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Consumer Data Right for Energy

Energy Consumers Australia is the national voice for residential and small business energy consumers. Established by the Council of Australian Governments Energy Council (the Energy Council) in 2015, our objective is to promote the long-term interests of energy consumers with respect to price, quality, reliability, safety and security of supply. In our role of promoting the interests of consumers we have identified that the delivery of affordable energy services requires the delivery of individualised services through an optimised energy system Achievement of this requires we make the most of energy data, which is why we are strong supporters of the Consumer Data Right (CDR).

Energy Consumers Australia therefore appreciates the opportunity to comment on the second exposure draft of the *Treasury Laws Amendment (Consumer Data Right) Bill 2018* (the Bill) and the Australian Competition and Consumer Commission's (ACCC) proposed Consumer Data Right Rules Framework of September 2018 (the Framework). The ability to comment on the Bill has been significantly enhanced by the availability of the Framework; this has highlighted the lack of clarity of the object of the reform and the process of designating a sector.

Accordingly, we are responding to both consultation invitations together. The response is in three parts. The first part outlines our interest in the CDR, the second part comments on the Bill and the third addresses components of the Framework. We also highlight matters in common to both consultations.

We do not comment on all the consultation issues; our focus is very much on the immediate needs in the first stage of a CDR for energy. We outline that interest in the next section.

Energy Consumers Australia's interest in the CRD

ACCC Retail Electricity Price Inquiry

In the recently released Retail Electricity Price Inquiry (REPI) report, the ACCC observed that:

> *The approach to policy, regulatory design and promotion of competition in this sector has not worked well for consumers. Indeed, the National Energy Market (NEM) needs to be reset.*[1]

Energy Consumers Australia agrees with this assessment. The 56 recommendations of REPI constitute a package of reform and Energy Consumers Australia is looking to all Governments to deliver the full benefits outlined in the report. The implementation of some of the ACCC's recommendations intersects with the CDR.

[1] https://www.accc.gov.au/regulated-infrastructure/energy/electricity-supply-prices-inquiry/final-report

The most relevant is Recommendation 31 – that the "application of the consumer data right to the electricity sector [be] pursued as a priority under the consumer data right framework regulated by the ACCC." This recommendation reflects the benefits to consumers from using consumption data to choose retail plans or to calculate the benefits of investing in Distributed Energy Resources.

Also relevant is Recommendation 14, that calls for steps to be taken to accelerate that take up of what it refers to as 'cost-reflective' network tariffs.[2] To be effective in helping to reduce total system costs these network tariffs need to be reflected in new retail prices and drive innovation in energy services. Consumers will only be able to fully assess these prices and services if they have access to consumption data.

Recommendation 8 proposes changes to B2B procedures to stop retailers who have lost a customer from conducting 'save' campaigns using the (early) market notification of an intent to transfer. The implementation of CDR must avoid adding to the opportunities for 'save' campaigns by limiting any requirement for the current retailer to authorise data access or to provide data.

Energy Consumers Australia's Data Portability proposal

In July 2017 we published a discussion paper on *Electricity Meter Data Portability*.[3] That paper proposed a framework similar to the CDR for consumers to be able to access consumption data from their network provider on a consent provided to a third party. The paper proposed an accreditation scheme to be operated by networks collectively. It built on the existing requirement for networks to provide access to data.

The proposed approach had three specific advantages:

1. It utilised the existing B2B (or e-hub) transaction platform developed by the Australian Energy Market Operator (AEMO) following the Australian Energy Market Commission (AEMC) Shared Market Protocol review.

2. It developed a framework for accreditation and consent that could be adapted for future applications. For example, there are devices provided by third parties that provide additional household data that sits outside the market data that could be accessed.

3. The application could be industry led.

The progression of the proposal has been hampered by concerns the networks hold about how they would manage their risk under the Privacy Act.

