the CDR will function within each sector.

Entities must be accredited before they are able to receive CDR data relating to individuals and businesses. This will ensure that the accredited entities have satisfactory privacy and security safeguards before receiving data.

Under the CDR, data must be provided in a format and in a manner which complies with the Standards. While the Standards may apply differently across sectors, it is important that the manner and form of the data coming into the CDR system be consistent within and between designated sectors, as far as is practicable. This will promote interoperability, reduce costs of accessing data and lower barriers to entry by data driven service providers – promoting competition and innovation.

Privacy Safeguards

Data that relates to an individual will be subject to new Privacy Safeguards once an individual requests its transfer to an accredited recipient. The Privacy Safeguards are contained in the primary CDR legislation, setting the minimum privacy protections under the CDR.

The Privacy Safeguards are as follows:

Privacy safeguard 1—open and transparent management of CDR data

This safeguard ensures that individuals understand how their data is being handled by a data holder or accredited entity. The safeguard requires the CDR entity to make transparent policy and procedure documents about management of the CDR data

available and also provides individuals with the ability to raise any issues with the CDR participant.

CDR Privacy Safeguard 2 – Anonymity and pseudonymity

This safeguard will allow an individual the option to use a pseudonym or remain anonymous when transferring information if it is appropriate to do so in the designated sector. As is the case with the similar APP 2, an individual may choose to use a pseudonym or remain anonymous using this Privacy Safeguard and still be reasonably identifiable and subject to protections within that situation.

CDR Privacy Safeguard 3 – Collecting solicited CDR data

This safeguard protects individuals from the unsolicited collection of CDR data. The individual must give a valid request for the accredited person to collect their data.

CDR Privacy Safeguard 4 – Dealing with unsolicited CDR data

This safeguard requires that an accredited person that finds itself in possession of CDR data without having requested that data must destroy that data unless an Australian law requires it to retain the data.

CDR Privacy Safeguard 5 – Notifying the collection of CDR data

This safeguard ensures that an accredited person must notify an individual about the collection of their data under the CDR.

CDR Privacy Safeguard 6 – Use or disclosure of CDR data

This safeguard requires that an accredited data recipient or designated gateway must obtain consent from the relevant individual in accordance with the Rules before using or disclosing the CDR data.

CDR Privacy Safeguard 7 – Use or disclosure of CDR data for direct marketing by accredited data recipients

This safeguard ensures that individuals are not subject to unwanted direct marketing as a result of their engagement with the CDR system unless the use of the data for direct marketing purposes is allowed by the Rules or allowed under other Australia law or by a court/tribunal order.

CDR Privacy Safeguard 8 – Cross-border disclosure of CDR data by accredited data recipients

This safeguard protects individuals by providing that CDR data may only be disclosed by an accredited data recipient to a recipient who is located outside Australia and is not a CDR consumer for that CDR data where:

- : the new recipient is an accredited data recipient; or
- : if the CDR data is personal information about an individual – the accredited data recipient takes reasonable steps to ensure the new recipient does not breach the APPs (other than APP 1) in relation to the CDR data; or
- : the accredited data recipient reasonably believes: that the new recipient is subject to a law, or binding scheme, that provides at least as much protection for the CDR data as the Australian Privacy Principles provide for personal information; and that a CDR consumer for the CDR data will be able to enforce those protections provided by that law or binding scheme.

CDR Privacy Safeguard 9 – Adoption or disclosure of government related identifiers

This safeguard provides that an accredited data recipient may not use or disclose government related identifiers, such as a tax file number, to identify an individual, except where the use is allowed under other Australian law or by a court/tribunal order.

CDR Privacy Safeguard 10 – Notifying of the disclosure of CDR data

This safeguard requires a data holder or an accredited data recipient to notify the individual that they have responded to a valid request to disclose the individual's CDR data.

CDR Privacy Safeguard 11 – Quality of CDR data

This safeguard requires CDR participants to take reasonable steps to ensure that the CDR data disclosed is accurate, up to date and complete for the purpose for which it is held. This safeguard applies to both data holders and accredited data recipients and requires that the individual is notified of any incorrect disclosures of data. It

gives individuals the ability to require the CDR participant to disclose corrected CDR data.

CDR Privacy Safeguard 12 – Security of CDR data

This safeguard requires that an accredited data recipient or designated gateway protects CDR data from misuse, interference and loss as well as from unauthorised access, modification or disclosure. It also requires that any data that is no longer needed by an accredited data recipient or designated gateway for permitted purposes is either destroyed or de-identified in line with the Rules.

CDR Privacy Safeguard 13 – Correction of CDR data

This safeguard provides an individual with the ability to request that the data holder correct data following a valid request to disclose the data, and to request that an accredited recipient of the data correct the data.

The Safeguards provide consistent protections for consumer data of both individuals and small business consumers and place requirements on CDR participants that are more restrictive than the requirements of the Privacy Act (outlined below).

The Privacy Act distinguishes between personal information and sensitive information, with sensitive information accorded a greater level of protection. The CDR does not make this distinction, and treats all information at least at the level of sensitive information.

In addition to the Privacy Safeguards, the framework provides flexibility to respond to emerging privacy risks, through the rulemaking and standard setting processes.

The ACCC may make additional Rules regarding the transfer, holding and use of data within the system, to build upon the Privacy Safeguards.

The Chair of the Data Standards Body, with assistance from that Body, may make technical standards, for example, information security standards, to support the operation of the Privacy Safeguards and any further privacy protections in the Rules. The Rules will mandate compliance with the standards. The standards apply as a contract between each data holder to which a binding standard applies, and each accredited person.

The CDR will give the OAIC the power to enforce the Privacy Safeguards and provide individual remedies to individuals, while the ACCC will have the function of enforcing the Rules and offence provisions, and for taking strategic enforcement actions.

All individual and small business customers in a designated sector are to have access to CDR-compliant dispute resolution processes, as required under the Rules, to resolve disagreements with participants in the system. It is envisaged that individuals will also have access to existing sector specific alternative dispute resolution arrangements, for example the Australian Financial Complaints Authority (AFCA).

Privacy and Other Rights

The right to privacy

The right to privacy is a human right, inherent in the basic dignity of the individual. It is protected under Article 12 of the United Nations Universal Declaration of Human Rights, which provides that:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.¹⁰

Article 17 of the International Covenant on Civil and Political Rights (ICCPR) replicates this provision, qualifying it to protect against ‘unlawful’ attacks upon honour and reputation.¹¹

The UN Human Rights Committee has not defined ‘privacy’, but it is generally understood to comprise freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy. This includes personal data. It has been suggested that there are four facets of the right to privacy:

- Information Privacy, which involves the establishment of rules governing the collection and handling of personal data such as credit information and medical records;

¹⁰ Available at: <http://www.un.org/en/universal-declaration-human-rights/>.

¹¹ Available at: <http://www.un-documents.net/iccpr.htm>.

- Bodily privacy, which concerns the protection of people's physical selves against invasive procedures such as drug testing and cavity searches;
- Privacy of communications, which covers the security and privacy of mail, telephones, email and other forms of communication; and
- Territorial privacy, which concerns the setting of limits on intrusion into the domestic and other environments such as the workplace or public space.¹²

In its 2008 Report, '*For Your Information: Australian Privacy Law and Practice*', The Australian Law Reform Commission viewed privacy as 'the bundle of interests that individuals have in their personal sphere free from interference from others', and noted that 'privacy interests unavoidably will compete, collide and coexist with other interests'.¹³ The Commission emphasised that 'compliance with basic information privacy principles ... accords with commercial best practice standards.'¹⁴

The right to freedom of opinion and expression

The right to freedom of opinion and expression, protected under Article 19 of the ICCPR, is also relevant to individuals' access to and control over data about themselves. It provides as follows:

1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

¹² David Banisar, 'Privacy and Human Rights: An International Survey of Privacy Laws and Practice', available at: <http://gilc.org/privacy/survey/intro.html>.

¹³ Australian Law Reform Commission, (2008) 'For Your Information: Australian Privacy Law and Practice (ALRC Report 108)', page 148, available at: <https://www.alrc.gov.au/publications/report-108>.

¹⁴ Australian Law Reform Commission, (2008) 'For Your Information: Australian Privacy Law and Practice (ALRC Report 108)', page 153, available at: <https://www.alrc.gov.au/publications/report-108>.

- a. *For respect of the rights or reputations of others;*
- b. *For the protection of national security or of public order, or of public health or morals.*

Article 19.2 recognises individuals' freedom to seek, receive and impart personal data through any media of their choice. This human right is not prescriptive of the types of data, classes of recipient or the purpose of the communication to which it purports to apply.

The right to privacy and Australian privacy law

In Australia, information privacy is primarily protected by the Privacy Act, which establishes an express or implied consent model.¹⁵ The Privacy Act contains the Australian Privacy Principles (APPs), which apply to government agencies and private organisations. Most small businesses with an annual turnover of less than \$3 million are exempt from the Privacy Act, though this is not the case for small businesses that are:

- reporting entities for the purposes of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) and associated regulations;
- ballot agents for the purpose of the Fair Work Act 2009 (Cth);
- small businesses that are an association of employees registered or recognised under the Fair Work (Registered Organisations) Act 2009 (Cth); and
- any small business prescribed in accordance with regulations made under the Privacy Act or carrying out acts or practices prescribed by regulations under the Privacy Act.

This is not an exhaustive list of small businesses who are not exempt from the Privacy Act.¹⁶

A number of other exemptions to the Privacy Act also apply, including for employee records, individuals who are acting in a non-business capacity, journalism, and political acts and practices.

¹⁵ NB: Collection, use and disclosure may be permitted without actual consent (express or implied) where it is reasonably necessary or expected for the performance of a business's functions. It may also be permitted in other cases, such as when otherwise authorised by law.

¹⁶ see subsection 6D(4) of the Privacy Act, available at: <https://www.legislation.gov.au/Details/C2018C00456>.

The APPs outline how APP entities must handle, use and manage personal information. Entities regulated by the Privacy Act must take such steps as are reasonable in the circumstances to notify individuals of factors including the purposes for collecting the information, who the organisation usually discloses information of that kind to, and whether the personal information is likely to be disclosed overseas. The APPs also cover maintaining quality and security of personal information and rights for individuals to access and correct their personal information. They place more stringent obligations on APP entities when they handle sensitive information. A summary of the APPs and how they compare to the CDR privacy safeguards can be found in Appendix A.

The Privacy Act contains a number of possible enforcement mechanisms. This includes a breach notification scheme for serious breaches of APP 11, and the ability for individuals to complain about a breach of the Privacy Act to the OAIC. The OAIC then assesses whether it can investigate the complaint. The Information Commissioner must take reasonable steps to conciliate complaints, but may decide not to investigate the complaint further. The OAIC is also able to undertake Commissioner-initiated investigations and accept enforceable undertakings. In recent times, it has been provided with the power to seek civil penalties for serious and repeated interferences with privacy, but it has not yet sought a civil penalty under the Privacy Act.

PIA Methodology

Privacy Impact Assessment process

This PIA was prepared in accordance with the Code and the OAIC *Guide to undertaking privacy impact assessments* (OAIC PIA Guidance).¹⁷

The Code requires Australian Government agencies to conduct a PIA for all high privacy risk projects, which may include where a project involves any new or changed ways of handling personal information that are likely to have a significant impact on the privacy of individuals.

¹⁷ Office of the Australian Information Commissioner, (2014) 'Guide to undertaking privacy impact assessment' (OAIC PIA Guidance), available at: <https://www.oaic.gov.au/resources/agencies-and-organisations/guides/guide-to-undertaking-privacy-impact-assessments.pdf>.

Privacy Scope

Treasury considers that the CDR has a significant privacy scope, and that it is appropriate to conduct a PIA for the CDR, for the following reasons:

- It allows easier transfer of specified data, which will include personal information.
 - As the CDR is intended to be an economy wide right, it will affect and involve many types of personal information
- It will create new Privacy Safeguards that will affect the way CDR participants handle, store and transfer personal information.
- The CDR involves risks to privacy at each stage of the data transfer.

Treasury has determined that the PIA should include a detailed analysis of the risks and mitigation strategies, in order to better manage these risks during implementation of the CDR.

Conduct of the PIA

This PIA has been developed by Treasury drawing upon extensive ongoing consultation with relevant stakeholders on privacy risks and proposals as part of the broader development of the regime.

The OAIC PIA Guidance provides that:

“Generally, whoever is managing the project would be responsible for ensuring the PIA is carried out. The nature and size of the project will influence the size of the team needed to conduct the PIA, and how much the team needs to draw on external specialist knowledge.

A PIA is unlikely to be effective if it is done by a staff member working in isolation. There could be a team approach to conducting a PIA, making use of the various ‘in-house’ experts available, such as the privacy officer or equivalent, and outside expertise as necessary. A range of expertise may be required, including information security, technology, risk management, law, ethics, operational procedures and industry-specific knowledge. Seeking external input from experts not involved in the project can help to identify privacy impacts not previously recognised.

Some projects will have substantially more privacy impact than others. A robust and independent PIA conducted by external assessors may be preferable in those instances. This independent assessment may also help the organisation to develop community trust in the PIA findings and the project's intent.

The team conducting the PIA needs to be familiar with the Privacy Act, any other legislation or regulations that might apply to personal information handling (for example, state or territory legislation), and the broader dimensions of privacy.”¹⁸

A decision was made not to outsource the development of the PIA to external consultants. This has been criticised by some stakeholders.

The CDR regime as a whole is largely directed at protecting the data of consumers, including individual's data. It was therefore not appropriate to separate the assessment of privacy impacts and proposals to address privacy risks from the core policy development function being undertaken by Treasury.

This development process took place over approximately 18 months, in an iterative way, involving multiple consultations. This did not lend itself to a point in time assessment by external consultants.

The internal development of the PIA also reflects Treasury's recognition of the importance of developing internal capability in relation to PIAs and a better understanding of the privacy issues and risks raised by the CDR as part of its design. This was a secondary factor in the decision to conduct the PIA internally and had little influence on the decision.

Initial shortfalls in Treasury's capabilities to develop a PIA were addressed through staff development, internal research and engagement with privacy experts over the course of the process.

The Government has committed to a post-implementation review of the CDR. The requirement for this review (and that it must be independently conducted) will be mandated

¹⁸ OAIC PIA Guidance, page 10.

by legislation.¹⁹ The findings of this independent review will be required to be tabled before the Australian Parliament.

The PIA process is iterative, and it is expected that further versions of this PIA and further PIAs will be required as the right is expanded and developed (see ‘next steps’ below).

Consultation

The privacy aspects of the CDR have been the subject of extensive consultation. –

In accordance with the OAIC PIA Guidance, consultations have previously taken place on the privacy risks and concerns associated with introducing consumer data access and portability rights and options to mitigate those risks, as part of:

- the PC Report;
- the Taskforce established to consider the Government’s response to that Inquiry;
- the OBR;
- the Government’s consultation on the Final Report of the Open Banking Review;
- consultations on two drafts of the Treasury Laws Amendment (Consumer Data Right) Bill 2018;
- consultations by the ACCC on its proposed Consumer Data Right rules framework; and
- consultations by the interim Chair of the proposed Data Standards Body on proposed technical standards.

As part of those consultations, a broad range of stakeholders have made formal and informal written submissions and oral submissions (such as at roundtables or bilateral meetings), and opportunity has been provided to stakeholders to gain a better understanding of, and provide comment on, any proposed mitigation strategies.²⁰

The assessment has also benefited from public commentary on the proposed reforms and from observations of the implementation of Open Banking in the United Kingdom.

¹⁹ See section 56GH of the Treasury Laws Amendment (Consumer Data Right) Bill 2018, which provides that this review must report by 1 January 2022.

²⁰ OAIC PIA guidance, page 11.

Further detail of consultations forming part of this privacy assessment is set out in the Stakeholder Consultation section of this PIA.

The OAIC PIA Guidance provides the following requirements for consultation, which have been met in relation to the proposed reform:²¹

“Consulting with stakeholders may assist in identifying privacy risks and concerns that have not been identified by the team undertaking the PIA, and possible strategies to mitigate these risks. Consultation may also offer stakeholders the opportunity to discuss risks and concerns with the entity and to gain a better understanding of, and provide comment on, any proposed mitigation strategies. Importantly, consultation is also likely to provide confidence to the public that their privacy has been considered. Failure to consult may give rise to criticism about a lack of consultation in relation to the project.

For consultation to be effective, stakeholders will need to be sufficiently informed about the project, be provided with the opportunity to provide their perspectives and raise any concerns, and have confidence that their perspectives will be taken into account in the design of the project. Many consultation models are available, including telephone or online surveys, focus groups and workshops, seeking public submissions, and stakeholder interviews. Different models will be appropriate for different stakeholder groups and different stages of the project, and careful consideration should be given to which consultation model/s will be appropriate in the circumstances.

Consultation does not necessarily need to be a separate step as it can be useful to consult throughout the PIA process. It is important that some form of targeted consultation is undertaken, even if widespread public consultation is not possible (for example, if a private organisation is concerned about sharing commercially sensitive information widely), such as with groups representing relevant sectors of the population, or advocacy groups with expertise in privacy.”

²¹ OAIC PIA guidance, page 11.

While there has been extensive consultation on the privacy risks and concerns and strategies to mitigate them (in accordance with the OAIC PIA Guidance), the text of version 1.0 of the PIA has only been subject to very limited targeted consultation. Further consultation will occur – see below.

Next steps

This PIA has been developed based on the proposed legislative framework for the CDR and the recommendations of the OBR as to the proposed content of the Rules and standards.

A second round of consultation on the Bill occurred between 24 September 2018 and 12 October 2018, receiving 25 submissions. The second consultation on the Bill included consultation on the draft Designation Instrument for Open Banking. There will be consultations on further drafts of the designation instrument prior to February 2019.

The ACCC released its Rules Framework paper for consultation on 11 September 2018 to 12 November 2018, receiving 54 submissions. A decision paper on the draft Rules is expected to be released in December.

Data61 is developing technical standards with the benefit of advice from an Advisory Committee which includes industry, FinTech, privacy and consumer representatives. Three industry working groups have been established that are open to all interested parties, on: APIs Standards; Information Security; and User Experience. The standards are being developed transparently and iteratively through GitHub. Collated draft standards were released for consultation from 2 November 2018 until 23 November 2018. A subsequent draft will be released before the end of 2018. Additional standards on matters such as information security are being developed in parallel.

The PIA will be further developed to document the privacy assessments (risks, concerns and mitigants) and consultations arising from these processes – to the extent they add to or differ from the positions stated in the Open Banking Review Final Report. Key issues considered in these processes, which will be addressed in version 2.0 of the PIA, will include (but not be limited to):

- The nature of and processes for consent to disclosure, use, holding and collection;
- Detail of deletion and anonymisation rights;

- Restrictions and processes for transfers of data out of the CDR system;
- Restrictions on direct marketing and on-sale of data;
- Granularity of access permissions that the system will support; and
- Granularity of use permissions that the system will allow.

This first version of the PIA is open for public consultation until 18 January 2019, with comments to be incorporated into version 2.0.

The updated PIA will be available before introduction of the Bill into Parliament, which is expected to be in early 2019 (and therefore before any legislation is passed and supporting Rules and standards made).

Ongoing development work, including from the Government's commitment to informing the design of the system through consumer testing, will mean that not all detail of the regime will be settled before the Bill is introduced. The PIA will therefore continue to be developed as testing identifies any consumer and privacy risks and further solutions are settled and incorporated into the Rules and Standards. The PIA will be further refined prior to the launch of access to consumer data in February 2020.

Where new sectors are designated or the Rules amended, the legislation requires the ACCC and Minister to consider the privacy impacts. Where such changes significantly impact privacy, the ACCC may review the PIA or undertake a fresh PIA. New PIAs will be developed as part of any future sectoral assessments, prior to a sector being designated as being subject to the CDR.

Stakeholder Consultation

Consultation during the Productivity Commission's Inquiry into Data Availability and Use

In May 2017, the Government received the PC Report which included a set of 41 recommendations, including for the creation of a new economy-wide Comprehensive Data

Right. In developing these recommendations, the PC conducted extensive stakeholder consultation.

On 18 April 2016, the PC released an Issues Paper seeking comments from interested parties until 29 July 2016.²² The PC received 211 public submissions during this period, which have been made available on the Inquiry website.²³ The Issues paper included a section concerning individuals' access to and control over data about them. This followed on from a recommendation in the 2015 Competition Policy Review (mentioned above) that supported allowing consumers to access information in an efficient format.

On 3 November 2016, the PC released its Draft Report for public comment with consultation open until 12 December 2016.²⁴ The report included a draft recommendation for a new Comprehensive Right for individuals. The PC received 125 public submissions in response to the Draft Report.

Submissions to the Inquiry included: 94 from industry associations or representative bodies; 69 from governments or government agencies; 59 from private sector businesses; 58 from academics or research groups; 38 from individuals; and 18 from not-for-profit or other non-business groups.

All public submissions have been made available on the Inquiry website.²⁵ In addition, the PC held separate discussions with around 130 businesses, business groups, academics, government agencies and individuals in Australia and overseas. Three roundtable discussions were held during the Inquiry — with academics; with Australian Government agencies; and with members of the Business Council of Australia. Public hearings were held in Melbourne on 21 November 2016 and in Sydney on 28 November 2016.

