Australian Banking Association

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Mr Mark Fitt
Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: economics.sen@aph.gov.au

Dear Mr Fitt

Inquiry into Treasury Laws Amendment (Consumer Data Right) Bill 2019

The Australian Banking Association (**ABA**) welcomes the opportunity to provide a submission to the Committee on the Treasury Laws Amendment (Consumer Data Right) Bill 2019 (the **Bill**).

With the active participation of its members, the ABA provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services. The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy and community and to ensure Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry.

The Bill provides a comprehensive legislative and regulatory framework that can be used to allow consumers to access and benefit from data that relates to them.

The Bill has been subject to valuable consultation and subsequent refinement. The Bill provides a solid footing for improved data access in Australia. At this stage, the Committee may like to consider several topics which ABA members have identified for further improving the Bill.

The ABA recommends amendment of the Bill as follows:

- The principle of reciprocity should be more comprehensively embraced in the legislation to ensure consumers are able to fully participate in a vibrant data sharing regime.
- The Privacy Safeguards should be aligned with the Australian Privacy Principles where possible, particularly in relation to Privacy Safeguard 4.
- Provisions around the creation and regulation of chargeable fees for derived and value-added data be revised to require an economic study prior to designating derived datasets.

While not a matter within the confines of the Bill, the ABA notes that the current timelines announced by the Government in December 2018 are challenging. If there are delays in finalising the Australian Consumer and Competition Commission (**ACCC**) rules, technical standards and settings for the application of the Consumer Data Right (**CDR**) to banking, the ABA requests that this does not result in shortened timeframes for testing and quality assurance.

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1. The Consumer Data Right and benefits of open data

The ABA supports a comprehensive right for consumers to access data across the economy. The Bill introduces a CDR to provide individual consumers and businesses access to data and authorise the sharing of data with trusted third parties.

Banking will be the first industry to be designated under the CDR. Australia's banks are committed to the success of the CDR in banking. By making transaction and product data available to consumers, the CDR is expected to make it easier for consumers to consider their specific needs and compare products and services. Data sharing should enable competitors to offer more tailored and innovative products to consumers. The CDR could also help those consumers manage their finances more effectively.

The banking industry continues to work with the ACCC and Data61 to design, draft, test and finalise the rules and standards which will underpin the CDR in banking. The legislative framework established by the Bill is essential to the finalisation of the rules and standards, and to the operational work currently underway to enable the four major banks to share the first tranche of data from 1 July 2019.

2. An economy-wide open data regime and reciprocity

The Productivity Commission Inquiry[1] recommended an economy-wide open data regime. An economy-wide regime can only be achieved if customers are able to access their data in all industries.

Economy-wide open data could be achieved by either applying the CDR to all industries simultaneously or by providing for reciprocal data sharing. Reciprocal data sharing would involve entities which receive data from entities in designated sectors coming under an obligation to make data available to consumers in return.

In lieu of an economy-wide approach to data sharing, the Bill establishes a scheme where consumers' right to access information is created by the Minister 'designating' a sector. The initial sectors will be banking, energy and then telecommunications. Entities who choose to participate in the CDR within these designated sectors will need to make the data they hold available (i.e. banking, telecommunication and energy data). Accredited entities outside these sectors will be able to receive this data, for example, where a customer consents, a social media company or retailer will be able to receive banking or energy data.

However, in return, entities outside of designated sectors will only need to expose data to the extent it is designated data (e.g. a retailer that holds banking data independently of receiving such data under the CDR). This will mean that in the initial stages of the Bill's operation, data will likely flow from designated sectors to non-designated sectors (subject to the consumer's consent).

For example, consider a multinational technology company, which offers a mobile wallet and collects data on what a customer purchases (**Wallet Data**), and becomes an accredited data recipient. The company combines Wallet Data with 'CDR data' (data that has been designated), to develop a finance application (app). That app could also provide customers with recommendations on credit products which they are likely to be eligible for offered by third parties. Under the Bill, that multinational technology company has no corresponding obligation to share any non-CDR data, such as the Wallet Data, regarding the products and services that a customer acquires from it.

In a data driven economy, companies that track customer's online activity and who collect large amounts of data in the process (such as large search engines, online market places and media providers), can gain significant value from the data of Australian customers. Under the reciprocity principles as currently designed, many large companies would be able to obtain significant additional volumes of data from Australian bank customers, without coming under an equivalent obligation to make available data relating to their services. The ACCC has also proposed rules that would not require recipients of banking data to make that received banking data available to customers (i.e. there

[1] The Productivity Commission stated "It (the comprehensive right to data) is comprehensive because it is intended to apply across the economy, to all data holding entities – whether private or public sector". Productivity Commission (2017), *Data Availability and Use*, 197.