HoustonKemp and Energy Council

Following the Energy Consumers Australia paper the Energy Council "engaged HoustonKemp Economists to examine and make recommendations for streamlining the process, and for facilitating timely access to consumers consumption data by authorised third party service providers."[4]

On 14 August 2018 parties that had participated in the consultation of the HoustonKemp proposal were advised by email that:

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[2] It is not directly relevant to this submission, but it is important to note Energy Consumers Australia's concerns about the way the network pricing issue has been framed, often being to design pricing structures to solve a problem for the network rather than our preferred approach, which is for energy companies to partner with consumers and reward them for their flexibility.

[3] http://energyconsumersaustralia.com.au/publication/electricity-meter-data-portability-discussion-paper/

[4] http://www.coagenergycouncil.gov.au/publications/call-submissions-facilitating-access-consumer-energy-data

COAG Energy Council met last Friday. The Consumer Data Right was one item on the rather full agenda, which unfortunately means it didn't get a direct mention in the Communique, but it was endorsed. The Energy Council has supported the proposed approach to applying the Consumer Data Right to the energy sector as set out in the Houston Kemp report (attached), including the proposed single access gateway building on existing data sharing mechanisms. COAG Energy Council has written to the Treasurer to endorse this approach and requesting that energy officials continue to work closely with the ACCC and AEMO to implement. There will be more opportunities to continue the discussions we've had with you on this as we progress.

We expect to confirm implementation timelines agreed with the ACCC at the COAG Energy Council's next meeting in November.

The HoustonKemp report identified that to be effective the CDR would require consumers to be able to access consumption data, meter configuration data and current price plan data. The report recommended that the AEMO be designated as the CDR data provider for electricity metering and National Meter Identifier (NMI) standing data in the National Electricity Market, and that the ACCC be requested to examine and designate a data provider for consumer gas metering data, retail product data, and electricity metering data outside of the National Electricity Market no later than 12 months prior to those datasets being subject to a Consumer Data Right.

On receipt of the report two retailer representatives and two consumer advocates expressed to Energy Consumers Australia concern that AEMO was being requested to become the data provider for data for which it has no consumer relationship.

Further the recommendations seem to be inconsistent with the general intent of the Bill that decisions on designation are made by the Treasurer after consultation with the ACCC and Office of the Australian Information Commissioner (OAIC).

It is our understanding that the Energy Council decision did not endorse all the recommendations in the HoustonKemp report. The HoustonKemp report has not yet been made generally available, and overall the COAG Energy Council process could benefit by being more visible and by providing more opportunity for consumer and stakeholder input.

The immediate objective of the CDR for energy

Energy Consumers Australia and others are very focused on the objective of bringing consumer bills down. Our focus with the CDR is to create the ability for a consumer who is in possession of their energy bill to visit the relevant government comparator website[5] and entering only data from their bill, get advice on the annual cost of their electricity bill across various offers based on their consumption data. This should be able to be implemented within twelve months.

While it is also valuable to make the data available for other comparison services and for other uses e.g. to help a consumer get a quote for rooftop solar panels and other Distributed Energy Resources (DER), our focus is on the immediate application we describe above. The rest of this submission is focussed on the development of the legislation and rules to deliver this simple retail application.

[5] The websites are the AER's Energy Made Easy (https://www.energymadeeasy.gov.au/) and Victorian Energy Compare (https://compare.energy.vic.gov.au/)

The Legislation

Object of the Part

As stated in the introductory comments, the ability to review the Bill and Framework together provides greater clarity on the operation of the legislation.

The Framework states on page 11 that "the CDR aims to give consumers more access to and control over their data." This misrepresents the objectives – a misunderstanding that flows from the way the objects are described in the Bill.

We note that submissions on the first exposure draft from Consumer Policy Research Centre (CPRC) and the combination of the Financial Rights Legal Centre and Financial Counselling Australia suggested the extent of the proposed CDR is really a 'portability right' rather than a 'data right'. This limitation in scope addresses the fact that the legislation only covers data use and not any other aspect of data rights (such as rights to deletion and rectification). However, portability conveys the idea of something being taken from one place to another and, by extension, no longer existing in the first place. This is not the objective of this regime.

This regime is designed to address the question of the use of data – it is by nature an access right to use specific data about identified consumers or data sets about groups of unidentifiable consumers.