On 8 May 2017, the Government released the PC's Final Report for the Inquiry.²⁶ As outlined above, the Report included 5 recommendations on a new Comprehensive Right for consumers.

²² Available at: <https://www.pc.gov.au/inquiries/completed/data-access/issues/data-access-issues.pdf>.

²³ Available at: <https://www.pc.gov.au/inquiries/completed/data-access/submissions>.

²⁴ Available at: <https://www.pc.gov.au/inquiries/completed/data-access/thedraft/data-access-draft.pdf>.

²⁵ Available at: <https://www.pc.gov.au/inquiries/completed/data-access/submissions>.

²⁶ Available at: <https://www.pc.gov.au/inquiries/completed/data-access/report/data-access.pdf>.

Consultation during the Government's Data Availability and Use Taskforce

The Government's Data Availability and Use Taskforce (Taskforce) developed a Government response to the PC's Data Availability and Use Inquiry. In its Response, the Government agreed to 33 of the Inquiry's 41 recommendations including the implementation of the new CDR which was to be informed by the findings of the Open Banking Review.

In developing the Government's response, the Taskforce consulted with 83 interested parties including Commonwealth agencies, States and Territories, and other significant stakeholders. Consulted parties included: 78 peak industry bodies and businesses, including the banking, telecommunications and energy sectors; 15 community, consumer and society representatives; 16 research sector bodies; 43 Commonwealth public sector bodies; and 9 State and territory public sector bodies.

As a result of stakeholder feedback, the CDR proposed by the Government's Taskforce varied from the model proposed in the PC Inquiry, but maintains some similarities with the PC's proposed comprehensive data right. Departures from the PC's proposed economy-wide-by-default approach relevant to this PIA include:

- The CDR will be progressively rolled out on a sector-by-sector basis beginning in the banking, energy and telecommunications sectors. As the right will not immediately apply comprehensively across the economy, it was considered more appropriate that it be labelled the Consumer Data Right. The roll-out to additional sectors will involve cost benefit analysis including in relation to privacy impacts.
- The CDR will explicitly recognise the dual nature of an individual's personal information, in the sense that it holds both fundamental human rights aspects and an economic character.
 - The CDR regulatory model will ensure that competition, consumer and privacy outcomes are balanced.
 - Future sectors to be designated will be determined by the Treasurer in consultation with the ACCC and the OAIC.
 - The ACCC will be the primary regulator responsible for competition and consumer matters, including setting the Rules and Standards, with the OAIC being responsible for

privacy matters and complaints handling. This moves away from the PC's proposal to have the ACCC as the single regulator.

Consultation during the Open Banking Review

The OBR consulted with over 100 stakeholders to consider issues in the current data sharing environment.

On 9 August 2017, the OBR released an Issues Paper seeking comment from interested parties for a period of six weeks.²⁷ The Issues Paper called specifically for advice on how data should be shared under open banking, and on ways to ensure that privacy is protected and shared data is kept secure. Comments received were used to inform the Review's chapters on privacy safeguards and the data transfer mechanism.

The OBR received 39 non-confidential submissions (available on the OBR's website) and one confidential submission.²⁸ The OBR conducted two public roundtable consultations in Sydney and Melbourne, and one roundtable dedicated to privacy issues with privacy and consumer advocates and academics in Canberra. In addition, the OBR held over 100 meetings with interested parties such as banks, FinTech firms, consumer advocates and regulators.

Stakeholders raised a range of privacy concerns. These issues were generally broad privacy policy concerns related to the introduction of the CDR, but submissions sometimes addressed matters outside of its scope.

Some submissions advocated for stronger privacy protections than those currently available under the Privacy Act, arguing that they are inadequate compared to those in other countries. However, many supported the extension of existing privacy frameworks to the CDR. Some submissions advocated for protections similar to those under the European Payment Services Directive 2 (PSD2) and the GDPR including meaningful, unbundled and informed consent, behaviourally tested consent disclosures and data erasure and portability rights. Some stakeholders also argued that the Privacy Act should be extended to include

²⁷ The Treasury (2017), 'Review into Open Banking in Australia – Issues Paper', available at: <https://static.treasury.gov.au/uploads/sites/1/2017/08/Review-into-Open-Banking-IP.pdf>.

²⁸ Available at: <https://treasury.gov.au/consultation/review-into-open-banking-in-australia/>.

small to medium enterprises. Overall, submissions called for a cohesive fit for purpose regulatory framework with well-resourced, proactive regulators.

Submissions cautioned against a range of risks involved with data sharing. These included the risk of further eroding trust in the banking system in cases of breaches or data misuse. Additionally, there were concerns that increased complexity and choice from new products could lead to sub-optimal consumer choices, and that there could be a reduction in positive friction in decision making. There were also concerns that there could be an increase in predatory practices likely to cause increased economic inequality, such as risk segmentation, profiling for profit, price discrimination, digital exclusion, use of non-transparent terms and conditions, black box technology and biased algorithms which lead to poor consumer outcomes.

Consultation following the Open Banking Review

On 9 February 2018, the Government released the Report from the OBR for public comment for a period of six weeks, in order to assist with developing details for implementation.²⁹ Privacy was a key consideration during the OBR. The Final Report included a chapter which outlined privacy concerns and the proposed Privacy Safeguards, to ensure that the risks identified by privacy and consumer advocates were addressed and considered. The chapter included detailed recommendations about divergence from the Privacy Act, appropriate consent requirements, the issue of a right to deletion, and a comprehensive liability and dispute resolution framework.

The consultation received 74 submissions, with 7 submissions being confidential.

Non-confidential submissions have been made available on the OBR's website.³⁰ Some submissions raised concerns about a lack of transparency and genuine individual consent to use of data when signing up for products and services. Additionally, some submissions called for review and modernisation of the Privacy Act and the APPs to increase protections for individuals participating in the CDR. The privacy concerns raised are listed in more detail in

²⁹ The Treasury (2018), 'Review into Open Banking in Australia – Final Report', available at: https://static.treasury.gov.au/uploads/sites/1/2018/02/Review-into-Open-Banking-_For-web-1.pdf

³⁰ Available at: <https://treasury.gov.au/consultation/c2018-t247313/>.

Appendix B. It should be noted that some of these are questions of broader privacy policy, beyond the scope of the CDR.

Consultation on the Treasury Laws Amendment (Consumer Data Right) Bill 2018

On 15 August 2018, the Government released an Exposure Draft of the Treasury Laws Amendment (Consumer Data Right) Bill 2018, which will amend the *Competition and Consumer Act 2010 (Cth)* to establish the CDR Framework.³¹ The initial round of consultation was open until 7 September 2018. The consultation received 65 submissions from a range of stakeholders, including community and society representatives.

Treasury undertook a second round of consultation on the Exposure Draft Bill between 24 September 2018 and 12 October 2018, receiving 25 submissions.³²

Treasury conducted eight stakeholder roundtables between 23 and 31 August 2018 – three in Sydney, three in Melbourne, one in Canberra, and one with academics and consumer advocates across Australia via teleconference. In total, approximately 150 people attended these roundtables and were asked to provide input to this PIA as part of their submissions.

Treasury has also conducted bilateral meetings with privacy academics and advocates since February 2018 and will continue to do so.

A number of stakeholders engaged with the privacy aspects of the Exposure Draft Bill. Many stakeholders welcomed the introduction of the Privacy Safeguards, noting that they would provide stronger privacy protections than the APPs, although some stakeholders felt that the Safeguards should be strengthened. Other privacy related concerns included:

- that the introduction of Privacy Safeguards creates unnecessary complexity, both for individuals to navigate their rights under separate regimes and from a compliance perspective for participants;

³¹ Available at: <https://treasury.gov.au/consultation/c2018-t316972/>.

³² Available at: <https://treasury.gov.au/consultation/c2018-t329327/>.

- requests for clarification on the interaction between the Privacy Act and the Privacy Safeguards, including as to when each of these regimes apply and whether an entity's CDR privacy policy could be merged with its existing APP privacy policy;
- requests for simplification of the CDR privacy regime;
- that only the APPs should apply to the CDR, either in their existing form or strengthened in line with the GDPR;
- that the Privacy Safeguards should be more detailed, for example in relation to the definition of valid consent, rather than leaving this detail to the Rules;
- that all Privacy Safeguards should apply to data holders and to all CDR data;
- that foreign CDR participants should be subject to the Privacy Act;
- that there should be a broad right to deletion;
- that on-sale of personal data should be banned; and
- concerns about the significance of penalties applying to breaches of the Privacy Safeguards and views that only serious or repeated breaches of the Privacy Safeguards should be penalised.

Some concerns were also raised regarding the process for preparing the PIA – in particular, that it should be prepared independently.

Consultations on the Consumer Data Right Rules and Standards

Consultations are ongoing in relation to the ACCC's development of the Rules; and the development of the consumer data right technical standards by the interim Data Standards Body (the Data61 branch of the CSIRO).

The ACCC released its Rules Framework paper for consultation from 11 September 2018 to 12 November 2018, receiving 54 submissions.³³ A decision paper on the draft Rules is scheduled to be released in December.

Data61 is developing technical standards with the benefit of advice from an Advisory Committee which includes industry, FinTech, privacy and consumer representatives. Three industry working groups have been established that are open to all interested parties: on APIs Standards; Information Security; and User Experience. The standards are being developed transparently and iteratively through GitHub. Collated draft standards were released for consultation from 2 November 2018 until 23 November 2018. A subsequent draft will be released before the end of 2018. Additional standards on matters such as information security are being developed in parallel.

Mapping of personal information flows

Simple Consumer Data Right model

An example of how the CDR may function is outlined below. Note that the personal information involved in flows under the CDR is limited to personal information that has been designated as subject to the CDR in a sector designation instrument – this example uses banking data.

This example sets out a simple use of the CDR with only three parties: the individual, a data holder and a data recipient. The diagram below illustrates this model.

Stage 1: Individual engages with data recipient

Naomi is considering changing to a different credit card. She wants to compare her current credit card to other options on the market and engages a comparison website, BetterDeals (the data recipient).

³³ Available at: <https://www.accc.gov.au/focus-areas/consumer-data-right/accc-consultation-on-rules-framework>.

Stage 2: Individual authorises use and collection of data

BetterDeals offers Naomi the option of tailored advice if she consents to it collecting and using her credit card data for that purpose.

In this same stage, Naomi consents to the collection and use of her data by BetterDeals for those specific purposes.

Stage 3: Individual consents to disclosure

BetterDeals refers Naomi to her bank, National Nickle Bank (NN Bank, the data holder), so that she can provide them with her consent to disclose that information.³⁴ As part of the consent process, NN Bank authenticates her identity.

NN Bank will need to ensure that the consent to disclosure accords with the consent requirements in the Rules, and check the Accreditation Register to ensure that BetterDeals is an accredited data recipient.

Stage 4: Data holder discloses to the data recipient

Having received Naomi's consent, then discloses her credit card data to BetterDeals.

Stage 5: Data recipient receives data and uses data

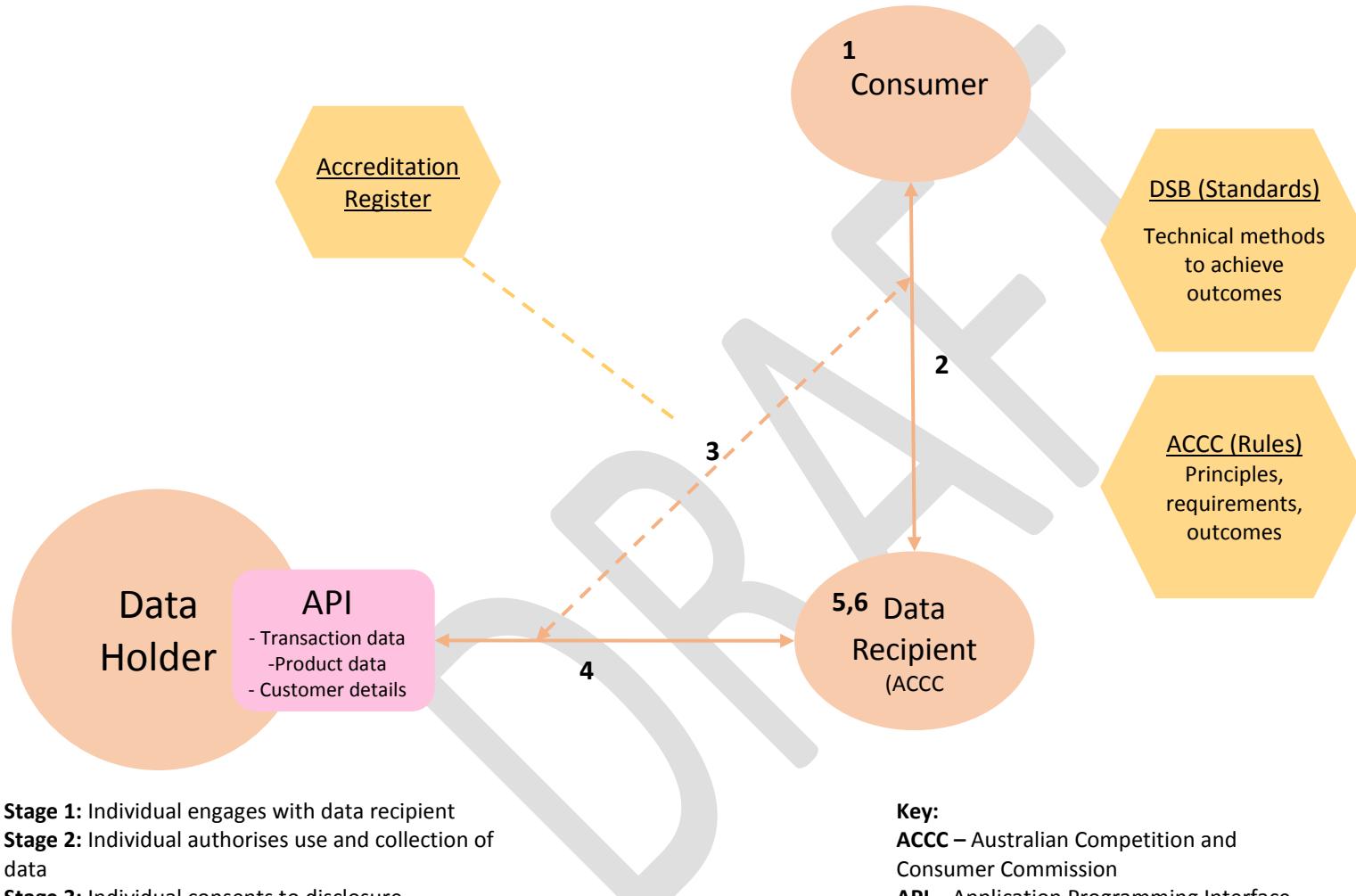
This data is received by BetterDeals who analyses Naomi's data together with data on all of the credit card products that are available to recommend the credit card account which would best suit Naomi's usage and personal circumstances.

Stage 6: Deletion or de-identification

Having used the data for all the purposes consented to by Naomi, BetterDeals destroys or de-identifies her data.

³⁴ There are three authentication models that could be used to refer an individual to their bank to provide their consent to disclose data: a decoupled approach; a redirect approach; or a known channel redirect approach. The Data Standards Body is developing standards that will detail the proposed methods of authentication. The current draft of the data standards can be found on the [Data61 Consumer Data Standards website](#).

Simple Consumer Data Right Framework Information Flows



- Stage 1:** Individual engages with data recipient
- Stage 2:** Individual authorises use and collection of data
- Stage 3:** Individual consents to disclosure
- Stage 4:** Data holder discloses to the data recipient
- Stage 5:** Data recipient receives data
- Stage 6:** Deletion

Additional Consumer Data Right scenarios

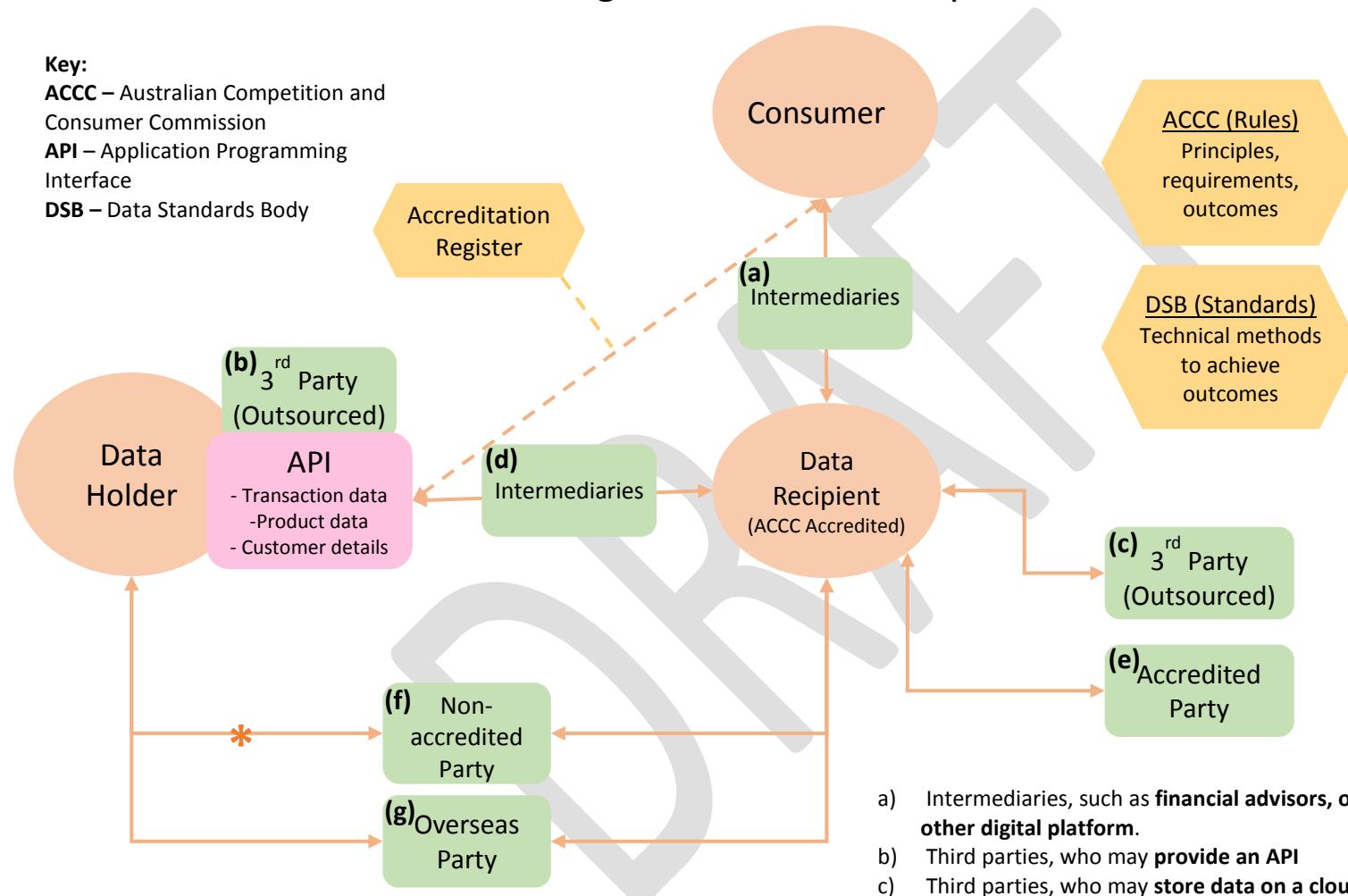
There are several possible ways for the information to flow through other parties:

- (a) Naomi may access BetterDeals' services through an **intermediary** such as a financial advisor, or a social media or other digital platform. If the intermediary is not accredited, this could only occur where permitted by the Rules.
- (b) Rather than developing their own API (the channel through which data is provided), NN Bank may outsource to a third party who will **provide an API** on their behalf.
- (c) Similarly, BetterDeals may outsource some of its functions to a third party to, for example, **store data on a cloud service** or process and analyse the data.
- (d) BetterDeals may engage the services of an accredited intermediary to connect to NN Bank. An intermediary may be a contractor/agent for BetterDeals or may be a separate data recipient in their own right. This intermediary might also provide services to BetterDeals, such as **filtering or processing transaction data** from the data holder. An intermediary may also be a designated gateway (a sub-class of intermediary), as defined in the Bill. BetterDeals may be required to transfer data through a designated gateway. Designated gateways will only be able to collect, use and disclose information as specifically provided for in the Rules.³⁵
- (e) Naomi may also request BetterDeals to transfer her data to another accredited party, such as a **budgeting application**.
- (f) Naomi may also request BetterDeals to transfer Naomi's data to a **non-accredited party** such as her accountant, thus the data would leave the CDR system (if this is permitted by the Rules).
- (g) Finally, Naomi may want to transfer her data to an **overseas recipient**.
 - Naomi is moving to New Zealand and requests that BetterDeals transfers her data to their New Zealand affiliate to help her select a card from a New Zealand bank.

³⁵ References to an intermediary in this document should be read as including designated gateways.