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is no requirement to on-share data that is received), so data recipients from non-designated sectors would have no obligation to share any data.

Broadening the application of reciprocity would allow consumers to transfer data across more products and services they use and quicken the pace of potential innovation in new products and services.

The competition implications of a regime where reciprocity is limited needs careful consideration. Under the CDR, firms outside of designated sectors will have strong incentives to accumulate data (and few costs in doing so) to either compete with each other (e.g. retailer against retailer) or to pave the way for entry into the designated sector or an adjacent market (e.g. offering payments as an adjacent market to banking).

The CDR has been developed to promote competition in industries like banking, telecommunications and energy by reducing barriers to entry to new entrants, thereby empowering consumers through greater choice of products and providers. However, in doing so, it is important that the framework does not distort the competitive landscape and create new asymmetries between different sizes and types of market participants.

The ABA believes that a broader application of reciprocity is possible if the Bill required the Minister to promptly designate data sets relating to the industries of accredited data recipients upon accreditation of those recipients. This would increase the pace of designating industries through the economy and expand the volume of data that consumers can choose to share.

3. Protecting consumers' privacy

Australia has existing privacy protections under the *Privacy Act 1988* (Cth). These are primarily set out in the Australian Privacy Principles (**APPs**). The Bill establishes a parallel set of 'Privacy Safeguards' that operate with respect to CDR data. The reason for this parallel set of safeguards is to both enhance and turn off elements of the APPs. The safeguards enhance the APPs by applying to all entities that receive CDR data even if the APPs would not ordinarily apply (such as small business). Further, the APPs apply to 'personal information' whereas the Privacy Safeguards apply to the broader concept of CDR data for which there is a 'CDR consumer'. Importantly, consumers will also have direct rights of action for breaches of the Privacy Safeguards.

Data recipients are generally subject to the Privacy Safeguards, while data holders are subject to certain Privacy Safeguards with the APPs remaining the primary privacy regime for those entities. However, the Explanatory Memorandum suggests that the ACCC could write consumer data rules providing that certain received CDR data could revert to being treated under the APPs and not the Privacy Safeguards. This would occur if the CDR data that is received is '…of a class that the accredited data recipient would generate or collect in the ordinary course of its business outside of the CDR; and the accredited data recipient would use the information for the same purpose as their ordinary business'. Thus, if a bank received bank data, and it used that data for banking purposes, then it could handle the data under the APPs and not the Privacy Safeguards.

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

In particular, we recommend that Privacy Safeguard 4 and APP 4 on the treatment of destruction of data is aligned. APP 4 requires organisations to destroy or de-identify unsolicited personal information as soon as practicable if lawful and reasonable to do so. Privacy Safeguard 4 does not contain this qualification in relation to such destruction or de-identification having to be "lawful and reasonable". The Office of the Australian Information Commissioner (**OAIC**) has recognised the technical complexities in carrying out the destruction of data held in electronic format in the APP Guidelines so we recommend that Privacy Safeguard 4 be aligned with APP 4 in this regard.

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4. Chargeable data

The ABA welcomes clarity on the classes of information within a designation instrument for which data holders can charge a fee (section 56AC (2)(d)).

The framework establishes two tests for a data holder to charge a fee for a designated dataset. First, before being included in the designation instrument as a chargeable dataset, the Minister must consider whether that designation would constitute an acquisition of property; whether the data holder currently charges consumers or businesses for that data; whether requiring that data to be disclosed would reduce the incentives to generate, collect, hold or maintain that data set; and the marginal cost of disclosing that data.

The test established in the legislation rests on Ministerial judgement, rather than a formal commitment for a rigorous assessment of the impact of such decisions on the industry such as may be produced in a cost-benefit analysis. Nor is there a requirement that the Minister publish the findings into the considerations outlined in the legislation.

The ABA recommends that:

a) That section 56AC be amended to require the Minister to produce an economic study of designating derived datasets, including the costs and benefits to consumers; and the effect of such a designation on investment and innovation.

b) That in conducting such a study, the Minister publish the findings for formal consultation before being considered by Parliament.

To ensure the impact is properly assessed, the Minister should be required to consider how widespread the collection and enhancement of the relevant dataset is within the industry. If only a handful of designated data holders collect the data, there would be a disincentive for these players to do so once an instrument has been introduced.

Yours sincerely

Signed by

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Policy Director