The object of the part is to enable data to be used. The end-purpose of that use is not to create 'choice and competition.' They are both only intermediate goals. The goal is the creation of economic value.

The object clause (56AA) could be simplified to read:

The object of this part is to create additional economic value by

(1) enabling additional use of data held about individual consumers at the direction of those consumers and

(2) enabling additional use of data that does not relate to any identifiable, or reasonably identifiable, consumers.

The concern about the title can be addressed by referring to the right as the 'Consumer Data Use Right'. The concerns expressed about rights such as rectification and deletion should be resolved through revision of the Privacy Principles (for example APP 13 covers correction).

Minister's task before designating

The confusion between means and ends also extends to the Minister's tasks before designating a sector. In the current drafting the Minister is required to consider (s56AD(1)):

(a) the likely effect of making the instrument on:

(i) consumers; and

(ii) the efficiency of relevant markets; and

(iii) the privacy or confidentiality of consumers' information; and

(iv) promoting competition; and

(v) promoting data-driven innovation; and

(vi) any intellectual property in the information to be covered by the instrument; and

(b) the likely regulatory impact of allowing the consumer data rules to impose requirements relating to the information to be covered by the instrument; and

(c) any other matters the Minister considers relevant.

The elements in sub-subsection (a) are benefits ((i), (ii), (iv) and (v)) and potential costs ((iii) and (vi)) and should be more clearly separated. The four elements of benefits really can be resolved to 'promoting the efficiency of relevant markets' and if necessary this could have elements of 'through promoting competition and data-driven innovation.'

The phrase 'regulatory impact' is an imprecise phrase. In the economics of regulation 'regulatory impact' more commonly refers to deadweight loss through price or entry controls. It is clear from the explanatory memorandum that what is envisioned here is the direct cost for firms to comply with the obligations.

Accordingly, we suggest s56AD(1) could read:

(a) the likely effect of making the instrument on:

(i) promoting the efficiency of relevant markets for the long-term interests of consumers[6]; including

a) promoting competition and

b) promoting data-driven innovation

(ii) the privacy or confidentiality of consumers' information; and

(iii) any intellectual property in the information to be covered by the instrument; and

(b) the likely compliance cost of allowing the consumer data rules to impose requirements relating to the information to be covered by the instrument; and

(c) any other matters the Minister considers relevant.

This drafting then makes transparent that the intention is that the economic benefits are to be related to the implementation costs. That is, it makes explicit that the Treasurer is required to consider both costs and benefits but not to formalise that as a 'cost benefit analysis' as defined by Office of Best Practice Regulation.[7]

Obligation for a public process

In the draft the Minister is required to consult with the ACCC and OAIC and there is no obligation on the ACCC or OAIC about what they are required to do in forming their advice to the Minister. The obligation should be for the Minister to consult the two agencies and for the agencies to provide written advice to the Minister.

[6] The energy and telecommunications regulatory regimes both have the promotion of the long-term interests of consumers as objectives.

[7] https://www.pmc.gov.au/sites/default/files/publications/006-Cost-benefit-analysis.pdf

Submissions on the exposure draft have variously suggested that all three should be required to undertake a public consultation process. We think this would be excessive. We do, however, believe that the ACCC should be required to undertake a public consultation process.

We suggest that the legislation place the obligation on the ACCC that prior to giving advice, the ACCC must at least publish a draft advice and allow three weeks for submissions on that draft advice before preparing final advice for the Minister. We also suggest that for the avoidance of doubt the OAIC should provide comments on the ACCC draft advice, and the OAIC final advice should be provided after it has been provided with a copy of the ACCC's final advice.

The Telecommunications Act 1997 establishes a very effective procedure that governs the ability of the Australian Communications and Media Authority to register an industry code.[8] In addition to requiring the ACMA to consult with the ACCC and the Information Commissioner it requires the ACMA to be satisfied that at least one body or association that represents the interests of consumers has been consulted. We suggest the Treasurer should be required to consult with at least one such body.

Finally, the legislation should specify that the Treasurer must publish the advice received from the ACCC, OAIC and the consumer body before making a designation, and that a designation should be a disallowable instrument.