Consumer Data Right Framework Complex Information Flows

Key:
ACCC – Australian Competition and Consumer Commission
API – Application Programming Interface
DSB – Data Standards Body



*Within the CDR this information flow would only be of information for which there is not an identifiable consumer, such as product information

- a) Intermediaries, such as **financial advisors, or a social media or other digital platform**.
- b) Third parties, who may **provide an API**
- c) Third parties, who may **store data on a cloud service**
- d) Intermediaries, who may provide the API and services such as **filtering or processing transaction data** from the data holder
- e) Other accredited parties, such as a **budgeting applications**
- f) **Non-accredited parties**
- g) **Overseas recipients**

Impacts on Privacy

The transfer of an individual's personal data from data holder to data recipient involves multiple stages as outlined in the 'Mapping of Personal Information' section above. The following section identifies and critically analyses the potential privacy risks and their likely consequences at each stage of the data transfer.

Risks outlined in this section are categorised as one of six types in relation to the point in the process at which the risk could occur (according to the type of risk they most closely relate to). A risk may be a:

- **Identification Risk** – meaning a risk to privacy arising from the misidentification of a consumer, data holder or recipient, whether through inadvertence or misleading conduct.
- **Authorisation Risk** – meaning a risk arising during the process of the customer consenting to collection, use or disclosure of the personal data. This included risks as to whether authorisation is genuine and whether authorisations are then complied with.
- **Transfer Risk** – meaning a risk to privacy arising during the communication of information from one party to another. This may involve transfers such as the communication of information regarding the data transfer, the data transfer itself, or any other incidental information transfers.
- **Holding Risk** – meaning a risk to privacy arising from a failure to secure held data from improper disclosure or use, either by internal or external actors.
- **Usage Risk** – meaning a risk to privacy arising from use of the data by the parties who obtain customer data, either through negligence or misconduct.
- **Data Quality Risk** – meaning a risk to privacy arising from inaccurate, misleading or incomplete information being collected, used or disclosed.

The risks identified in this section are mainly focussed on privacy, however, not mentioned in this assessment are other risks that may exist. This includes the potential negative impact of the CDR on some consumer outcomes, on the stability and efficiency of markets, and social impacts (such as due to increased or new forms of differentiation in price, quality and

availability of goods and services to different classes of individual). These have been considered as part of the policy development process, but are not documented in this PIA.

The table below also notes that most of the privacy risks exist in relation to current data sharing practices, which, as outlined above, are often unregulated. While the CDR may exacerbate or adjust the nature of some of these risks, the privacy protections provided in the CDR system will mitigate these risks.

It should be noted that in addition to the risks to the privacy of the individual, each of these scenarios would also pose a reputational risk to the CDR system itself.

Risks also exist in relation to the effectiveness of the governance and operation of the regulatory framework.

Risk Assessment

The risks identified in this section have been assessed according to a modified form of the Treasury's risk rating matrix. The risk assessment framework takes into account the likelihood of each risk occurring and the severity of their potential consequences to determine a risk rating between "Very Low" and "Severe". The likelihood and consequence descriptions in Treasury's risk rating matrix were modified to be more relevant to the CDR.

Risk Rating Matrix

This PIA applies the risk rating matrix below to categorise each of the risks identified in the next section. For example, Treasury considers that a situation that occurs rarely with a major consequence would have a "Low" rating.

Table 3: Modified form of Treasury's risk rating matrix

		Consequence				
		Insignificant	Minor	Moderate	Major	Extreme
Likelihood	Almost Certain	Low	Medium	High	Severe	Severe
	Likely	Low	Low	Medium	High	Severe
	Possible	Low	Low	Medium	Medium	High
	Unlikely	Very Low	Low	Low	Medium	High
	Rare	Very Low	Very Low	Low	Low	Medium

Table 4 below provide guidance for determining the likelihood and consequence ratings for the privacy impacts identified in the CDR. The risk ratings are applied to the identified risks to determine the overall rating.

Treasury conducted a series of internal workshops in order to determine an appropriate assessment of the likelihood and severity of each privacy risk. Treasury staff trained in Structured Analytic Techniques (SATs) led the workshops to systematically incorporate the independent views of the project team into a combined assessment. Treasury used SATs such as a structured brainstorm and horizon scanning to apply different perspectives and ways of thinking to the problem, and reduce the possibility of groupthink.

Table 4: Likelihood and consequence ratings for the privacy impacts identified in the CDR

Rating	Likelihood Description	Rating	Consequence Description
Almost Certain	The risk to the individual/business is almost certain to eventuate within the CDR system.	Extreme	The risk to the individual/business results in severe reputational damage, severe emotional or physical harm, and/or extreme financial loss.
Likely	The risk to the individual/business will probably eventuate within the CDR system	Major	The risk to the individual/business results in significant reputational damage, significant emotional or physical harm, and/or significant financial loss.

Possible	The risk to the individual/business may eventuate within the CDR system	Moderate	The risk to the individual/business results in reputational damage, emotional or physical harm, and/or financial loss.
Unlikely	The risk to the individual/business may eventuate within the CDR system at some time but is not likely to occur	Minor	The risk to the individual/business results in minor reputational damage, minor emotional or physical harm, and/or minor financial loss.
Rare	The risk to the individual/business will only eventuate in exceptional circumstances or as a result of a combination of unusual events	Insignificant	The risk to the individual/business results in insignificant: reputational damage; emotional or physical harm; and/or financial loss.

The likelihood of risks arising was assessed with regard to an individual participating in the CDR over a given year and across multiple interactions with multiple data recipients and data holders. The likelihood assessment **does not** reflect the probability of harm per interaction with the system. Adopting such an approach generally resulted in a ‘rare’ assessment against each risk and therefore did not provide meaningful information to a reader seeking to assess the level of a given privacy risks.

The likelihood of risk was also not assessed across the individual’s lifetime exposure to the CDR.

e.g. Over a given year a consumer exercising their rights under the CDR in respect of multiple data holders is *unlikely* to suffer loss from risk X, but where they do the consequences are most likely to be *major*.

Note also that if risks were assessed at the group level, this may increase the likelihood and/or severity attached to those risks.

The privacy impacts table and analysis in this section **does not** take into account any of the risk mitigation strategies in the CDR framework.

For example, in the absence of any protections, the risk of a malicious third party seeking to mislead a data holder that they are a particular data recipient in order to obtain data has a moderate likelihood with potentially severe consequences. However, the proposed information security arrangements (such as digital certificates, accreditation registers with real time look up and encrypted communications) are expected to reduce this likelihood to

'rare'. See Tables 7 and 8 below for an assessment of the likelihood of these risks occurring once mitigation strategies are applied.

The analysis in this section **does** takes into account pre-existing risk mitigation arrangements – including existing laws (such as the Privacy Act), practices and system (such as cyber security arrangements) and behaviours (such as, individuals generally exercising caution and due care when dealing with transferring personal data). This includes arrangements that are already in place to mitigate both the likelihood and consequences of some risks.

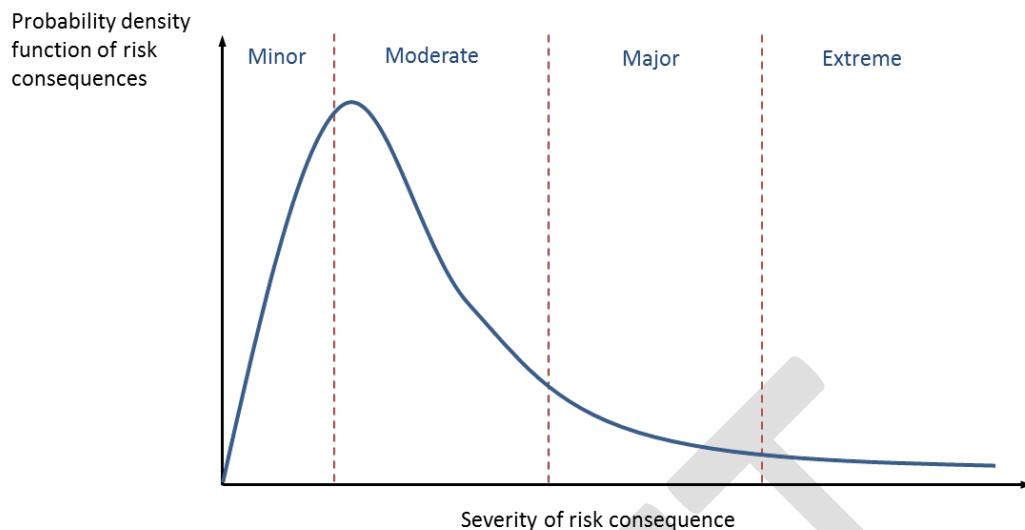
The assessment of the potential severity of the consequences of a privacy risk being realised has sought to take into account harm arising from

- the infringement on the individual's fundamental human right to privacy;
- any financial loss;
- personal and psychological harm;
- emotional harm falling short of psychological harm, including arising from a feeling of violation or from suffering inconvenience; and
- consequential loss, such as rectification costs.

The severity of the consequence of the identified risk will vary based on any given situation. A given risk identified in the CDR may not result in any meaningful financial, emotional, physical or reputational loss or harm to the individual or business in all cases.

Therefore, when assessing each risk, it is appropriate to consider that severity will generally follow a probability distribution rather than a discrete categorisation of severity (which might otherwise be implied in the risk rating framework).

Figure 1: Distribution of severity for realised risks



The diagram above shows that each risk has varying degrees of severity, depending on the individual's unique situation.

In the example case drawn out in Figure 1, it can be seen that most of cases fall within the 'Moderate' portion of the probability function (that is, the area under the curve is largest for this region). Therefore, we would rate the severity of the consequence in this case to be "Moderate".

However, the distribution's long tail implies that there are some cases in which an extreme consequence, for example identity theft or fraud, could be envisioned for this particular risk.

An example to help illustrate this point is a situation in which a data breach contributes to identity theft which enables funds to be stolen money from an individual's account.

Individuals with higher account balances will have a greater possibility of losing higher amounts of money, making the consequence more severe than for most individuals with lower balances. Similarly, some individuals may place a higher value on their privacy than others. Those individuals will face higher psychological and emotional losses following the invasion of their privacy.

An assessment in the table below should not be read as an assertion that more (or less) severe consequences may flow from a risk.

The table below also recognises that most of the risks outlined already exist under current data sharing practices. However, it should be acknowledged that because the CDR is likely to

increase the velocity and immediacy of data transfer, and facilitate the development of richer targets for hackers, it may contribute to increased frequency, likelihood and severity of negative consequences of these risks.

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Simple Consumer Data Right model – Risk Assessment

The following table considers the potential privacy risks and likely consequences if data were shared in a manner similar to the simple CDR model scenario outlined above.

The assessments of severity are based on the application of CDR to banking data. The severity of consequences of a risk being realised is highly dependent upon the data sets involved. Banking is a high risk data set. For example, banking transaction data may include insights into an individual's location, health purchases, relationships, or political or other associations; this may particularly be the case when this data is combined with other data sets (such as telecommunications or social media data).

Separate privacy impact assessments will occur as part of the sectoral assessments for each new sector subject to the regime.

Examples provided in the table below are purely for illustrative purposes – to help the reader understand the nature of the risk. They do not provide an indication of the most likely severity of case. For example, an example might highlight a more severe scenario that could occur (for example, the example of political use of a person's data in stage 2.1) – notwithstanding the likely consequences might be lower (or even higher). As noted above, this table does not take into account risk mitigation strategies in the CDR framework – see tables 7 and 8 below for an assessment of the likelihood of these risks occurring once mitigation strategies are applied.

Table 5: Privacy Impacts Table – Simple CDR Model

Stage	#	Potential Privacy Risk	Risk Likelihood	Risk Severity	Risk under current data sharing?
Stage 1: Individual engages with data recipient	1.1	<p><i>A third party may pose as the accredited data recipient in order to acquire the individual's information directly from the individual.</i></p> <ul style="list-style-type: none"> E.g. A non-accredited financial application may pretend to be BetterDeals and request that Naomi send them her email address and phone number. <p>NB: The risks of the third party trying to acquire the individuals data from the data holder is dealt with further below.</p>	Possible	Moderate	(Y)
	1.2	<p><i>A third person may use a false identity to acquire authentication information from the accredited data recipient.</i></p> <ul style="list-style-type: none"> E.g. Amanda may pretend to be Naomi and engage BetterDeals to get Naomi's email address and phone number. 	Possible	Moderate	(Y)
	1.3	<p><i>The individual may engage an accredited data recipient who instead seeks data outside the CDR system.</i></p> <ul style="list-style-type: none"> E.g. Naomi may engage with a tech company believing that access is obtained through the regulated framework of the CDR. The data recipient instead obtains her personal information through screen scraping. E.g. Naomi engages with a financial advisor who obtains her data through existing bilateral arrangements with NN Bank. 	Possible	Minor	(N)

Stage 2: Individual authorises use and collection of data	2.1	<i>The individual may authorise the accredited data recipient to use or collect their data in a way that they did not genuinely intend.</i>	Almost Certain	Minor	Y
	2.2	<i>The individual may inadvertently authorise a level of access or use of their data beyond what is required for the services they are seeking.</i>	Almost Certain	Minor	
	2.3	<i>The information that the individual discloses in the course of seeking services may be used or disclosed by the accredited data recipient without authorisation.³⁶</i>	Possible	Minor	

³⁶ Authorisation data refers to information that can be obtained from the individual's action of providing consent to the data recipient. This may include things such as the individual's choices with respect to product types, or basic customer information such as their name, or their bank. This type of data may be used for direct marketing purposes.

2.4	<i>The accredited data recipient may use the individual's data in an unauthorised manner.³⁷</i>	Possible	Moderate
	<ul style="list-style-type: none"> • E.g. BetterDeals decides to on-sell Naomi's data to a third party without her consent, who then uses the data to get insights into Naomi's purchasing habits. • An example of a major (but less likely) consequence is that BetterDeals may decide to on-sell Naomi's data to a third party without her consent, and the third party then uses the data to get insights into Naomi's health status. 		Y
2.5	<i>The accredited data recipient may limit the individual's free choice by including contract terms that require access to the individual's data in exchange for a service.</i>	Almost Certain	Minor
	<ul style="list-style-type: none"> • E.g. BetterDeals may include a consent term providing that Naomi can only receive their services on the condition that Naomi allows them to use her information for the purpose of research to improve its products and services. • E.g. An example of a major negative consequence may be that Nick, a financially disadvantaged consumer, might only be able to receive advice from BetterDeals under an option where he agrees to the on-sale of his transaction data to a third party. Although there is an option to pay an upfront fee, he cannot afford this. <p>NB: This risk should only be read in relation to risks to privacy. These circumstances may also give rise to non-privacy consumer or competition risks.</p>		Y
2.6	<i>A non-accredited data recipient may request that the consumer access and download their own CDR data directly, and hand it over to them.</i>	Likely	Moderate

³⁷ See Misuse of Individual data section

		<ul style="list-style-type: none"> E.g. Help Me! Deals (HM Deals) may request that Naomi directly access and download her data from NN Bank and provide it to them, in exchange for HM Deals' services. This means that HM Deals will not have to seek accreditation or comply with the CDR obligations. 		
Stage 3: Individual consents to data disclosure	3.1	<i>The accredited data recipient may direct the individual to a fake website posing as the data holder's website.</i>	Unlikely	Extreme
		<ul style="list-style-type: none"> E.g. BetterDeals may redirect Naomi to a fake bank so she can give her consent to disclose her banking data. The fake bank could then attempt to phish for her banking credentials, passwords or other personal information. 	(Y)	
	3.2	<i>A third person may pose as the accredited data recipient to gain access to the individual's consent information from the individual.</i>	Possible	Extreme
		<ul style="list-style-type: none"> E.g. A third person could pose as BetterDeals, in order to redirect Naomi to a fake bank, thereby obtaining her consent information. 	(Y)	
	3.3	<i>A third person may intercept an individual's authorisation as it is sent to the data holder.</i>	Rare	Extreme
		<ul style="list-style-type: none"> E.g. A hacker intercepts the communication between Naomi and her bank, obtaining Naomi's preferences for future services. 	(Y)	
	3.4	<i>The individual may unintentionally authorise the disclosure of the wrong data to the accredited data recipient.</i>	Possible	Minor
		<ul style="list-style-type: none"> E.g. Naomi authorises disclosure of her data relating to her debit card, rather than her credit card data. 	(Y)	
	3.5	<i>The individual may accidentally authorise a level of access to their data beyond what is</i>	Possible	Moderate
			(Y)	

	<i>necessary or required for the services they are seeking.</i>		
	<ul style="list-style-type: none"> E.g. Naomi may authorise NN bank to give ongoing access to her credit card transaction data to BetterDeals and not merely on a once off basis as is necessary for them to undertake product comparisons. 		
3.6	<i>The individual may unintentionally authorise the disclosure of the right data to the wrong accredited data recipient.</i>	Unlikely	Moderate
	<ul style="list-style-type: none"> E.g. Naomi authorises disclosure of her credit card data to OtherDeals rather than BetterDeals. 		(Y)
3.7	<i>The individual's authorisation to disclose data may not be received by the data holder.</i>	Possible	Minor
	<ul style="list-style-type: none"> E.g. NN Bank may not receive Naomi's authorisation to disclose her data to BetterDeals, meaning that she will not receive the comparison service offered by BetterDeals. Naomi's data is not disclosed to anyone. 		(Y)
3.8	<i>A third person may pose as the individual and authorise disclosure of data.</i>	Unlikely	Extreme
	<ul style="list-style-type: none"> E.g. Amanda could pose as Naomi and provide authority to Naomi's bank to disclose her data. 		(Y)
3.9	<i>The data holder may improperly use or disclose the information contained in the individual's authorisation.</i>	Likely	Minor
	<ul style="list-style-type: none"> E.g. After becoming aware that Naomi is seeking services from BetterDeals, NN Bank might impose itself on the relationship between Naomi and BetterDeals in order to seek to provide a similar service to Naomi itself. <p>NB: The assessment of 'likely' assumes a broader interpretation of the term improper than merely contrary to law.</p>		(Y)

	3.10	<i>The data holder may seek alternative or additional information from the individual during the disclosure authorisation that is not required for the primary purpose of data transfer.</i>	Likely	Minor	
	3.11	<i>The data holder may obstruct or dissuade the individual from transferring their data to the accredited data recipient.</i>	Possible	Minor	
Stage 4: Data holder discloses data to data recipient	4.1	<i>The data holder may accidentally send the wrong individual's data to the accredited data recipient.</i>	Unlikely	Moderate	
		<ul style="list-style-type: none"> E.g. Due to the negligence of NN Bank, Amanda's data may be sent to BetterDeals, instead of Naomi's data, without Amanda's awareness or consent. 			Y
	4.2	<i>The data holder may accidentally send the individual's data to the wrong accredited data recipient.</i>	Unlikely	Moderate	
		<ul style="list-style-type: none"> E.g. Due to the negligence of NN Bank, Naomi's data may be sent to WorseDeals, who may misuse that data. 			Y
	4.3	<i>The data holder may accidentally send the wrong individual's data to the wrong accredited data recipient.</i>	Unlikely	Moderate	
		<ul style="list-style-type: none"> E.g. Due to the negligence of NN Bank, Amanda's data may be sent to WorseDeals without her awareness or consent. WorseDeals may misuse that 			Y

	data.			
4.4	<i>The data holder may intentionally or unintentionally fail to send any or complete data to the accredited data recipient.</i>	Possible	Minor	(Y)
	<ul style="list-style-type: none"> E.g. NN Bank may erroneously fail to send a year's worth of transaction data and thereby make BetterDeals' product comparisons less accurate. 			
4.5	<i>The data holder may intentionally or unintentionally send inaccurate data.</i>	Possible	Moderate	(Y)
	<ul style="list-style-type: none"> E.g. NN Bank sends transaction data to BetterDeals containing transactions processed by NN Bank in error. In an extreme case, this could mean that Naomi is denied a loan, until she requests correction of her data. 			
4.6	<i>The data holder may intentionally or unintentionally fail to send the data in a timely manner.</i>	Possible	Minor	(Y)
	<ul style="list-style-type: none"> E.g. NN Bank's systems are unreliable so there is a delay sending data to BetterDeals. Naomi gives up using the service in frustration as a result. 			
4.7	<i>The data holder may send the data to the accredited data recipient in a format that frustrates its efficient and timely use.</i>	Likely	Minor	(Y)
	<ul style="list-style-type: none"> E.g. NN Bank may scan and send a hardcopy of Naomi's bank statement. This format may not be an appropriate input to BetterDeals' product comparison algorithms. 			
4.8	<i>The data holder may intentionally or unintentionally send accurate but misleading data.</i>	Possible	Moderate	(Y)
	<ul style="list-style-type: none"> E.g. NN Bank sends Naomi's transactions data. The data does not contain information on payments that have not yet been sent through to NN Bank. 			

	4.9	<i>A third party may intercept or interfere with the data during transfer between the data holder and the accredited data recipient.</i>	Rare	Extreme	
	4.10	<i>A third person may pose as the accredited data recipient to gain access to the individual's raw transaction data from the data holder.</i>	Unlikely	Extreme	
Stage 5: Data received by data recipient	5.1	<i>The accredited data recipient, their employee or contractor may access or use the individual's data without authorisation.</i>	Unlikely	Moderate	
	5.2	<i>The accredited data recipient may misuse the information provided by the individual in a way technically consistent with their authorisations.</i>	Possible	Minor	
	5.3	<i>The accredited data recipient, their employee or contractor may disclose the individual's data without authorisation.</i>	Possible	Moderate	

	<ul style="list-style-type: none"> E.g. BetterDeals sells Naomi's data to a data aggregator without permission. 			
5.4	<p><i>A third party may access the accredited data recipient's systems and acquire or use an individual's data without authorisation.</i></p> <ul style="list-style-type: none"> E.g. BetterDeals has insecure data systems, allowing a hacker to obtain Naomi's credit card or personal details, which they could then use to commit identity theft or fraud. 	Unlikely	Major	(Y)
5.5	<p><i>The individual may experience increased threats to privacy due to improved insights about the individual enabled by analytics and better access to aggregated datasets.</i></p> <ul style="list-style-type: none"> E.g. BetterDeals collects personal data from multiple sources (which Naomi has separately authorised). The aggregated data sets are collectively capable of providing far greater detail of Naomi's location than any of the separate data sets. This presents greater risks to Naomi if the data was subsequently stolen or misused. 	Possible	Moderate	(Y)
Stage 6: Deletion or de-identification	<p><i>The accredited data recipient may intentionally or unintentionally fail to delete or de-identify data when required.</i></p> <ul style="list-style-type: none"> E.g. BetterDeals holds on to data that by law should be deleted as it is no longer necessary for the original use Naomi agreed to. This holding may create additional ongoing risks associated with unauthorised use and disclosure. 	Possible	Minor ³⁸	(Y)
	<p><i>The accredited data recipient may publically release personal information that has not</i></p>	Possible	Moderate ³⁹	(Y)

³⁸ This is an assessment of the harm from unauthorised holding per se. Consequences arising from other privacy risks that ongoing holding may exacerbate are dealt with under those risks.

³⁹ As Above

	<i>been properly de-identified, carrying a risk of future re-identification and hence privacy risks.</i>	
6.3	<p><i>The holding of data does not cease even though the accredited data recipient is no longer an eligible data custodian.</i></p> <ul style="list-style-type: none"> E.g. BetterDeals sends de-identified data to an academic institution for research purposes which then gets published in a journal. A third party re-identifies individuals from the information published in the journal article. 	Possible Moderate ^{4c} N

Additional Consumer Data Right scenarios – Risk Assessment

Table 6: Privacy Impacts of additional CDR scenarios

Scenario	Risks	Examples
Joint Accounts	One joint account holder may authorise the disclosure of CDR data that relates to a different joint account holder without their consent.	Naomi and Amanda hold a joint account together. Amanda is the primary user of the joint account. Naomi decides to disclose the joint account's transaction data to BetterDeals without first obtaining

⁴⁰ As Above

		Amanda's consent.
	<p>One joint account holder may prevent the other joint account holder from accessing or disclosing CDR data that relates to them.</p>	<p>Amanda wants to disclose the joint account's transaction data to a family law practitioner, but is unable to do so without obtaining Naomi's consent. Naomi refuses to give consent.</p>
Silent Parties	<p>Data may relate to and be personal information of other parties. Data collection, use, holding or disclosure may therefore affect the privacy rights of other parties.</p> <p>One person's rights in their data may conflict with the rights of other person's rights in that data.</p>	<p>Naomi transacts with Paul. Naomi's transaction data therefore discloses information about Paul's transactions. Naomi wishes to share this data with her accountant without seeking Paul's permission.</p>
Intermediaries	<p>In relation to receiving, holding and using data, the risks that arise from the use of an intermediary mirrors the risks that arise when a data recipient receives, holds or uses data.</p>	<p>An intermediary engaged by BetterDeals to filter raw transactions before the data is sent to it may misuse the data for marketing purposes.</p>
	<p>The risks associated with an intermediary disclosing data are the same as those when a data holder</p>	<p>An intermediary may not use a secure form of communication when disclosing Naomi's information</p>

	discloses data.	to BetterDeals.
Outsourcing to a third party	Both the data holder and data recipients can outsource functions to a third party. The risk of doing so mirrors the risks of the same activities when undertaken by the data holder or recipients. However, they may be amplified by the addition of more handlers of data. Communication risks are also increased as data is transferred between more entities.	BetterDeals outsources their analysis of Naomi's data to a third party, BruerTech. An employee at BruerTech has been secretly accessing data and using it for his own purposes.
Pooling of data and activities	The use of intermediaries and outsourcing to third parties increases the risk of 'honeypots' and single points of failure. However, as intermediaries would specialise in dealing with data, they may have higher protections than smaller CDR participants.	Many FinTechs might use an intermediary to filter data so that they only receive the data sets they require for permitted uses. The systems of the intermediary are compromised.
Non-Accredited Entities	The types of risks associated with CDR data being sent to a non-accredited entity are similar to the risks associated with data being sent to accredited data	Naomi authorises an accredited financial budgeting app to provide reports (prepared using CDR data) to a financial counsellor. The financial counsellor is not

recipients. However, the likelihood and severity of those risks may vary.

accredited.

The CDR does not create rights for consumers to direct accredited entities (or original data holders) to transfer their data to non-accredited entities. It may allow accredited persons to voluntarily do so at the direction of the consumer. Therefore the potential is limited for non-accredited entities to pressure individuals to provide their personal information outside of CDR frameworks as a condition of receiving a service.

The severity and likelihood of various privacy risks is greater where data is transferred through APIs to non-accredited recipients, particularly in respect of vulnerable consumers. This is because of the greater volume, velocity, and useability of data when provided in standardised form through APIs. However, the CDR, while mandating API access by accredited data recipients, will not mandate this for access by non-accredited.

While the CDR will not grant additional legal mechanisms for accredited to non-accredited transfers than those that exist under the general privacy law, more convenient and efficient access by accredited recipients will create more points from which data may move to non-accredited entities. Many accredited entities will also be in the business of creating and providing information products, potentially to non-accredited entities (with the consumer's consent).

Risks are also greater if consumers become more trusting of data transfers, in particular to non-accredited persons by accredited data recipients. This might occur if consumers assume that accredited data recipients will not be allowed to transfer or use CDR data for risky purposes.

Risks to data are particularly high where data is disclosed to a non-accredited person who is not subject to the Privacy Act, such as small-to-medium sized enterprises.

Further discussion of transfer to non-accredited recipients is contained in the ‘Mitigants not adopted’ section below.

Data transferred overseas	<p>The same types of risks arise in relation to data where it is transferred overseas.</p> <p>However, the likelihood and severity of these risks may be greater when data is transferred to a data holder, data recipient or non-accredited entity overseas due to the potential impediments to enforcing any privacy rights and remedies.</p> <p>However, it should be noted that some overseas jurisdictions have stronger privacy protections than Australia.</p>	<p>Naomi authorises that her data is transferred to a bank in the country, Moneyland. Moneyland does not recognise foreign court or tribunal orders and Naomi is unable to enforce a judgment against the bank when they misuse her CDR data.</p>
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Vulnerable and Disadvantaged Individuals

The analysis above considers the privacy risks of the CDR from the viewpoint of consumers as a single class. However, the likelihood and severity of these same risks is likely to be different for those subsets of individuals who are vulnerable or disadvantaged. They may experience an increased chance of harm, as well as more severe harm.

Vulnerable and disadvantaged individuals may be impacted by different privacy risks in different ways:

- Literacy: Individuals with poor literacy may have difficulty understanding the consent processes and mechanisms. This may lead to the individual authorising a use, disclosure or access to their data that they did not intend. This may in particular occur where data holders and recipients use technical language.
- Digital literacy: Low digital literacy may lead to confusion for individuals. They may find it more difficult to access the CDR and to understand the protections available and authorisation processes.
- Financial hardship: Individuals who experience financial hardship may be more vulnerable to exploitation as they may be more willing to engage services that have lower privacy standards due to their perceived lack of choice.⁴¹
- Culturally and linguistically diverse: Different cultural backgrounds may impact individuals' understanding and attitudes towards privacy, consent and technology.
- Individuals experiencing domestic violence: Individuals who are subject to domestic violence may, for example, be coerced by their abusive partner into unwillingly authorising access, use or disclosure of their data; or may be prevented from accessing assistance with the benefit of their own data.

⁴¹ Financial Rights Legal Centre and Financial Counselling Australia (2018), joint submission to Treasury on the Treasury Laws Amendment (Consumer Data Right) Bill 2018, available at: <https://static.treasury.gov.au/uploads/sites/1/2018/09/t329531-Financial-Rights-Legal-Centre-and-Financial-Counselling-Australia-joint-submission.pdf>.

- Minors: individuals who are under 18 may face greater risks. They may not fully comprehend the consequences of authorising access, use or disclosure of their data, and may not fully have control of their data.

Vulnerable and disadvantaged individuals may also have more difficulty exercising their rights to avoid or mitigate risks, such as through the use of external dispute resolution, direct rights of action, and seeking assistance from the OAIC. The exercise of some rights requires some familiarity with legal rights and protections, as well as time and other resources.

Authorisation Risks: Genuine consent

Threats to genuine consent

Within authorisation risks, ensuring genuine consent is one of the major challenges to protecting privacy under the CDR. Consent may be given unintentionally or without the individual being fully aware of what they are consenting to or the consequences of their consent. It should also be noted that the CDR consent model is intended to, but cannot ensure valid consent in every case.

The following are factors that influence whether consent is genuine:

- Coerced
 - Consent is not voluntary where there is duress, coercion or pressure that could overpower the individual's will.
 - Coercive conduct may originate from the data holder or recipient; or by a third party, such as an abusive domestic partner.
 - In the case of joint account holders, individuals may be at risk of unwillingly consenting to transfers that the other account holder advocates for. Likewise, a person who wants to transfer their data to a third party in order to obtain assistance may be coerced into not consenting to disclosure.
- Imbalance of power with service providers (including conditionality in service provision)
 - An inability to access a service without consenting (to the collection, use or disclosure of data) does not make consent involuntary per se. Indeed, in some cases, consumers

are happy to ‘pay’ for a service using their data. However, depending upon the significance of the impacts of not being able to access the service, consent may not be ‘free’, and in extreme cases, consent may not be voluntary.

- There may be more significant risks where there is an imbalance of power between a provider of an essential service and a consumer, for example if a bank refused to provide a loan to a consumer without receiving all the consumer’s previous loan repayment data.
- Sufficiently informed
 - Consent should be supported by sufficient information for the consumer to reasonably understand what they are consenting to, the consequences of consenting and their rights regarding consenting (or not consenting).
- Unbundled information
 - A person may fail to be actually informed if information is not clearly presented in a way that is separated from material extraneous to the consent.
- Non-express or non-explicit
 - Where consent is implied this may negatively impact on whether there is a true and complete understanding of what is being consented to.
- Clear
 - Consent may be undermined if the consent terms are not readily understandable for a member of the general public (that is, someone without legal or technical expertise).
 - For example, consent terms may not be comprehensible if they are presented in multiple locations, incorporated by reference, or split across separate webpages.
- Unambiguous
 - Consent may be undermined if its meaning is not certain.
- Current
 - Consent may not be effective if it is not obtained at or prior to the time of (and remains current during) the collection, use, holding or disclosure it relates to.

- Comprehensive
 - Consent may be undermined if its terms fail to describe all of the permitted collection, use, holding or disclosure. Examples may aid in true understanding, but may not be sufficient alone.
- Specific, as to purpose

Consent may be undermined if it is not of sufficient particularity to ensure the consumer understands the actual collection, use, holding or disclosures they have authorised. An example of non-specific consent is permission to use data for ‘research purposes’.
- Consent minimisation
 - Excessive consents may undermine the effectiveness of consent as a mechanism to exert genuine control over information. This may occur where a party seeks a broader consent (for collection, use, holding or disclosure) than that required for the use anticipated at the time of consent.
- Specific, as to relying party
 - Consent may be undermined if it is not of sufficient particularity as to the entities who will collect, use, hold or disclose the information. An example is where permission is given for ‘any subsequent data recipient to whom the data is transferred.’
- Granularity
 - A failure for consents to be for distinctly different data sets and purposes may undermine the quality of consent as it restricts choice in accepting some matters and rejecting others.
 - A lack of granularity in relation to the request for access that can be made, in addition to undermining consent, may also increase other privacy risks.
 - Where data is provided in pre-determined chunks in excess of what is strictly required for intended uses, this may give rise to transfer, holding and use risks that would not otherwise occur.
- Manipulative

- Where processes for obtaining consent are manipulative, this may impact on the quality of consent.
- ‘Fully informed’ consent may still be undermined if the information provided is not balanced and dispassionate. Processes (such as use of pre-filled boxes, more onerous steps to reject settings, etc) may also result in lower quality consent.
- Consents may be affected by behavioural obstacles in the consent process to effective assessment and decision making. This may be intentional or unintentional on the part of the person seeking consent. These risks may be mitigated by improved analysis, presentation of options and a positive focus on convenience in processes.

Examples of behavioural obstacles		
Information overload	Status quo bias	Choice overload
Mental accounting	Reference dependency	Relativity bias
Hyperbolic discounting	Salience	Decoy effects

- Diminished capacity to consent
 - The quality or validity of consent may be diminished because of the level of capacity of individuals.
 - Capacity to consent means that the individual is capable of understanding the nature of a consent decision, including the effect of giving or withholding consent, forming a view based on reasoned judgement and how to communicate a consent decision.
- Issues that could affect an individual's capacity to consent include:
- : age;
 - : physical or mental disability;
 - : temporary incapacity, for example during a psychotic episode or a temporary psychiatric illness.
 - Where the individual is a minor, they may also make authorisation decisions that have not been fully informed or genuine. When this is the case will depend upon the circumstances.

- The Privacy Act does not specify an age after which individuals can make their own privacy decisions. An APP entity will need to determine on a case-by-case basis whether an individual under the age of 18 has the capacity to consent. The GDPR provides that people younger than 16 years of age cannot consent without a guardian's involvement, although individual member states may provide for younger age limits provided they are no lower than 13 years of age.
- Capability impediments
 - While a person may have the mental or physical capacity to meaningfully consent, they may nonetheless suffer from other impediments that mean that they are not capable of doing so.
 - They may be impeded in their communications or understanding by language, literacy, education, cultural, linguistic or other barriers.
 - Consent processes must meet the needs of the broad range of persons who may utilise them. Their development must therefore draw upon a diversity of views and expertise.
 - A key barrier to meaningful consent is the potential for a lack of consumer understanding of their rights and the protections afforded by the CDR system and general privacy laws.
 - The CDR education programs that will be undertaken by the ACCC and the OAIC will help to ensure consumers understand the CDR system. They should be designed with a broad range of consumers in mind. The ongoing design of CDR consent processes will be informed by consumer testing.
- Engagement
 - Even where stakeholders have the ability and knowledge to properly engage in consent processes, there is a significant risk to genuine consent posed by disengagement by consumers with consent processes.
 - Individuals' stated privacy preferences may depart from the preferences they reveal by their conduct in consenting to data collection, use, holding and disclosure.

- Positive friction
 - While negative friction in consent processes can be used to manipulate the outcome of consent processes, a lack of ‘positive friction’ in decision making regarding consents (when those decisions become too convenient or automated) may also negatively affect the quality of consents.
- Silent parties
 - An individual may be a silent party to a data transfer where their data can be revealed in information of another individual who has provided consent. For example, where Amanda has transferred money to Naomi, Amanda’s details will appear in Naomi’s transaction data.
 - Silent parties may be excluded from consent processes. Depending upon the circumstances this may or may not be appropriate.

Specific Risks: Cyber Attacks, Identity theft

The introduction of the CDR may contribute to increased risks when communicating and holding information. In particular, it may result in increased frequency, likelihood and severity of hacking activities.

Although these activities occur frequently with current data sharing models, the CDR may create additional risks due to the following factors:

- an increase in the velocity and immediacy of the data transfer;
- an increase in the number of persons holding (or having access to) information;
- the possible development of richer targets for hackers (‘honeypots’); and
 - Honeypots may be particularly prevalent in cases where intermediaries or aggregators collate and store consumer data from a range of data holders.
- vulnerabilities in communicating with back-end systems existing within APIs that could be more easily exploited.

Hacking activities may have a number of significant consequences, such as direct theft of funds or identity theft.

In particular, identity theft may have significant negative consequences to an individual, for example:

- the consumer may have ongoing problems in dealing with services that require identification;
- unauthorised access to sensitive personal information;
- the consumer may be unable to gain credit because of credit ratings information related to the misuse of their identity; or
- the consumer may have to spend significant time and money changing their identifying information.

Aggregation and enhanced insights

Where multiple data sets are aggregated they may pose greater privacy risks than the mere sum of their individual privacy risks.

Data analysis of aggregated data sets can give rise to greater or different outcomes to the individual – both negative and positive.

For example, banking data sets may, combined with telecommunications data, may give rise to far more detailed insights regarding the private behaviours of an individual. The individual may choose to enable the creation of these insights and benefit from them – for example, insights into their spending behaviour. However, these insights may also be subject to misuse – for example, unauthorised insights into political preferences.

Banking data

The first sector to which the Consumer Data Right will be applied is the banking sector.

Banking data is a high risk data set.

The financial information contained in banking data can pose financial risks to an individual – such as the loss of funds through fraud. However, banking data contains far more information than ‘mere’ financial information.

Banking transaction data contains behavioural information.

It contains information as to where a person has been, what their preferences are, what actions they have taken, their relationships, and what their interactions have been with others.

Many very personal activities involve financial transactions – such as in relation to health care.

Political, religious, and philosophical associations or beliefs may be evidenced by financial records. A person's sexuality or sexual activity may be disclosed. Financial records may reveal insights into a person's professional, trade or trade union associations. They may reveal criminal or other improper activities.

Many financial transactions relate to a person's immediate or extended family, including children. Likewise they may relate to the location or other characteristics of a person's home or the homes of loved ones. Such information may pose great risks in a domestic violence context.

Financial status may be closely linked to people's feelings about their status in the broader community. Its misuse or unauthorised disclosure may therefore cause acute emotional or social harm.

Risk Mitigation

The CDR framework and existing legal protections provide a number of risk mitigation techniques to manage the authorisation, communication and usage risks identified above.⁴² These protections in the CDR, including those in the Privacy Safeguards (outlined in the section entitled 'Regulatory framework governing the CDR'), are intended to provide a stronger level of privacy protection than the APPs and the Privacy Act.

⁴² See Appendix B for diagrams that illustrate the different privacy protections that apply at each stage of the CDR.

CDR specific

- 1. Privacy Safeguards: The Bill will create a minimum set of Privacy Safeguards for the CDR that may be supplemented by additional protections in the Consumer Data Rules.**

CDR participants are all required to comply with the Privacy Safeguards which are ‘hardwired’ in the primary legislation and set out the minimum privacy requirements. While Privacy Safeguards bear similarities to the APPs, they reflect the more onerous privacy protections required by the CDR framework. The ACCC can use its rulemaking powers to further strengthen privacy protections. The Privacy Safeguards contain requirements that will assist in mitigating usage risks.

- 2. Information security standards: Data security and transfer standards will be developed by the Data Standards Chair, setting out minimum requirements that must be met.**

The Data Standards Chair will set out data security and transfer Standards containing the minimum information security requirements that CDR participants must meet. These Standards are intended to reduce the risk of unauthorised access to CDR data so that the privacy of individuals will be further protected. These Standards may be supported by additional requirements in the Rules.

The regime will require all communications to be encrypted, greatly minimising communication risks.

- 3. Express consent: Consents to collect, disclose, hold or use data will need to be genuine.**

It is proposed that the Rules will set out requirements to ensure consent is express, informed, current, clear, specific, unbundled, and time limited. It is also proposed that the rules will ensure that consent is given by the relevant person, with the appropriate capacity, thereby helping to mitigate authorisation risks.

- 4. Data is transferred to trusted recipients: The CDR will only require data relating to identifiable individuals to be transferred to accredited data recipients. Accreditation is expected be tiered according to the risk level of the data in question.**

The ACCC will be responsible for the accreditation of data recipients and will set out accreditation requirements in the Rules. It is expected that accreditation will be limited to entities who meet minimum requirements specified in the Rules (for example security, privacy and internal dispute resolution process requirements). It is also expected that the Rules will provide for accreditation to be graduated – that is, data recipients who seek to have access to high risk data will be required to have a higher level of accreditation and more stringent protections in place. Accreditation tiers aim to ensure that only those data recipients with the capability of protecting high risk data are able to access it, and to mitigate communication risks. The ACCC will be empowered to suspend, revoke, downgrade or impose conditions on accreditations.

Further, generally, small to medium sized enterprises (SMEs) are not currently bound by the Privacy Act. However, this exception will not be available to enterprises that obtain accreditation under the CDR. This means that non-CDR personal information held by these accredited data recipients will be subject to the Privacy Act.

However, the regime does not create a closed system – the rules may permit consumers to direct that data be transferred out of the system (subject to further authorisations and restrictions).

5. Remedies: It is intended that individuals will have access to external dispute resolution arrangements, leveraging existing sector specific schemes. The OAIC will also be empowered to provide remedies to individuals.

The ACCC will be empowered to recognise existing external dispute resolution schemes in the relevant sector. External dispute resolution provides a low-cost alternative to the court system, and will be accessible by both individuals and small business consumers.

Additionally, individuals and small business consumers will be able to seek individual remedies from the OAIC.

6. A privacy specific regulator: The OAIC will provide advice and expertise on privacy protection, as well as complaint handling and enforcement for privacy protections. The ACCC will have a complementary strategic enforcement role.

The OAIC will be primarily responsible for enforcing the Privacy Safeguards. It will be able to provide individual remedies to complainants. The OAIC will also advise the ACCC on privacy impacts when the ACCC is conducting sectoral assessments. The ACCC will focus on consumer and competition outcomes and on enforcing the balance of the regime.

The dual regulator model ensures that all aspects of the CDR will be effectively enforced by regulators with the necessary expertise, and that there is a regulator with a key privacy focus in the system.

7. Penalties: Breaches of the Safeguards and Rules carry high penalties that will act as an effective deterrent against misconduct or carelessness.

Breaches of specific Rules and any Privacy Safeguard can attract civil penalties up to, for individuals, \$500,000 or, for corporations: \$10,000,000; three times the total value of the benefits that have been obtained; or 10% of the annual turnover of the entity committing the breach. These penalties align with the competition law and Australian Consumer Law penalty amounts. These significant penalties are intended to discourage participants from intentionally disregarding the Rules and safeguards.

8. Broad regulators' powers: The Bill will provide regulators with extensive investigation and enforcement powers.

Regulators will be provided with extensive tools to assist in investigation and enforcement of the CDR:

- Criminal penalties
- Civil penalties
- Compensation orders
- Infringement notices
- Injunctive orders
- Disqualification of directors orders
- Adverse publicity orders
- Enforceable undertakings
- Investigation and auditing powers

- Sectoral assessment/general inquiry powers
- Information sharing

9. Direct rights of action: The Bill provides a right of action for breaches of the CDR. This can form the basis of class actions.

Currently, the Privacy Act does not give rise to a right of action directly to the courts by an aggrieved party.⁴³ For breaches of the CDR, the Bill will create a direct right of action. This right will enable individuals to seek court remedies against a CDR participant who breaches the CDR, including the Privacy Safeguards.

Where multiple parties are affected, the direct right of action can form the basis of a class action. This right will exist alongside external dispute resolution mechanisms and the ability for the regulators to seek remedies.

10. Targeted application: The CDR is only applied to data sets after consideration of privacy impacts has taken place.

A sectoral assessment by the ACCC, in conjunction with the OAIC, will be required before data sets and data holders become subject to the CDR. The Treasurer must consider the privacy and confidentiality impacts before a sector is designated. Further, the legislation will empower the Treasurer to make regulations to accompany a designation. This power can be used to ensure that the Rules contain certain requirements, including in relation to privacy. The targeted application of the CDR will assist in ensuring that privacy impacts are at the forefront when a sector is designated.

11. Rights to withdraw consent or delete: Individuals will be entitled to withdraw their consent to a data holder providing access to a data recipient. The CDR framework will also require data to be deleted upon any use permissions becoming spent.

Individuals will have rights to withdraw their consent to the use, disclosure and collection of their data.

⁴³ The Privacy Act does not include a direct right of action from damages through the courts, however, allows an individual to seek injunctive relief (s98).

The requirement to destroy or de-identify data once permission has lapsed aims to prevent data recipients holding data indefinitely, particularly without the individual's knowledge.

The Rules will specify the circumstances in which this may occur at the election of the consumer or of the data recipient.

12. Holding out offence: The Bill will make it an offence for a person to falsely hold out that they have accreditation, or have accreditation at a particular level. There will be criminal and civil penalties attached.

The Bill will make it an offence for data recipients to falsely present themselves as accredited or accredited at a particular level.

13. Misleading or deceptive conduct offence: The Bill will include an offence of misleading or deceptive conduct. There is a corresponding civil penalty provision.

The Bill will create an offence and related civil penalty provisions to prohibit engaging in misleading or deceptive conduct in relation to the CDR system. This will act as a deterrent for entities that may seek to mislead individuals into compromising their data, and privacy. These provisions primarily target two classes of activities:

1. Impersonating a consumer in an attempt to access data under the system.
2. Misleading a consumer into thinking that they are authorising data transfers under the CDR (or that transfers are occurring pursuant to the CDR data protections) when they are not.

14. Accreditation Register: All accredited entities will be listed on a publicly available register. CDR participants will be required to confirm that entities are listed on the Register before transferring CDR data to them.

The Accreditation Register will be a publicly available resource that both CDR participants and individuals will be able to access. The Register will list all accredited entities, and the level to which they are accredited. CDR participants will be required to confirm that entities are accredited and listed on the register before transferring data. Individuals will therefore be assured of the trustworthiness of entities before their data is transferred.

The register will, through the use of digital certificates, guard against the risk that a person may seek to impersonate a participant.

15. Scope: The CDR framework can potentially apply to a broader range of data than the Privacy Act does, that is, data that relates to either a natural or legal person. SMEs are not exempted from the Privacy Safeguards.

The Privacy Act applies to data that is *about* an identified or reasonably identifiable person.

In contrast, the Privacy Safeguards can apply to specified types of data that *relates to* an identifiable or reasonably identifiable natural or legal person. However, they will only apply to data sets specified as being subject to the CDR.

Any privacy related Rules can also apply to all CDR data in the system.

The CDR framework will bind all data holders, accredited data recipients and gateways. This means that SMEs will not be exempt from privacy protection obligations. In contrast, the Privacy Act contains an exemption for SMEs.

16. Use restrictions.

The Privacy Safeguards restrict the use of CDR data for direct marketing unless positively permitted by the rules. This restriction on direct marketing will help ensure that subsequent use of data will not occur without the customer's consent, and address usage risks.

It is also proposed that the Rules will create restrictions on the on-selling of data.

Further, as outlined above there will be a sub-class of intermediary called a designated gateway. Designated gateways will only be able to collect, use and disclose information as specifically provided for in the rules.

Additionally, the CDR system will not authorise credit reporting agencies to undertake actions that they are otherwise prohibited from doing under the law (e.g. under Part IIIA of the Privacy Act).

17. General practices: there will be record keeping, audit trails and notification requirements that are intended to ensure CDR participants comply with best practice.

The Privacy Safeguards require CDR entities to keep and publish privacy policies about CDR data. The ACCC can make rules on record keeping – this could include a power for CDR consumers to request reports from a data holder or recipient on their valid requests and any disclosures made in response. There may also be requirements to report to the ACCC and OAIC. The CDR Framework extends the Privacy Act notification schemes to capture CDR data recipients.

This record-keeping and reporting power also allows the ACCC to use new Reg-Tech based approaches to enforcement. An example of this is that the ACCC could require post-purchase/post-initiation consent testing to find out what consumers believe that they have consented to and whether this aligns with the consents as formulated by the data recipient.

18. Education: the ACCC and OAIC have received funding for ongoing education of individuals. Data61 has been provided with funding for the education of data holders and recipients.

The ACCC and OAIC will provide education to individuals in regards to the CDR and their rights and protections under the regime. The OAIC will also be empowered to issue guidance on the Privacy Safeguards. Data61 will have responsibility for educating CDR participants in relation to compliance with technical standards for privacy, confidentiality and information security. Education will help to ensure that individuals understand the CDR and are able to use it safely and securely.

Behavioural research

This PIA recommends that the ACCC, the OAIC and the Data Standards Body should continue to incorporate behavioural research in the design of the CDR system to ensure that the system works effectively and takes into account *actual* consumer preferences and behaviours regarding the exercise of their privacy rights (recommendation 1). As independent agencies, these bodies have discretion as to what research they undertake and the methods used.

The interim data standards body, Data61, has commissioned consumer research focusing on consumer understanding of consent processes to inform its guidelines about a standard experience for consumers to consent to the sharing and monitoring of their data. The

research will be undertaken by Tobias and CHOICE. The test group of consumers will incorporate different consumer typologies (such as early and late adopters of technology and technophobes). The study will recruit a diverse range of participants to account for diverse needs, scenarios and expectations. There will be a 50% weighting towards participants considered to be vulnerable or otherwise underrepresented. The recruitment process will include the following characteristics:

- English, financial and digital literacy;
- cultural and linguistic diversity;
- different life stages;
- income;
- consumers with disabilities;
- gender;
- both consumers and small to medium sized enterprises; and
- a mix of metro, regional and remote consumers.

All participants must be financial decision-makers and able to provide consent for themselves.

Initial research will be undertaken in three stages. There will be at least 20 participants in the first stage, a further 50 in the second stage, and a further 20 in the third stage. Participants will be recruited by CHOICE. It is expected that further research will be undertaken throughout the implementation of the CDR.

Existing Mitigants

19. Privacy Act: The Privacy Act and APPs will continue to operate alongside the CDR.

The Privacy Act and APPs will provide protection where data falls outside the ambit of the CDR. Individuals will be able to access the OAIC's complaints handling process, and the OAIC will retain its investigation capabilities.

20. Commonwealth Criminal Code: The Code includes offences prohibiting unauthorised access, modification, or impairment of data where there is an intent to commit a serious offence.

Individuals will continue to have access to remedies outside of the CDR framework where their privacy has been breached, or data misused. The Commonwealth Criminal Code currently has offences against unauthorised access to, modification or impairment of data held in a computer, with intent to commit a serious offence against a Commonwealth, State or Territory law. Additionally, there is an offence of dishonestly obtaining or dealing in certain personal financial information. These offences may deter unauthorised access by internal parties (for example, an employee of a data recipient), and provide individuals with remedies.

21. State criminal laws: All States have criminal laws against accessing restricted data.

These offences may deter unauthorised access by internal parties.

Individuals will also continue to have access to State remedies outside of the CDR framework where their privacy has been breached, or data misused. Each State currently has offences of unauthorised access, modification or impairment of data. These offences may deter unauthorised access by internal parties (for example, an employee of a data recipient), and provide individuals with remedies.

22. Breach of Confidentiality: Banks have additional duties of confidentiality. This is a potential cause of action for individuals to pursue.

Where a bank has inappropriately disclosed an individual's data, they may have breached their duty of confidentiality. Individuals may be able to seek remedy through civil courts through this cause of action.

23. Tort of Negligence: The common law tort of negligence and the Civil Liabilities Acts across all States provide a cause of action for individuals to seek remedy.

The tort of negligence is an existing cause of action that may be applicable when a CDR participant has negligently dealt with data. Where an individual can show that they are owed a duty of care by the data holder or data recipient, and this duty has been negligently breached, they may be able to seek compensation.

24. Australian Consumer Law: Part 2.1 Misleading or Deceptive Conduct will allow individuals to bring an action against data recipients where they engage in misleading or deceptive conduct.

The Australian Consumer Law has an existing provision similar to the misleading or deceptive conduct offence that will be created by the Bill. It prohibits businesses from engaging, in trade or commerce, in conduct that misleads or deceives or is likely to mislead or deceive consumers or other businesses, even if the business did not intend to mislead or deceive or no one suffered any loss or damage as a result of the conduct. The prohibition is not limited to the supply of goods or services. Prohibited conduct may include failing to disclose relevant information, and making statements, promises, opinions and predictions. This remedy is available for data both within and outside the CDR framework. State and territory fair trading laws extend this prohibition to individuals.

Risks associated with the risk mitigants

Some stakeholders have raised concerns that the use of the Privacy Safeguards in some circumstances and the Privacy Act protections in other circumstances will make the CDR system too complex for consumers to navigate and therefore make it difficult for them to enforce their rights.

However, the CDR system is designed to be consumer-friendly. The Privacy Safeguards are principally consent-driven in relation to authorisations for collection, use and disclosure of data. Clear consent requirements will make it easier for consumers to identify where the Safeguards have not been complied with, and therefore to enforce their rights.

A separate privacy regime is justified because of the need for higher privacy protections than those established by the APPs. These protections mitigate risks associated with more convenient and higher velocity transfers of valuable machine readable data; and to instil justified high levels of consumer confidence in the use of the system.

To address these concerns about complexity, the Bill was amended following the first round of consultation to ensure that most of the Privacy Safeguards will not apply to data holders, and only the Privacy Safeguards will apply to data recipients in respect of CDR data that they have received.

Concerns were also raised by some stakeholders following the first round of consultation on the Bill that the varied roles of the ACCC, OAIC, and the Data Standards Body created a risk

of coordination failure, lacked a single role with responsibility for oversight of the CDR system as a whole, and lacked reporting mechanisms.

The different roles were proposed and retained because they allow the CDR system to incorporate important differences in expertise, experience, and values; create a framework of contestability and independence in advice to the Minister; for differing styles of industry and consumer engagement; and incorporate differing enforcement roles and styles.⁴⁴

Clear reporting lines are provided through *Public Governance, Performance and Accountability Act 2013* (Cth) frameworks. The frameworks include requirements that entities include their performance of CDR functions in their annual reports. Nevertheless, this creates the risk that the functioning of the CDR system will only be reported on in a fractured manner. When compiling reports, relevant agencies should have regard to ensuring that a holistic picture of the CDR is publicly available, and it may be desirable for the ACCC to compile the separate reporting into a single report once all agencies have published their annual reports.

The Bill also requires that an independent review of the CDR be conducted by 1 January 2022.

In respect of oversight, the Minister ultimately has oversight of all CDR functions and is responsible to Parliament for the appropriate performance of this role. The Bill requires all decisions to be subject to Ministerial consent.

Administrative arrangements allow for additional oversight and co-ordination mechanisms. As is the norm, the Minister will be advised by Treasury in these decisions, and where decisions impact on areas of responsibility of other Ministers, the Minister would be expected to consult with those Ministers and their relevant agencies. The OAIC and ACCC have prepared Memoranda of Understanding regarding their relevant enforcement and educational roles in the CDR, while the Minister will set out their expectations of these processes in an expectations letter.

⁴⁴ See pages 16 to 31 of the OBR for a more detailed discussion of the differing and complementary strengths and styles of these regulators.

Practically, it is expected that the close engagement that currently occurs between Treasury, the Attorney-General's Department, the ACCC, the OAIC and the Data Standards Body will continue into the future, with officer level conversations occurring frequently.

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Risk Mitigation Strategies

Table 7: Risk Mitigation Strategies Table – Simple CDR Model

Table 7 lists CDR and other risk mitigation strategies (as set out above) that are applicable to each risk. Risk mitigation strategies have been listed in order of relevance to the specified privacy risk. The table also includes a revised, post-mitigant risk likelihood following from the pre-mitigation risk identified in Table 5.

Please note that not all mitigants listed apply in every situation that could result in the risk.

Stage	#	Potential Privacy Risk	Risk Mitigation Strategies	Risk likelihood following application of mitigation strategies
Stage 1: Individual engages with data recipient	1.1	A third party may pose as the accredited data recipient in order to acquire the individual's authentication information.	Primary: Misleading or deceptive conduct offence, holding out offence, Education Other: 19, 15, 6, 8, 4, 14, 9, 20, 21, 24, 7	Unlikely
	1.2	The individual may use a false identity to acquire authentication information from the accredited data recipient	Primary: Misleading or deceptive conduct offence, Education Other: 19, 15, 6, 8, 4, 14, 9, 20, 21, 24, 7	Unlikely

Stage	#	Potential Privacy Risk	Risk Mitigation Strategies	Risk likelihood following application of mitigation strategies
Stage 2: Individual authorises use and collection of data	1.3	The individual may engage an accredited data recipient who instead seeks data outside the CDR system.	Primary: Misleading or deceptive conduct offence, Holding out offence, Education, Accreditation requirements Other: 19, 5, 6, 7, 8, 9, 10, 24	Unlikely
	2.1	The individual may authorise the accredited data recipient to use or collect their data in a way that they did not genuinely intend.	Primary: Consent requirements based on user testing, restrictions on direct marketing Other: 4, 17, 11, 5, 9, 7, 18	Unlikely
	2.2	The individual may inadvertently authorise a level of access or use of their data beyond what is required for the services they are seeking.	Primary: Consent requirements based on user testing, Rules, Standards Other: 10, 15, 16, 17, 11, 5, 8, 9, 7, 18	Unlikely

Stage	#	Potential Privacy Risk	Risk Mitigation Strategies	Risk likelihood following application of mitigation strategies
	2.3	The information that the individual discloses in the course of seeking services may be used or disclosed by the accredited data recipient without authorisation.	Primary: Rules, Privacy Act, Other: 11, 4, 5, 9, 7, 8	Unlikely
	2.4	The accredited data recipient may use the individual's data in an unauthorised manner. ⁴⁵	Primary: Privacy Safeguards Other: 4, 3, 17, 6, 8, 3, 11, 5, 9, 7, 18	Unlikely
	2.5	The accredited data recipient may limit the individual's free choice by including contract terms that require access to the individual's data in exchange for a service.	Primary: Privacy Safeguards, genuine consent requirements, Rules, use restrictions Other: 11, 4, 5, 6, 7, 8, 9, 18, 13	Possible
	2.6	A non-accredited data recipient may request that the consumer access and download their own CDR data in exchange for a service.	Primary: Rules, Privacy Act, education	Possible

⁴⁵ See 'Misuse of individual data' section.

Stage	#	Potential Privacy Risk	Risk Mitigation Strategies	Risk likelihood following application of mitigation strategies
Stage 3: Individual consents to data disclosure	3.1	The accredited data recipient may direct the individual to a fake website posing as the data holder's website.	Primary: Misleading or deceptive conduct, Privacy safeguards Other: 4, 19, 15, 17, 5, 6, 7, 8, 9, 3, 20, 21, 22, 24, 18	Unlikely
	3.2	A third person may pose as the accredited data recipient to gain access to the individual's consent information from the individual	Primary: Commonwealth Criminal Code, State criminal laws, Holding out offence, Misleading or deceptive conduct Other: 19, 18, 4, 5, 6, 7, 8, 9	Unlikely
	3.3	A third person may intercept an individual's authorisation as it is sent to the data holder.	Primary: Commonwealth Criminal Code, State criminal laws, Privacy Safeguards, Standards Other: 19, 4, 5, 6, 7, 8, 9	Rare
	3.4	The individual may unintentionally authorise the disclosure of the wrong data to the accredited data recipient.	Primary: Regulators' powers, genuine consent requirements Other: 10, 11, 5, 6, 7, 8, 9, 18	Unlikely

Stage	#	Potential Privacy Risk	Risk Mitigation Strategies	Risk likelihood following application of mitigation strategies
	3.5	The individual may accidentally authorise a level of access to their data beyond what is necessary or required for the services they are seeking.	Primary: Rules, Other: 11, 18, 17	Unlikely
	3.6	The individual may unintentionally authorise the disclosure of the right data to the wrong accredited data recipient	Primary: Standards, Privacy Safeguards Other: 11, 14, 15, 17, 18	Rare
	3.7	The individual's authorisation to disclose data may not be received by the data holder.	Primary: Standards Other: 5, 9, 17, 18	Unlikely
	3.8	A third person may pose as the individual and authorise disclosure of data.	Primary: Misleading or deceptive conduct, Privacy Safeguards, Rules, Commonwealth Criminal Code, State criminal laws Other: 19, 4, 5, 6, 7, 8, 9, 17,	Unlikely
	3.9	The data holder may improperly use or disclose the authorisation itself.	Primary: Rules, Privacy Safeguards Other: 19, 10, 15, 16, 17, 5, 6, 7, 8, 9, 3, 11,	Unlikely

Stage	#	Potential Privacy Risk	Risk Mitigation Strategies	Risk likelihood following application of mitigation strategies
Stage 4: Data holder discloses data to data recipient	3.10	The data holder may seek alternative or additional information from the individual during the disclosure that is not required for the primary purpose of data transfer.	Primary: Privacy Safeguards, genuine consent requirements, Rules Other: 19, 10, 15, 16, 17, 5, 6, 7, 8, 9, 13, 24.	Unlikely
	3.11	The data holder may obstruct or dissuade the individual from transferring their data to the accredited data recipient.	Primary: Privacy Safeguards, Rules, Standards Other: 19, 5, 6, 7, 8, 9, 4, 18	Unlikely
	4.1	The data holder may accidentally send the wrong individual's data to the accredited data recipient.	Primary: Privacy Safeguards, Standards, Tort of Negligence Other: 5, 6, 7, 8, 9, 4, 17, 22	Rare
	4.2	The data holder may accidentally send the individual's data to the wrong accredited data recipient.	Primary: Privacy Safeguards, Standards, Tort of Negligence Other: 5, 6, 7, 8, 9, 4, 17, 22	Rare
	4.3	The data holder may accidentally send the wrong individual's data to the wrong accredited data recipient.	Primary: Privacy Safeguards, Standards, Tort of Negligence	Rare

Stage	#	Potential Privacy Risk	Risk Mitigation Strategies	Risk likelihood following application of mitigation strategies
			Other: 5, 6, 7, 8, 9, 4, 17, 22	
	4.4	The data holder may intentionally or unintentionally fail to send any, or complete data to the accredited data recipient.	Primary: Privacy Safeguards, Rules, Tort of Negligence Other: 5, 6, 7, 8, 9, 4, 17, 22	Unlikely
	4.5	The data holder may intentionally or unintentionally send inaccurate data.	Primary: Privacy Safeguards, Misleading or deceptive conduct Other: 5, 6, 7, 8, 9, 4, 17, 18, 22, 23	Unlikely
	4.6	The data holder may intentionally or unintentionally fail to send the data in a timely manner.	Primary: Privacy Safeguards, Rules, Standards Other: 5, 6, 7, 8, 9, 4, 17, 18, 23	Unlikely
	4.7	The data holder may send the data to the accredited data recipient in a format that frustrates its efficient and timely use.	Primary: Privacy Safeguards, Rules, Standards Other: 5, 6, 7, 8, 9, 4, 17, 18, 23	Rare

Stage	#	Potential Privacy Risk	Risk Mitigation Strategies	Risk likelihood following application of mitigation strategies
	4.8	The data holder may intentionally or unintentionally send accurate but misleading data.	Primary: Privacy Safeguards, Rules, Penalties Other: 5, 6, 7, 8, 9, 4, 17, 18, 2313, 24	Unlikely
	4.9	A third party may intercept or interfere with the data during transfer between the data holder and the accredited data recipient. ⁴⁶	Primary: Privacy Safeguards, Standards, Commonwealth Criminal Code, State criminal laws Other: 19, 4, 5, 6, 7, 8, 9, 17, 18, 20, 21, 22, 23	Rare
	4.10	A third person may pose as the accredited data recipient to gain access to the individual's raw transaction data from the data holder.	Primary: Privacy Safeguards, Standards, Commonwealth Criminal Code, State criminal laws Other: 19, 4, 5, 6, 7, 8, 9, 11, 14,	Rare

⁴⁶ The CDR involves an increase in the velocity and immediacy of data transfer, and the development of richer targets for hackers known as honeypots (particularly aggregators that collate and store significant amounts of customer data). Combined, these factors may contribute to increased frequency, likelihood and severity of hacking activities and cyber-attacks.

Stage	#	Potential Privacy Risk	Risk Mitigation Strategies	Risk likelihood following application of mitigation strategies
Stage 5: Data received by data recipient			17, 18, 20, 21, 22, 23	
	5.1	The accredited data recipient, their employee or contractor may access or use the individual's data without authorisation.	Primary: Privacy Safeguards, Standards Other: 4, 5, 6, 7, 8, 9, 11, 17, 18, 20, 21, 22, 23, 24	Unlikely
	5.2	The accredited data recipient may misuse the information provided by the individual in a way technically consistent with their authorisation.	Primary: Use restrictions, Privacy Safeguards, genuine consent requirements Other: 4, 5, 6, 7, 8, 9, 11, 13, 17, 18, 20, 21, 22, 23, 24	Unlikely
	5.3	The accredited data recipient, their employee or contractor may disclose the individual's data without authorisation.	Primary: Privacy Safeguards, Standards, genuine consent requirements Other: 4, 5, 6, 7, 8, 9, 11, 13, 17, 18, 20, 21, 22, 2324	Unlikely

Stage	#	Potential Privacy Risk	Risk Mitigation Strategies	Risk likelihood following application of mitigation strategies
Stage 6: Deletion or de-identifica- tion	5.4	A third party may access the accredited data recipient's systems and acquire or use an individual's data without authorisation.	Primary: Privacy Safeguards, Standards Other: 19, 4, 5, 6, 7, 8, 9, 11, 17, 18, 20, 21, 22, 23, 24	Unlikely
	5.5	The individual may experience increased threats to privacy due to improved insights about the individual enabled by analytics and better access to aggregated datasets.	Primary: Privacy Safeguards, education Other: 10, 11, 16, 18, 19	Unlikely
	6.1	The accredited data recipient may intentionally or unintentionally fail to delete data when required.	Primary: Right to withdraw consent or delete, Privacy Safeguards, Rules, Standards Other: 4, 5, 6, 7, 8, 9, 16, 17, 23	Unlikely
	6.2	The accredited data recipient may publicly release personal information that has not been properly de-identified, carrying a risk of future re-identification and hence privacy risks.	Primary: Privacy Safeguards Other: 4, 5, 6, 7, 8, 9, 16, 17, 23	Unlikely

Stage	#	Potential Privacy Risk	Risk Mitigation Strategies	Risk likelihood following application of mitigation strategies
	6.3	The holding of data does not cease even though the accredited data recipient is no longer accredited.	Primary: Right to withdraw consent or delete, Privacy Safeguards Other: 4, 5, 6, 7, 8, 9, 16, 17, 23	Unlikely

Additional Consumer Data Right scenarios

Table 8: Risk Mitigation Strategies - Additional CDR Scenarios

Scenario	Risk Mitigation Strategies	Risk likelihood following application of mitigation strategies
Joint Accounts	Privacy Safeguards 5 and 10 allow the Rules to provide requirements for joint account holders to both be notified of the collection and disclosure of CDR data. The rules can also include requirements for both parties to provide consent, or for either party to withdraw consent. No mitigation strategy will perfectly mitigate both risks that exist for joint accounts. A trade off exists between these scenarios.	Likely

Silent Parties	Rules may provide requirements for consents by silent parties, balancing the competing data rights of the parties, and may provide rules restriction certain uses of data (e.g. profiling of silent parties).	Possible
Intermediaries	In relation to receiving, holding and using data, the mitigants that apply to risks associated with the use of an intermediary mirror the mitigants that apply to risks when a data recipient receives, holds or uses data.	Unlikely
	The mitigants that apply in relation to an intermediary disclosing data are the same as those for a data holder.	Unlikely
	Designated Gateways will be subject to strong constraints regarding their collection, holding, use and disclosure of data.	Unlikely
Outsourcing to a third party	Both the data holder and data recipients can outsource functions to a third party. The same mitigants apply as those that apply to risks that are created by activities undertaken by the data holder or recipients.	Unlikely
Pooling of data and activities	The use of intermediaries and outsourcing to third parties increases the risk of ‘honeypots’ and single points of failure. The Privacy Safeguards and Standards are key mitigants in relation to these risks.	Unlikely

Non-Accredited Entities

The CDR rules cannot require data holders or accredited data recipients to transfer CDR data to non-accredited recipients. In the absence of a rule authorising transfer by an accredited data recipient to a non-accredited person, the default under Privacy Safeguard 6 is therefore that transfer to non-accredited recipients is not authorised. However, the ACCC can permit (but not require) transfer to non-accredited recipients, via the Rules. The reasons for this are discussed in the ‘Mitigants that were not adopted’ section below.

The range of mitigants that apply in relation to risks of CDR data being transferred to a non-accredited entity are the same as those that apply to risks associated with the process of transfer to accredited data recipients. As discussed further below, protections will continue to apply in the instances of overseas transfer (under Privacy Safeguard 8), or transfer to non-accredited recipients through outsourcing arrangements.

It is expected that the Rules will adopt more onerous requirements in relation to the transfer of CDR data from accredited recipients to non-accredited recipients. The Rules will limit the circumstances in which CDR data may be disclosed to non-accredited recipients and prescribe additional warnings when consumers are consenting to disclose to non-accredited recipients, and there will be branding of CDR transfers.

A data holder is prohibited from directly transferring CDR data relating to a person to a non-accredited entity. Additionally, it is expected that the Rules will not allow for direct

Minor reduction to risks arising once the data is outside of the CDR system.

However, significant mitigants applying to prevent inappropriate transfers out of the system.

API access to CDR data by consumers (though access in other formats will be permitted).

These mitigants represent a significant reduction in the risks of inappropriate transfers of data to non-accredited recipients.

However, no CDR mitigants apply once the CDR data has left the CDR system. In relation to *ongoing handling* of data by non-accredited entities, the CDR system does not apply.

Once this data is in the hands of non-accredited recipients, the only mitigants that will apply are the Privacy Act (except where the non-accredited recipient is exempt from the Privacy Act, such as an SME) and other relevant existing mitigants, as discussed under the 'Existing mitigants' section above.

While the system does not provide for risk mitigants once the data has been transferred outside of the system, the associated risks are somewhat reduced by the mitigants that apply at the time of transfer.

Data transferred overseas	Obstacles to enforcement of risk mitigants may increase the likelihood and severity of risks. The regime provides mechanisms to minimise this increase, such as a broad jurisdictional reach, additional accreditation requirements, potential loss of accreditation, more onerous transfer requirements, maintenance of liability by transferees and insurance requirements.	Increased likelihood and severity associated with each type of risk.
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Personal data held in foreign jurisdictions will be subject to foreign regulatory protections, some of which are more rigorous than domestic general privacy laws (e.g. the EU GDPR).

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Mitigants That Were Not Adopted

Stakeholders proposed a number of privacy mitigants that were either not adopted in the Consumer Data Right system, or that were partially adopted in a different form. Four key proposals and the reasons they were not adopted are discussed below. Of these proposals, two would require legislative reform if they were to be adopted in the future. The remaining two proposals are possible within the proposed legislative framework and can be adopted through the Rules should evidence suggest that this is the best course of action.

Mitigants that would require further legislative change

General Privacy Act reform

A number of stakeholders throughout the CDR reform process have advocated for overarching reform to the Privacy Act, to introduce protections similar to those provided by the GDPR.

While some stakeholders advocated for this position instead of the CDR reforms, others advocated for it in addition to the CDR reforms, and still others proposed that many aspects of GDPR should be substantially replicated within the CDR.

General Privacy Act reform was outside the scope of this project, which was focussed on data portability and provides rights to business customers as well as individuals. The CDR Bill is more targeted than the Privacy Act. It is intended to bring consistency to consumers' experiences of requesting to access and transfer specific data sets, so that they can more easily be made immediately available in a standardised form and therefore at a lower marginal cost.

As discussed above, the fact that CDR data will be more readily available, with data moving through the system with greater velocity and in a more useable format means that the risk profile of data transferred through the CDR is greater than that of much data shared under APP 12 of the Privacy Act currently. This, combined with the need for a high level of consumer confidence regarding the safety of the system, weighed in favour of privacy settings that are stronger than those which should apply generally to personal information throughout the economy.

In considering reforms to the Privacy Act, it is important to remember that the Privacy Act is intended to be of broad application and to cover all instances of collection and use of individuals' personal information (other than by SMEs, and in particular circumstances such as some political purposes). The Privacy Act therefore spans a range of actors, from retail shops, to large multi-national corporations, health providers and the Federal Government; and a range of circumstances, such as online and offline interactions. In contrast, the CDR provides for the narrower range of circumstances relating to the operation of electronic data portability, allowing for better and more targeted solutions. More specialised arrangements (such as allowing only express consent) with greater privacy benefits are not only practicable, but may be implemented without imposing unacceptable levels of regulatory burden or unduly adversely affecting competition, consumer outcomes or innovation.

The proposed CDR privacy arrangements can thus be considered analogous to the existing range of sector- or actor- specific legislation that imposes additional or higher level privacy protections in specific circumstances. For example, state based privacy laws, health records laws, and privacy codes such as the Credit Reporting Code.

Within the CDR system, a number of GDPR-style protections have been or are likely to be adopted. This includes the scope of data being that which *relates* to a person, as opposed to data that is *about* a person; adoption of much of the GDPR definition of consent, including that it be express; binding small-to-medium sized enterprises where they are accredited persons; a direct right of action for individuals; and increased penalties. See below for information on the extent of rights of deletion under the CDR.

It should be noted that elements of the CDR are more restrictive than GDPR. For example, it does not permit non-consent based collection, use and transfer on grounds such as it being within the 'legitimate interests' of the business.

Placing elements of protections in the CDR Bill as opposed to the Rules

Some stakeholders have argued that elements of the CDR system such as the definition of consent, bans on on-selling of data, timeliness for notifications of inaccuracies in data or correction of data, and what consumers need to be notified of under Privacy Safeguards 5 and 10, should be incorporated in the CDR Bill as opposed to the Rules. This concern is

based on the risk that the protections described in the ACCC's Rules Framework paper may be reduced over time.

The protections proposed in the Rules Framework paper are based on the risk levels for financial information, following a long period of consultation with the sector and consumer advocates regarding the appropriate privacy protections in this context. Though it is anticipated that consistent protections will be applied for all CDR sectors, flexibility is required in order to tailor how the system works in sectors with differing existing regulatory systems, data sharing arrangements and business models; to enable the system to evolve as technologies and data sharing approaches evolve; to meet the needs of different consumer types; and to address different risks arising in relation to different data sets.

Rulemaking is subject to ministerial consent and parliamentary disallowance, and mandatory consultation and assessment processes must be followed to ensure that the protections in the Rules remain appropriate.

Mitigants that have not been adopted, but are possible within the existing legislative framework

It is not currently proposed that the following mitigants be fully adopted. However, they are within the scope of the rule-making power, and as such could be adopted by the ACCC should robust evidence suggest there is a need for them in the future.

Banning other forms of sharing of CDR data

In the CDR legislative consultation process some stakeholders proposed that other forms of data sharing, such as screenscraping, should be banned.

There are a broad range of data sharing arrangements currently in place. The CDR regime cannot meet all of the different tailored requirements of these arrangements. Prohibiting them would have significant negative impacts on consumers and business. As the CDR develops it is expected that it will meet the needs of many of these arrangements. If the CDR is designed and implemented in a way that is efficient, convenient and that inspires confidence in consumers and businesses, it is expected that consumers and business will choose to use the 'safe pipe' that it represents.

Reasons for this proposal also include concerns that individuals may not understand that they are subject to different protections when sharing data through the CDR compared to

when doing so under the Privacy Act. Concerns were raised that this could result in negative outcomes outside of the CDR system undermining individuals' confidence in the CDR.

This is a risk that can be mitigated using methods other than banning other forms of data sharing. Consumer education and clear branding of CDR transfers should be sufficient to differentiate CDR disclosures from other forms of data sharing. Additional mitigants include the public register of accredited persons, customers being able to initiate transfers from the data holder end as well as the data recipient end of the transfer, and the CDR Bill including the offences of misleading or deceiving a CDR consumer and holding out as an accredited person.

Other stakeholder concerns related to privacy and security concerns with these other data sharing arrangements, other than concerns with the CDR per se. Addressing these concerns, if appropriate, is outside the scope of the design of a CDR.

Only authorising certain uses

Some stakeholders have proposed that the CDR should be limited to a range of Government-approved uses. It has been suggested that this should be achieved by creating a taxonomy of approved uses and limiting the use of data to those listed on this taxonomy.⁴⁷ Some have suggested that this list should only include uses supported by a majority of respondents to relevant consumer surveys. Proponents of this approach argue that it will ensure that data is used only in accordance with community expectations.

A proposal to ban uses only within the specific CDR context runs contrary to the principle of individuals having agency and control over their own data. Treasury has not identified a precedent for such an approach worldwide.

Where a use is not otherwise illegal, consumers should be free to choose their own uses and seek value from their data. Selection of uses at the individual allows choices to reflect individual consumer, risk and privacy preferences.

⁴⁷ This should be distinguished from proposals to develop a non-limiting taxonomy of proposed uses for use in approval processes. The purpose of such a taxonomy is to aid in consumer comprehension by creating a short-hand and shared understanding of common uses.

Many future uses of data available to consumers through the CDR have not yet been conceived, and may rely upon the creation of future technologies, or may become apparent as new sectors are added. Limiting use to use cases that exist at this moment in time would limit these future innovations that are likely to significantly enhance consumer welfare.

There may be circumstances in which it may nonetheless be appropriate for the Government to introduce a ban on certain data-driven products, services or practices. These circumstances might be for reasons of safety, anti-discrimination, or the high risk they pose to individuals.

It is likely more appropriate for any bans on using information to apply to all participants in an industry, regardless of the source of that information, rather than only where the data is sourced through the CDR.

For example, there are existing bans on how credit reporting information may be used, use of information for discriminatory purposes under Australia's anti-discrimination laws, and proposed bans under *the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018* that would apply to some Australian Financial Services licensees who may choose to be accredited.

Where such bans do exist, the CDR would not otherwise authorise these uses.

Possible Mitigants That Are Still Being Determined

The following mitigants are within the scope of the ACCC's rule-making power, but have not yet been conclusively determined whether or how they will be adopted.

A closed CDR system

Some stakeholders have argued that the CDR should be a closed system. There are two ways in which the CDR could be a closed system – some stakeholders have argued for both, while others have argued for one or the other. These are: by preventing disclosure to the consumer themselves; or by preventing disclosure by accredited data recipients to non-accredited third parties.

The following discussion considers the risks associated with an 'open' system, as well as the scenarios in which disclosure of CDR data to non-accredited recipients may be desirable.

The ACCC has proposed that when the system first becomes operational, it will be largely closed to third parties – that is, disclosure of CDR data outside the CDR system (other than to the consumer themselves or as part of outsourcing arrangements) will not generally be permitted. This is an interim position. The ACCC will give further consideration to opening up the system in due course.

Preventing the consumer from accessing their own data

Some stakeholders have raised concerns that if consumers have the right to access their own data, with the data provided in a useable form, unscrupulous actors will use the consumer to bypass the accreditation requirement.

It has been suggested that this skirting of the CDR framework could be achieved, for example, by the third party not receiving the data themselves but instead providing the consumer with the software that enables *the consumer* to download the data via an API. CDR data would then be stored on the consumer's device or on cloud storage under an account that is owned by the consumer, but accessed by the non-accredited third party.

Some stakeholders who have raised this concern have proposed that the best method of mitigating this risk is to prevent consumers from accessing their own information under the CDR.

It can be said that, from a privacy rights perspective, it is desirable that consumers have the right to access their information without being required to first provide it to a third party. This is because consumers may wish to access their information simply to know what is being held about them, or may wish to conduct their own analysis of the information without having to disclose this information to others.

It is therefore necessary to consider the balance between the risk of consumers being used as a 'funnel', and the desirability of enabling consumers to access their own information. While there is a risk that consumers could be used to funnel information, there are methods to mitigate this risk other than preventing the consumer from accessing their own data.

For example, this risk could be mitigated by ensuring data holders are not required to provide this access through an API in standardised formats. Data holders could instead be enabled to determine the format in which this information is provided to the consumer, so long as it is provided in a user-friendly digital format.

Greater friction would be introduced if the consumer accessed this information themselves rather than disclosing it to an accredited person. Additionally, education and clear branding of CDR transfers would ensure consumers know that when they are transferring this way, they are no longer using the CDR (see below for further discussion of branding).

While this would not prevent consumers being used as a funnel in every instance, and as such would not eliminate this risk, it would act as a de facto barrier for the majority of consumers who are considering sharing their data with a non-accredited third party. The residual risk would likely be no greater than existing risks associated with direct access under APP 12.

Preventing disclosure to non-accredited third parties where the consumer has consented

Some stakeholders have argued that the CDR Bill should prevent disclosure of CDR data that is personal information to anyone who is not accredited. In making this argument, they acknowledge that this is significantly more restrictive than the Privacy Act requirements for disclosure, but maintain the view that this degree of restriction is necessary to promote confidence in the CDR system.

The CDR Bill limits the ACCC's rule-making power so that it is only able to require CDR participants to disclose CDR data that relates to a consumer to accredited persons or designated gateways. As such, the CDR cannot be used to write rules that *compel* CDR participants to disclose personal information to those who are not accredited.

Additionally, in the absence of a rule authorising transfer by an accredited data recipient to another person (including a non-accredited person), the default under Privacy Safeguard 6 is that transfer to non-accredited recipients is not *permitted*.

The ACCC is able to write rules that authorise accredited data recipients to disclose CDR data that relates to consumers, including personal information.

The CDR Bill allows for these authorisations because, as recognised by the Open Banking Review,⁴⁸ there are a number of scenarios where consumers are likely to benefit from transfer of some CDR data to non-accredited recipients.

⁴⁸ OBR, page 136.

There are risks associated with disclosure to non-accredited third parties. These may be seen to reflect the existing risks under the status quo. However, the CDR may create more channels by which personal data may end up the hands of these parties.

These risks arise in particular when these parties are not bound to comply with the Privacy Act. This leaves individuals at risk of having no privacy rights against potential recipients. This would, for example, allow those recipients to use the individuals' information in any way they saw fit, including on-selling this information to others.

Similarly, in the absence of clear warnings of the risks of transferring data outside the CDR system, and clear information about when data is within the CDR system, it is likely that many individuals may not understand the risks that they are exposing themselves to when transferring data outside the CDR system.

A possible mitigant for this risk would be to only authorise such disclosure where, in addition to the consumer expressly consenting to the disclosure, specific warnings are provided to consumers before such disclosure. This could include a warning with language that explains in an easily understood manner that the disclosure means that the information will be going to a recipient who may not be required to comply with the Privacy Act.

Disclosure to non-accredited recipients could also be limited to disclosure in specific circumstances.

Three broad groupings of scenarios in which such disclosure may occur are discussed below:

1) Disclosure of 'information products' / derived data at the consumer's request

The first of these is when an accredited data recipient transfers data that has been derived from received CDR data at the consumer's request.

For example, accounting software providers may be accredited to receive raw banking transaction data in order to prepare financial statements, which the customer might then consent to being passed outside the system to a potential business partner.

Another example is where an individual in financial distress might approach a financial counsellor. There are benefits to allowing the counsellor to, with the

individual's consent but without becoming accredited, access the outcomes of budgeting analysis conducted by an accredited data recipient.

As another example, currently many real-estate agents require bank statements before renting a property to tenants. This is to check the account balance, and to check the tenant's history of paying rent. Under the CDR, it is possible that an accredited person will create a business that provides only an assessment that the tenant has paid on time, and their bank balance to the real-estate agent. As this is a limited amount of information compared to what real-estate agents currently receive, it is not clear that the agent should be required to be accredited in order to receive such limited, derived information.

The last example is one where an individual's privacy may be better protected by allowing the disclosure of some CDR data to non-accredited persons, than by only allowing disclosure of personal information through non-CDR processes.

2) *Disclosure of raw transaction data where there are existing confidentiality requirements*

There may be limited cases where it is appropriate for a non-accredited entity to receive raw data.

This scenario poses a greater privacy risk to the individual.

One example where this may be appropriate is where the consumer wishes to provide their banking data to their lawyer or accountant for the purpose for which the person providing the service is licensed under a different licensing regime. In this instance, various professional confidentiality requirements would apply. It is also possible that such disclosure could be limited to those who are bound by the Privacy Act or equivalent protections.

This circumstance could include disclosure to overseas banks, for example, when a consumer is moving overseas. Where transfer was to an overseas institution, the protections of Privacy Safeguard 8 would apply.

3) Disclosure to outsourcing providers

In this third scenario, the accredited data recipient may transfer CDR data to a non-accredited person as part of an outsourcing arrangement. As in the banking sector, outsourcing arrangements may allow for more secure forms of data storage and processing.

An accredited data recipient that enters into an outsourcing arrangement involving the disclosure of CDR data could be required to ensure it has appropriate plans and processes in place for managing risk, and to remain liable to the consumer for any breaches caused by the outsourced provider.

GDPR right to be forgotten

Some stakeholders have proposed that the CDR should incorporate the GDPR right to be forgotten. The precise extent to which the CDR will incorporate such a right has not yet been determined.

Article 17 of the GDPR creates a right to be forgotten where:

- i. the personal data is no longer necessary for the purposes for which it was collected or processed;
- ii. the business relies upon the ‘consent’ ground for processing, and the individual has withdrawn their consent to processing and the data was being processed solely on the basis of that consent;
- iii. the business relies upon the ‘legitimate grounds for the processing’ ground, and the individual objects to the processing of their information and either: (a) there are no compelling legitimate grounds for the processing that should override the interests or rights of the individual, or (b) the data was being processed for direct marketing purposes;
- iv. the data was being unlawfully processed;
- v. the data has to be erased to comply with another legal obligation to which the controller of the data is subject; or
- vi. the data was collected for the purposes of providing information society services to a child who is at least 16.

There are a range of exceptions and limitations to this right, including that paragraph (ii) and (iii) above do not apply where the processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract.

The CDR framework is expected to include rights of deletion or de-identification that have the same effect as paragraphs (i), (iv), (v), and (vi) above. This is achieved through Privacy Safeguards 4, 6 and 12, and the current proposal by the ACCC that minors will not be able to participate in the CDR.

Paragraph (iv) also has effect within the CDR by ordinary operation of law. The CDR contains specific provisions setting out its interactions with other laws, including which prevails.

The CDR framework is consent driven. Processing without consent on the basis of 'legitimate interest' will not be allowed, and so the right of deletion in those cases under paragraph (iii) is not applicable or necessary.

Further, under the CDR, consumers will be able to readily withdraw their consent to further disclosure of data and limit the time in which accredited data recipients can collect their CDR data.

The sole element of the GDPR right to be forgotten which has not yet been adopted through the CDR is the right to deletion where the individual has consented and in the absence of a contract between the individual and the accredited data recipient. However, it is expected that most instances of use of data will be necessary for the performance of a contract to which the accredited data recipient is party or in order to take steps at the request of the data subject prior to entering into a contract.

Further expansion of the right to deletion or de-identification is possible through the Rule framework.

Recommendations

The risk mitigation strategies outlined above have been carefully designed to address the risks identified in the ‘Impacts to Privacy’ section. They combine existing protections with new protections that are being written into the legislation and further protections to be considered for inclusion in the Rules and Standards.

In order for the proposed mitigants to adequately protect participants in the CDR system, they will need to be properly implemented and maintained by the relevant agencies.

It is important to acknowledge that although the risk mitigation strategies should, if implemented correctly, appropriately manage and mitigate risks associated with the CDR, they will not altogether eliminate those risks.

The following recommendations relate to the proper functioning of the CDR system, and ensuring the risk mitigation strategies work as they are intended to.

Consumer engagement

Consumers will need to be engaged with the CDR system in order for it to work effectively and to ensure good customer outcomes.

The quality of consumer engagement will be affected by consumer behavioural obstacles. Factors such as how and when the information is presented can mitigate or exacerbate these obstacles.

Behavioural testing of consumer interfaces with the system is essential to ensure that the requirements of the system meet consumers’ needs. In particular, such testing may help to determine how to best present consent terms and authorisation flows in order to promote informed decision making by consumers, including vulnerable individuals.

Incorporating behavioural research into the CDR system will also ensure it takes into account *actual* consumer preferences and behaviours regarding the exercise of their privacy rights, noting that these preferences and behaviours will differ among different individuals.

Recommendation 1

The ACCC, the OAIC and the Data Standards Body should continue to incorporate behavioural research in the design of the CDR system to ensure that the system works effectively and takes into account *actual* consumer preferences and behaviours regarding the exercise of their privacy rights.

Proposed consumer testing by the Data Standards Body should have particular regard to vulnerable consumer groups. Test groups should be of sufficient size and diversity to provide justified confidence in the safety of consent processes.

Governance

The ACCC, the OAIC and Data61 (which is currently the CDR Data Standards Body), as government agencies or part thereof, are required to report to the Parliament on their performance annually.⁴⁹

It is important for individuals as well as to the success of the CDR that agencies responsible for its implementation conduct ongoing consideration of how their activities are addressing privacy concerns. Agencies should include this in their annual reports for transparency purposes.

For example, the OAIC should monitor and report in its annual report upon the numbers of complaints it receives that relate to CDR privacy issues. It should report generally on how these complaints have been addressed and consider avenues to limit repeat behaviours.

⁴⁹ Available at: <https://www.accc.gov.au/publications/accc-aer-annual-report>; <https://www.oaic.gov.au/about-us/corporate-information/annual-reports/all/>; <https://www.csiro.au/en/About/Our-impact/Reporting-our-impact/Annual-reports>.

Recommendation 2

The ACCC, the OAIC and the Data Standards Body should ensure that their annual reporting includes reporting on the operation of the CDR, particularly relating to privacy, to provide assurance that rules and practices continue to appropriately handle privacy risks. To facilitate this, the ACCC may consider compiling a consolidated annual CDR report, based on the reporting of relevant agencies' CDR functions.

Consent Framework

As identified in the ‘Threats to genuine consent’ section, obtaining genuine consent is one of the major challenges involved in protecting each individual’s fundamental right to privacy under the CDR. Where an individual lacks awareness or understanding of what they are consenting to, there may be considerable consequences for the welfare of that individual.

The proposed CDR legislation outlines high level principles for how a CDR participant should disclose CDR data. The participant should only disclose CDR data when they are authorised by the rules to do so in accordance with a valid consent from the relevant individual.

Further details relating to the definition of valid consent will be included in the Rules. Risk mitigation strategies rest on the assumption that the Rules will require consumer consent to be voluntarily given, express, informed, specific as to purpose, time limited and easily withdrawn.

It is also important that the Rules deal appropriately with issues relating to consent by vulnerable individuals, including minors and those with disabilities or language difficulties.

Recommendation 3

The ACCC should continue to work with the OAIC to ensure that the Rules create a consent framework that ensures consent is genuine, and protects vulnerable individuals.

Data Security and Transfer Standards

As outlined in the ‘Impacts on Privacy’ section, the CDR may lead to an increase in communication risks, particularly in relation to hacking and cybercrime activities.

This PIA has identified the data security and transfer Standards that will be developed by the Data Standards Body as a key method of mitigating this risk. These Standards are intended to ensure that CDR participants protect data and the privacy of individuals.

To effectively mitigate communication risks, the Data Standards Body should ensure that the Standards are implemented in accordance with the high level objectives set by the legislation.

Further, in developing the Standards, the Data Standards Body should aim to balance competition, innovation and privacy considerations.

Recommendation 4

When designing and implementing the Rules and data security and transfer Standards, the ACCC and the Data Standards Body should seek to avoid placing undue weight on the benefits of competition and innovation at the expense of protecting privacy.

It is noted that there is not always a trade-off between these objectives. Strong privacy protections will drive confidence in the system – which is a necessary prerequisite for realising all other objectives.

Rule making

The CDR supports a flexible rule and standards setting process that allows protections to be tailored to different risks and circumstances – both within and between industry sectors to which it has been applied. This flexibility within the Rules is necessary for a safer, more efficient and effective system. For example, higher risk data sets can be subject to higher security requirements.

However, a lack of consistency may increase complexities and costs associated with privacy compliance. This may hinder consumers' understanding and impede the exercise of their privacy rights.

Recommendation 5

The ACCC and the Data Standards Body should continue to work with the OAIC to ensure that the privacy related Rules and Standards remain largely consistent across designated sectors, with tailoring to particular privacy risks where necessary.

Coordination

The CDR regulatory framework takes a layered approach, with requirements set out in the legislation, rules and technical standards.

Given this layered approach, the legislation, the Rules, and the Standards need to be closely linked to work in conjunction with one another and ensure a properly functioning regulatory system. To ensure interactions work as intended, the Treasury, ACCC, OAIC and the Data Standards Body should maintain regular communication regarding upcoming issues and changes during the simultaneous development of the legislation, Rules and Standards.

Similarly, the framework establishes a dual regulator model for compliance with the law. The OAIC will be primarily responsible for complaint handling with a focus on privacy protection. The ACCC will be primarily responsible for strategic enforcement actions. Agencies will need to share intelligence and work cooperatively to be effective.

Recommendation 6

The Treasury, the ACCC, the OAIC and the Data Standards Body should continue to coordinate their activities, and put in place information sharing arrangements and memoranda of understanding as appropriate.

Consumer Education

A key element of a properly functioning CDR system is for participants to understand their rights and responsibilities within it.

Both the OAIC and the ACCC will conduct education programs to ensure participants understand the CDR system.

Participants, industry groups and consumer advocacy groups should contribute to the development and participate in the delivery of consumer awareness and education activities, as appropriate. Importantly, the education program should make consumers aware of privacy risks, as well as the protections that are available to help mitigate these risks.

Education programs should be primarily focussed on the period shortly before and after its commencement in the banking sector on 1 July 2019, but be ongoing.

Recommendation 7

The CDR education program should include a focus on raising CDR participant awareness of privacy risks and rights.

Post-implementation assessment

A post-implementation independent review of the CDR will be completed before 1 January 2022. The evaluation will use benchmarks and indicators to assess the benefits and costs of participation in the CDR. The assessment will provide an opportunity for improvements to the CDR to further promote consumer outcomes, including privacy outcomes.

Metrics that could be included in the assessment include the number of privacy-related complaints received by the OAIC, or the frequency of CDR-related data breaches. Including these metrics will provide the Government, rule makers and standard setters with a further opportunity to address privacy risks and add further protections for CDR participants if required.

Recommendation 8

The post-implementation assessment of Open Banking, and the CDR for future designated sectors, should report specifically on privacy relevant metrics such as privacy related complaints and data breaches.

Arrangements should be put in place at commencement so that the post-implementation assessment can be conducted with the benefit of a robust evidence base.

Further PIAs

The CDR is designed to adapt over time (through changes to rules and standards) and be applied to additional sectors (through new ministerial designations).

Applying the CDR system to new data sets in new sectors may present new or increased privacy risks. The legislation requires that assessments of impacts on privacy, and advice on how to address these impacts, be provided to the Minister when proposing new sectoral designations.

Recommendation 9

All significant changes to the CDR legislation or Rules should be accompanied by further PIAs, conducted in accordance with the OAIC *Guide to undertaking privacy impact assessments* and following engagement with privacy and consumer representatives.

Conclusion

The CDR presents some additional risks to privacy of individuals in exchange for other benefits to privacy, competition, convenience and choice. However, the Government has proposed a framework which includes safeguards to mitigate those risks.

The Treasury Laws Amendment (Consumer Data Right) Bill 2018, together with supporting rules and standards, will expand upon current privacy and security protections available under the Privacy Act and individuals' existing privacy rights.

The Government consulted broadly in developing the CDR, receiving and incorporating the views of a range of consumer and privacy groups into its design. Stakeholders were heavily engaged at each stage of the CDR development, including consultations run by the Productivity Commission, the Taskforce and the Open Banking Review.

This Privacy Impact Assessment has highlighted a range of privacy risks relating to consent, information security and the unauthorised misuse or transfer of data. Some of these risks could lead to substantial financial, personal and emotional loss.

The proposed privacy and information security protections are likely to adequately mitigate these risks.

These privacy protections include the mandatory accreditation of data recipients; the introduction of transfer, security and data Standards; a role for the OAIC in advising on and enforcing privacy protections; and a range of avenues for customers to seek meaningful remedies for breaches, such as access to external dispute resolution.

The mitigants do not completely eliminate these risks. A consumer consent driven regime will still require consumers to exercise due care and judgement in relation to their own data.

Appendices

Appendix A: Modifications to Privacy Law under Consumer Data Right System

Privacy Act compared to proposed CDR protections

	Privacy Act	CDR
What is protected	<p>Personal information, defined as information or an opinion about an identified individual, or an individual who is reasonably identifiable:</p> <ul style="list-style-type: none"> (a) whether the information or opinion is true or not; and (b) whether the information or opinion is recorded in a material form or not. 	<p>CDR data is data that is specified in an instrument designating a sector, or data that is directly or indirectly derived from or associated with CDR data, either wholly or in part.</p> <p>Whether the information is true or not, where CDR data relates to a person who is identifiable or reasonably identifiable and is held, or held on behalf of, an accredited recipient or data holder, the Privacy Safeguards apply.</p> <p>'Relates' is a broader term than 'about'.</p>
Who is bound	<p>Government agencies and private organisations where the organisation had annual turnover of >\$3m in the previous financial year.</p>	<p>Accredited persons are bound to treat data in accordance with CDR requirements. Accredited data recipients are a subset of accredited persons, this definition is used where a safeguard applies to someone who has received CDR data.</p> <p>Those who purport to be accredited are bound as though they were accredited.</p> <p>Once a request for disclosure has been received, data holders</p>

	<p>are bound by Safeguards 1, 6, 8, 10, 11 and 13.</p> <p>Data holders who receive data are bound by the Safeguards in the same manner as other accredited persons, unless the Rules provide otherwise.</p>
<p>Key exemptions</p>	<p><u>SMEs</u></p> <p>Organisations are not bound where turnover was <\$3m in the previous financial year, unless they register with the Information Commissioner as choosing to be treated as bound.</p> <p><u>Exemption of political acts and practices</u></p> <p>The exemption is primarily intended to ensure political parties can maintain databases containing personal information about individual voters. The Commonwealth <i>Electoral Roll Act 1918</i> provides registered political parties with access to electoral roll information.</p> <p><u>Saving of certain State and Territory laws</u></p> <p>Act is not to affect the operation of a law of a State or of a Territory that makes provision with respect to the collection, holding, use, correction or disclosure of personal information (including such a law relating to credit reporting or the use of information held in connection with credit reporting) and is capable of operating concurrently with this Act.</p> <p><u>SMEs</u></p> <p>SMEs are not exempt from the CDR protections if they are a data holder or accredited person.</p> <p>SMEs who are accredited persons lose their Privacy Act exemption in respect of non-CDR data.</p> <p><u>The Commonwealth</u></p> <p>In so far as it carries on a business, the Commonwealth is bound as if it were a corporation. The Commonwealth will otherwise not be liable to a pecuniary penalty or to be prosecuted for an offence.</p> <p><u>State and Territories</u></p> <p>States and Territories will be bound to the extent they submit themselves to the regime. They will not be liable to a pecuniary penalty or to be prosecuted for an offence.</p> <p><u>Part IIIA of the Privacy Act (Credit Reporting)</u></p> <p>The Privacy Safeguards do not limit Part IIIA of the Privacy Act. Credit reporting bodies will not be authorised by the CDR to act inconsistently with their obligations under Part IIIA of the</p>

		Privacy Act. To enable this, the Privacy Act is amended at sections 20E, 21G, and 22E to prevent the consumer data rules from being an authorising law.
Principle 1	Australian Privacy Principle 1—open and transparent management of personal information Entities must take steps as are reasonable in the circumstances to implement practices, procedures and systems to ensure compliance with the APPs or relevant privacy codes. Entities must also take steps as are reasonable in the circumstances to implement practices, procedures and systems to deal with inquiries or complaints from individuals about the entity's compliance with the APPs or relevant privacy codes. Entities must have an up-to-date and clearly expressed privacy policy and take such steps as are reasonable in the circumstances to make its privacy policy available free of charge and in such form as is appropriate.	Privacy safeguard 1—open and transparent management of CDR data <i>Privacy Safeguard 1 is equivalent to APP1.</i> All CDR entities must take steps as are reasonable in the circumstances to implement practices, procedures and systems to comply with the Privacy Safeguards and the Rules. CDR entities must also take steps as are reasonable in the circumstances to implement practices, procedures and systems to deal with inquiries or complaints from CDR individuals about the entity's compliance with the Privacy Safeguards and the Rules. CDR entities must have an up-to-date and clearly expressed policy about the management of CDR data and must make its policy about the management of CDR data available free of charge and otherwise in accordance with the Rules.
Principle 2	Australian Privacy Principle 2—anonymity and pseudonymity Individuals must have the option of not identifying themselves, or of using a pseudonym, when dealing with an APP entity in	Privacy safeguard 2—anonymity and pseudonymity <i>Privacy Safeguard 2 is equivalent to APP2, but is more restrictive.</i>

<p>relation to a particular matter unless the entity is required or authorised by or under an Australian law, or a court/tribunal order, to deal with individuals who have identified themselves.</p> <p>Entities may also require individuals to identify themselves if it is impracticable for the APP entity to deal with individuals who have not identified themselves or who have used a pseudonym.</p>	<p>Accredited data recipients must give CDR consumers the option of not identifying themselves, or of using a pseudonym, when dealing with the accredited data recipient unless a circumstance specified in the Rules applies.</p>
<p>Principle 3 Australian Privacy Principle 3—collection of solicited personal information*</p> <p>An entity must not collect solicited non-sensitive personal information unless the information is reasonably necessary for one or more of the entity's functions or activities.</p> <p>An entity must not collect solicited sensitive personal information unless: the individual consents to the collection of the information and the information is reasonably necessary for one or more of the entity's functions or activities; or any of the exceptions in sub-clause 3.4 apply.</p> <p>An entity must collect personal information only by lawful and fair means. An entity must collect personal information about an individual only from the individual unless it is unreasonable or impracticable to do so.</p>	<p>Privacy safeguard 3—collecting solicited CDR data</p> <p><i>Privacy Safeguard 3 is similar to APP3, but is more restrictive.</i></p> <p>An accredited person must not seek to collect CDR data from a CDR participant under the consumer data rules unless in response to a valid request from a CDR consumer and the accredited person complies with all other requirements in the consumer data rules for the collection of CDR data.</p> <p>This is a civil penalty provision.</p>

Principle 4	Australian Privacy Principle 4—dealing with unsolicited personal information	Privacy safeguard 4—dealing with unsolicited CDR data
	<p>If an entity receives unsolicited personal information it must determine within a reasonable period whether it could have collected the personal information under APP3.</p>	<p><i>Privacy Safeguard 4 is more restrictive than APP4.</i></p>
	<p>If the entity could not have collected the personal information under APP3, it must destroy information if lawful and reasonable to do so, or the entity may retain the information by de-identifying the information.</p>	<p>If an accredited person receives, but did not seek to collect, CDR data from a CDR participant, the person must destroy the CDR data as soon as practicable.</p>
Principle 5	Australian Privacy Principle 5—notification of the collection of personal information	Privacy safeguard 5—notifying of the collection of CDR data
	<p>At or before the time or, if that is not practicable, as soon as practicable after, an entity collects personal information about an individual, the entity must take such steps (if any) as are reasonable in the circumstances:</p>	<p><i>Privacy Safeguard 5 is equivalent to APP5, but is more restrictive.</i></p>
	<ul style="list-style-type: none"> • (a) to notify the individual as reasonable in the circumstances of matters including the identity and contact details of the entity, that information has been collected, • (b) to otherwise ensure that the individual is aware of any such matters. 	<p>At or before the time specified in the rules, a person who collects CDR data in accordance with Privacy Safeguard 3 must take the steps specified in the rules to notify the CDR consumers specified in the rules of the collection. This notification must cover the matters specified in the rules for the purposes of this subparagraph.</p>
		<p>This is a civil penalty provision.</p>

Principle 6	Australian Privacy Principle 6—use or disclosure of personal information	Privacy safeguard 6—use or disclosure of CDR data
	<p>If an entity holds personal information about an individual that was collected for a particular purpose (the primary purpose), the entity must not use or disclose the information for another purpose (the secondary purpose) unless:</p> <ul style="list-style-type: none"> (a) the individual has consented to the use or disclosure of the information; or (b) the individual would reasonably expect the APP entity to use or disclose the information for the secondary purpose and the secondary purpose is: <ul style="list-style-type: none"> (i) if the information is sensitive information—directly related to the primary purpose; or (ii) if the information is not sensitive information—related to the primary purpose; or (c) the use or disclosure of the information is required or authorised by or under an Australian law or a court/tribunal order; or (d) a permitted general situation exists in relation to the use or disclosure of the information by the APP entity; or (e) the APP entity is an organisation and a permitted health situation exists in relation to the use or disclosure of the information by the entity; or (f) the APP entity reasonably believes that the use or disclosure of the information is reasonably necessary for enforcement 	<p><i>Privacy Safeguard 6 is more restrictive than APP6.</i></p> <p><i>Use or disclosure by an accredited data recipient</i></p> <p>An accredited data recipient of CDR data must not use or disclose it unless the use or disclosure is in accordance with a CDR consumers' valid request.</p> <p>An accredited data recipient of CDR data may also use or disclose that CDR data where the use or disclosure is required or authorised by or under the rules, an Australian law, other than the Australian Privacy Principles, or a court/tribunal order and the person makes a written note of the use or disclosure.</p> <p>This is a civil penalty provision.</p> <p><i>Use or disclosure by a designated gateway</i></p> <p>A designated gateway of CDR data must not use or disclose it unless the use or disclosure is required or authorised under the rules or by an Australian law, other than the Australian Privacy Principles, or a court/tribunal order and the person makes a written note of the use or disclosure.</p> <p>This is a civil penalty provision.</p> <p>Note: The rules can only authorise Gateways to collect, store,</p>

	<p>related activities Exceptions</p> <p>This principle does not apply to the use or disclosure by an organisation of personal information for the purpose of direct marketing, or government related identifiers.</p>	<p>use, or disclose CDR data that relates to consumers where these rules relate to facilitating the transfer of data between data holders and accredited data recipients, or consumers.</p>
Principle 7	<p>Australian Privacy Principle 7—direct marketing</p> <p><i>Non-sensitive personal information</i></p> <p>If an organisation holds personal information about an individual, the organisation must not use or disclose the information for the purpose of direct marketing unless;</p> <ul style="list-style-type: none"> (a) the organisation collected the information from the individual; and (b) the individual would reasonably expect the organisation to use or disclose the information for that purpose; and (c) the organisation provides a simple means by which the individual may easily request not to receive direct marketing communications from the organisation; and (d) the individual has not made such a request to the organisation. <p>OR</p> <p>the organisation collected the information from:</p> <ul style="list-style-type: none"> (a) <p class="list-item-l1">(i) the individual and the individual would not reasonably expect the organisation to use or disclose the information</p>	<p>Privacy safeguard 7—use or disclosure of CDR data for direct marketing by accredited data recipients</p> <p><i>Privacy Safeguard 7 is more restrictive than APP7, as it treats all CDR data in a similar manner to the treatment of sensitive information under APP7.</i></p> <p>An accredited data recipient of CDR data must not use or disclose it for direct marketing purposes unless the use or disclosure is in accordance with a CDR consumers' valid request or is authorised under the rules.</p> <p>A designated gateway of CDR data must not use or disclose it for direct marketing purposes unless the use or disclosure is required or authorised under the rules.</p> <p>This is a civil penalty provision.</p>

- for that purpose; or
- (ii) someone other than the individual; and
- (b) either:
- (i) the individual has consented to the use or disclosure of the information for that purpose; or
- (ii) it is impracticable to obtain that consent; and
- (c) the organisation provides a simple means by which the individual may easily request not to receive direct marketing communications from the organisation; and
- (d) in each direct marketing communication with the individual:
- (i) the organisation includes a prominent statement that the individual may make such a request; or
- (ii) the organisation otherwise draws the individual's attention to the fact that the individual may make such a request; and
- (e) the individual has not made such a request to the organisation.

Sensitive personal information

If an organisation holds sensitive personal information about an individual, the organisation must not use or disclose the information for the purpose of direct marketing unless the individual has consented to the use or disclosure of the information for that purpose.

Principle 8	Australian Privacy Principle 8—cross-border disclosure of personal information	Privacy safeguard 8—cross-border disclosure of CDR data
	Before disclosing personal information to an overseas recipient:	<i>Privacy Safeguard 8 is similar to APP8, with the addition that the overseas recipient must be a person who holds an accreditation, or as otherwise allowed by the Rules.</i>
	<ul style="list-style-type: none"> • an entity must take steps as are reasonable in the circumstances to ensure that the recipient does not breach the APPs; or, • the entity must reasonably believe the recipient is subject to a law equivalent to the APPs and there are mechanisms the individual can access to enforce that protection; or • the individual must consent to the disclosure after being informed the entity has not taken steps to ensure the recipient does not breach the APPs; or • the disclosure must be required or authorised by Australian law or court/tribunal; or <p>a permitted general situation must exist</p>	<p>An accredited data recipient must not disclose CDR data to recipients who are overseas unless:</p> <ul style="list-style-type: none"> • the overseas recipient is also an accredited person; or • the accredited data recipient takes reasonable steps to ensure the overseas recipient will not contravene the privacy safeguards (and the accredited data recipient remains liable for any contravention of the privacy safeguards by the overseas recipient); or • the accredited data recipient reasonably believe the overseas recipient is subject to a law equivalent to the Privacy Safeguards and there are mechanisms the consumer can access to enforce that protection; or • the conditions specified in the consumer data rules are met. <p>This is a civil penalty provision.</p> <p><i>Note: This subsection applies in addition to the disclosure restrictions above.</i></p>
Principle 9	Australian Privacy Principle 9—adoption, use or disclosure of	Privacy safeguard 9—adoption or disclosure of government

government related identifiers Entities cannot adopt a Government identifier unless the use or disclosure of the identifier is reasonably necessary for the organisation to verify the identity of the individual for the purposes of the organisation's activities or functions or to fulfil its obligations to a government agency, or if authorised by Australian law or court or tribunal order. Other exceptions also exist. Privacy Safeguard 10 does not have an APP equivalent.	related identifiers <i>Privacy Safeguard 9 is more restrictive than APP9</i> Accredited data recipients cannot adopt a Government identifier as their own identifier of a person, unless the use or disclosure of the identifier is authorised by Australian law or court or tribunal order, other than the CDR. This is a civil penalty provision.
	Privacy safeguard 10 - notifying of the disclosure of CDR data Where a data holder has responded to a valid request from a CDR consumer and disclosed CDR data under the rules, the data holder must notify the CDR consumers required by the rules Similarly, where an accredited data recipient has disclosed CDR data, the accredited data recipient must notify the consumer as required by the consumer data rules. The consumer data rules may set out which CDR consumer must receive the notification, where there is more than one consumer, what matters must be included in the notification and the time in which the notification must be given. This is a civil penalty provision.

Principle 10 Australian Privacy Principle 10—quality of personal information

An entity must take steps as are reasonable in the circumstances to ensure personal information that it collects, uses or discloses is accurate, up-to date and complete and, if disclosed, relevant.

Accurate, up-to-date, complete and relevant, are interpreted having regard to the purpose of the use or disclosure.

Privacy safeguard 11—quality of CDR data

Privacy Safeguard 11 is equivalent to APP10 and creates a process where CDR participants must correct and disclose a corrected version of CDR data when directed by the individual.

A CDR participant for CDR data must take reasonable steps to ensure that the CDR data is, having regard to the purpose for which it is held, accurate, up-to-date and complete when the CDR participant discloses the CDR data in accordance with Privacy Safeguard 6.

This is a civil penalty provision.

If a CDR participant for CDR data discloses the CDR data pursuant to the CDR and later, the CDR participant becomes aware that some or all of the CDR data was incorrect because, having regard to the purpose for which it was held, it was inaccurate, out of date, incomplete or irrelevant the CDR participant must advise the CDR consumer for the CDR data accordingly, and do so in writing.

This is a civil penalty provision.

If a CDR participant for CDR data is advised by a CDR consumer for the CDR data that some or all of the CDR data was incorrect when the CDR participant had earlier disclosed it and the CDR consumer requests the CDR participant to disclose the corrected CDR data to the recipient of that earlier disclosure, the CDR participant must comply with the request.

		This is a civil penalty provision.
Principle 11	Australian Privacy Principle 11—security of personal information	<p>Privacy safeguard 12—security of CDR data</p> <p><i>Privacy Safeguard 12 is equivalent to APP 11.</i></p> <p>Persons who collect CDR data in accordance with Privacy Safeguard 3 must take the steps specified in the rules to protect the CDR data from misuse, interference and loss, unauthorised access, modification or disclosure.</p> <p>This is a civil penalty provision.</p> <p>If a person collects CDR data in accordance with Privacy Safeguard 3 and any of the CDR data is no longer needed by the person for the purposes permitted under the rules or the Privacy Safeguards, the person must take the steps specified in the rules to destroy or de-identify the redundant data.</p> <p>This is a civil penalty provision.</p>
Principle 12	Australian Privacy Principle 12—access to personal information	<p>The CDR as a whole is the equivalent of APP12.</p> <p>No provision of the <i>Treasury Laws Amendment (Consumer Data Right) Bill 2018</i> will have any effect until such a rule is in place.</p> <p>The Rule that will give effect to the rest of the CDR, and be the equivalent of APP12, will be contained in the Rules.</p> <p>This flexibility is required in order to tailor how the system works in sectors with differing existing regulatory systems, data</p>

		sharing arrangements and business models; to enable the system to evolve as technologies and data sharing approaches evolve; to meet the needs of different consumer types; and to address different risks arising in relation to different data sets.
Principle 13	Australian Privacy Principle 13—correction of personal information	<p>Privacy safeguard 13—correction of CDR data</p> <p><i>Privacy safeguard 13 is equivalent to APP 13.</i></p> <p>If a CDR participant for CDR data requests a data holder or accredited data recipient correct the CDR data,</p> <p style="padding-left: 40px;">that person must take the steps specified in the Rules to:</p> <ul style="list-style-type: none"> • correct the CDR data; or • include a statement with the CDR data, <p>to ensure that, having regard to the purpose for which the CDR data is held, the CDR data is accurate, up to date, complete, relevant and not misleading; and give notice of any correction or statement, or notice of why a correction or statement is unnecessary or inappropriate.</p> <p>This is a civil penalty provision.</p>

incomplete, irrelevant or misleading, the entity must take such steps as are reasonable in the circumstances to do so.

Entities must respond to such requests within a reasonable period after the request is made, and must not charge the individual for the making of the request, for correcting the personal information or for associating the statement with the personal information (as the case may be).

Extraterritorial application

Extra-territorial operation of Act

The Privacy Act, a registered APP code and the registered CR code extend to an act done, or practice engaged in, outside Australia and the external Territories by an organisation, or small business operator, that has an **Australian link**.

Note: The act or practice overseas will not breach an APP or a registered APP code if the act or practice is required by an applicable foreign law

An organisation or small business operator has an **Australian link** if the organisation or operator is: an Australian citizen; or a person whose continued presence in Australia is not subject to a limitation as to time imposed by law; or a partnership formed in Australia or an external Territory; or a trust created in Australia or an external Territory; or a body corporate incorporated in Australia or an external Territory; or an unincorporated association that has its central management and control in

Geographical application of this Part

The CDR framework has a broader geographical application than the Privacy Act.

The CDR provisions apply to some cases where there would not be an Australian link for the purposes of the Privacy Act. For example, where data is collected by a foreign company, outside of Australia, on behalf of an Australian registered company or an Australian citizen, the CDR would apply, but the Privacy Act would not.

To the extent that the CDR provisions have effect in relation to CDR data held within Australia and the external territories, the CDR provisions apply in relation to all persons (including foreign persons).

To the extent that the CDR provisions have effect in relation to conduct relating to CDR data held outside of greater Australia, the CDR provisions only apply if: the conduct is engaged in by (or on behalf of) an Australian person; or the conduct occurs wholly or partly in Australia or the external territories or on board an Australian

	<p>Australia or an external Territory.</p> <p>An organisation or small business operator also has an Australian link if all of the following apply: the organisation or operator is not described above; the organisation or operator carries on business in Australia or an external Territory; the personal information was collected or held by the organisation or operator in Australia or an external Territory, either before or at the time of the act or practice.</p> <p>This means the Commissioner can take action overseas to investigate complaints.</p>	<p>aircraft or an Australian ship; or the conduct occurs wholly outside Australia and the external territories, and an Australian person suffers, or is likely to suffer, financial or other disadvantage as a result of the conduct.</p>
Notifiable data breaches	<p>All entities subject to the Privacy Act must notify affected individuals and the Australian Information Commissioner following a breach of APP11.1 that poses a likely risk of serious harm.</p>	<p><i>The CDR extends the existing notifiable data breaches scheme to breaches of Privacy Safeguard 11 that pose a likely risk of serious harm.</i></p> <p>This extends the existing scheme in relation to the customers who must be notified of a breach (that is, all customers whose data is affected), and in relation to the types of data that will require notification if breached (that is, CDR data).</p>
Complaints process	<p>Individuals do not have standing to sue.</p> <p>Individuals must complain directly to the entity who must respond within 30 days, and then may complain to the OAIC in writing.</p> <p>The OAIC may investigate the complaint, and take reasonable</p>	<p><i>The CDR provides additional complaints handling mechanisms.</i></p> <p>Any person affected (including individuals) will have standing to sue for CDR breaches, including in relation to privacy-like protections.</p> <p>Individuals will be able to complain directly to the OAIC about</p>

<p>steps to conciliate complaints. However, the Commissioner may decide not to investigate further.</p>	<p>breaches of the Privacy Safeguards. The OAIC may then direct the individual to the relevant industry ombudsman, or handle the complaint themselves.</p>
<p>Consequences for a breach</p> <p>Following an investigation, the Commissioner may make determinations finding the complaint substantiated and declaring that;</p> <ul style="list-style-type: none"> • The entity must not repeat such conduct • The entity must take steps to ensure conduct is not repeated • The entity must perform any reasonable act to redress any loss or damage suffered • The individual is entitled to compensation for loss or damage suffered • That it would be inappropriate for further action to be taken <p>Determinations are non-binding.</p> <p>The Commissioner or complainant may commence proceedings in the Federal Court to enforce the determination.</p>	<p><i>The CDR uses existing powers of regulators (the OAIC and the ACCC), with additional powers related to de-accreditation or movement to a lower accreditation tier expected to be provided for in the Rules, additional penalty provisions and increased penalties.</i></p>

Civil penalty provisions

Breaches of specific Rules and Privacy Safeguards can attract civil penalties up to, for individuals, \$500,000 or, for corporations, \$10,000,000; three times the total value of the benefits that have been obtained; or 10% of the annual turnover of the entity committing the breach. These penalties align with the Competition law and Australian Consumer Law penalty amounts.

Persons who suffer loss or damage by reason of conduct done by another person in contravention of s56BN (1) or (2) (misleading or deceptive conduct towards CDR participants) or s 56CC(1) or (2) (holding out that they hold a CDR accreditation, or an accreditation at a particular level, where that is not the

Civil penalty provisions

Section 13G of the Privacy Act is a civil penalty provision for cases of serious or repeated interference with privacy by an entity. The Information Commissioner may apply to the Federal Court for an order that an entity pay the Commonwealth a penalty. The maximum penalty payable by a corporation is 10,000 penalty units (~\$2.1m).

To date the Commissioner has not used the civil penalty power.

Rates of compensation

Loss or damage that can be compensated for includes injury to the feelings of the individual and humiliation suffered by the individual.

The Commissioner's determinations of compensation for non-economic loss have ranged from \$1000 to approximately \$20,000 depending on the circumstances.

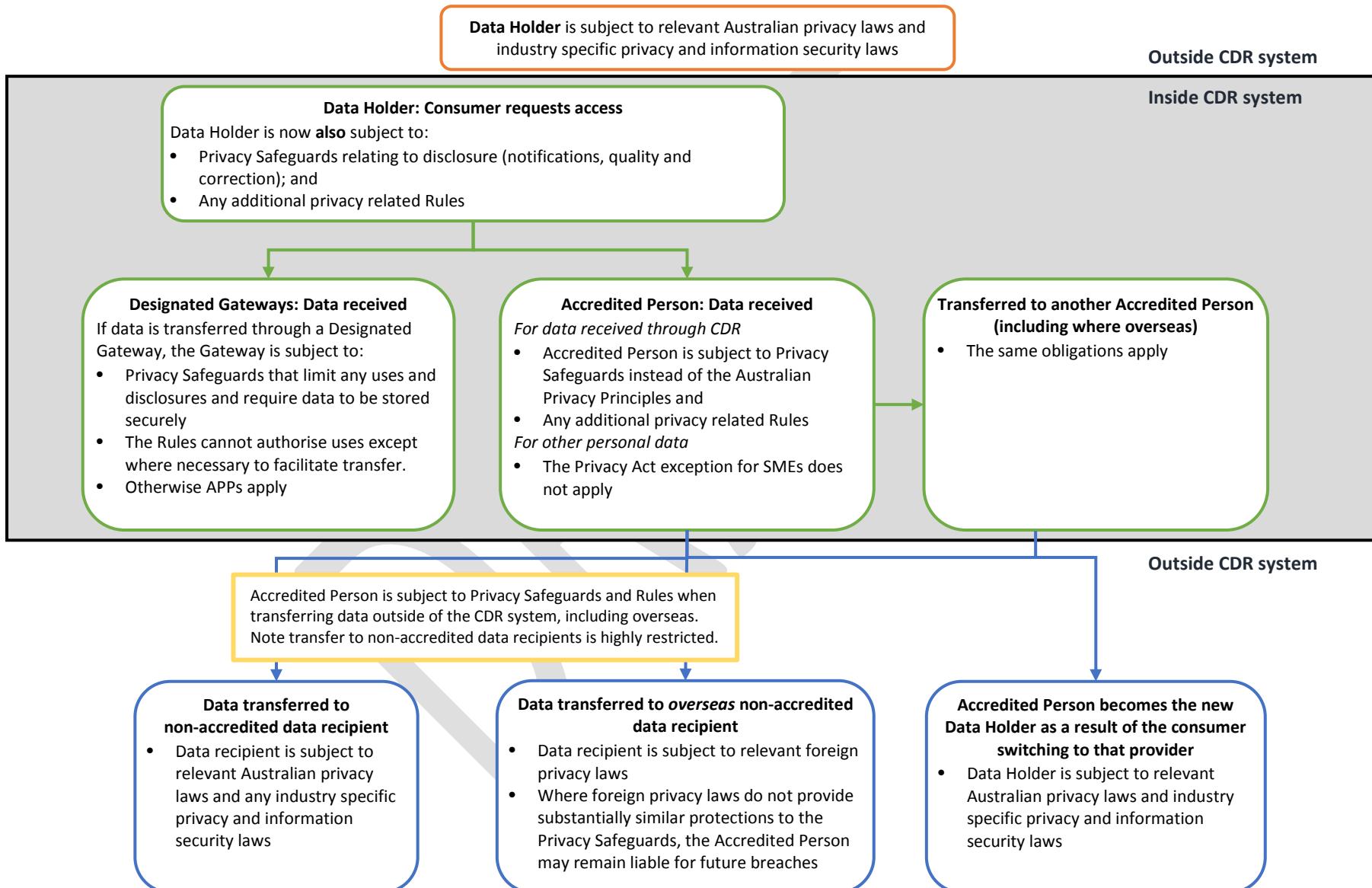
case) may also commit criminal or civil offences.

Rates of compensation

Loss or damage that can be compensated for includes injury to the feelings of the individual and humiliation suffered by the individual.

*Note: Analysis focuses on circumstances relevant to APP entities who are organisations as opposed to agencies as this is the most likely comparable scenario to data holders and accredited recipients under the CDR.

Appendix B: Privacy Protections at Each Stage



Australian Bank



- Australian Privacy Principles (if applicable)
- Only those Privacy Safeguards relating to disclosures under the CDR (notifications, data quality and correction rights)
- Privacy related Rules

Accounting Software Provider (Accredited Person)



- For data received through the CDR:
 - Privacy Safeguards
 - Privacy related Rules
- For other personal data:
 - Privacy Act (exception for SMEs does not apply)

Accountant (Non-Accredited)



- Australian Privacy Principles (if applicable)
- Accredited persons are subject to Privacy Safeguards and Rules when transferring to non-accredited persons

Foreign Accountant (Foreign Non-Accredited)



- Foreign privacy laws
- Where foreign privacy laws do not provide substantially similar protections to the Privacy Safeguards, the Accredited Person who transferred the data may remain liable for future breaches
- Possibly, Australian Privacy Principles
- Accredited persons are subject to Privacy Safeguards and Rules when transferring to non-accredited persons

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