Privacy Act and Privacy safeguards

We support the intent of the revision to the Privacy Safeguards so that they apply as a clear test for the purposes of the obligations of Data Recipients while leaving Data Holders bound by the Privacy Act. In saying this we note the similarity between the Privacy Safeguards and the Privacy Act, while noting the clarity that applying the Safeguards to a defined data set rather than the interpretation of the Privacy Act around personal data.

Energy Consumers Australia's view is that the Consumer Data Use Right is not trying to modify privacy rights. The intention is to facilitate the use of data at the consumer's direction that might otherwise be impeded by privacy law.

As will be discussed below in consideration of the rules, the important function that is performed by the CDR is to provide explicit procedures that can be followed by providers to give effect to a consumer's choice to have their data used by a third party. It is critical that the data holder is presented with clarity that the provision of the data is not breaching their privacy obligations.

The rules framework

We acknowledge that the rules will vary depending upon the relevant industry. There are, however, two aspects of the Framework as proposed that will be inconsistent with the objectives of a CDR in energy. The first relates to process flows and the concept of 'authorisation' and the second relates to the specificity of consent.

Process flows

The process flows described in section 2.1 of the Framework specify a five-step procedure in which the consumer is required to transact directly with both the accredited recipient and the data holder. We can understand and accept this process for access to financial data. It does not, however, work for our proposed approach to energy data.

[8] S117 https://www.legislation.gov.au/Details/C2018C00391

In utilities markets the concept of explicit informed consent is well developed as a procedure whereby a consumer can transact with only their new provider in the process of changing provider. This is the process used for choosing energy and telecommunications providers.

A similar process is required to transfer or 'port' a mobile phone number from one network to another. In the latter case, the objective of the process was to specify the least amount of information conceivable to limit incorrect ports. This is specified in clause 4.4.2 of the mobile number portability code and is the service number and either the account number or customer date of birth.[9]

This information is all that is required to transfer a service. The losing provider relies upon the gaining provider's attestation that the customer is agreeing to the transaction.

It is our view that the one-off provision of consumption data that will only be used to develop a quotation and not be otherwise provided to the requesting party requires no more complex process than this.[10] In forming our view we are conscious of concerns consumers have expressed about access to data, such as the ability for third parties to detect their daily movements from their energy use data. Our support is premised on strong protections to ensure that it is only the accredited party obtains this information and they use it to derive new information and it is only the derived information that is provided to the requesting party.

We know that consumers have very little time to consider their energy supply. Most do not have a preconfigured identity confirmation arrangement with their retailer, network or other data holder. To require consent and a separately provided authentication will likely hobble the CDR for energy in its early applications.

We note that the approach to consent and whether an additional authorisation is required depends upon the data requested and the purpose to which the data will be put. This has consequential significance for the consent arrangements.

Consent

The discussion of consent in the Framework details the criteria that the ACCC will apply in writing rules about consent. We are concerned that this approach runs the risk of promoting 'Ts and Cs overload.' By this we mean the requirement that terms and conditions become so detailed and overloaded for information that consumers do not read them. This in particular applies to suggestions such as that consumers should be given the option to determine if their redundant data is de-identified or destroyed; destruction should be the default condition.

Our view is that while the generality described by the ACCC in the Framework is appropriate, the rules themselves should be very specific about the forms of consent that will apply in relation to specific requests. In the case of historic consumption data our view is that the specification of the consent should be for a defined purpose (to generate an estimated bill using the consumption data or to

[9] https://www.commsalliance.com.au/__data/assets/pdf_file/0010/1342/C570_2009-Amendment-No-1-2015.pdf

[10] We are aware that parts of the banking industry think the requirements for number portability should be strengthened as fraudulent ports have been used as part of banking fraud. The mobile industry in turn notes that the choice to use texts to mobiles as second factor authorisation was not made by them, and have offered to the banks the ability to interrogate the ported number database as a protection against this fraud. It is notable that the driver for fraudulent mobile porting has been banking fraud.

generate an estimate of the benefit from a consumer purchase by using consumption data and price information). That defined purpose would include a requirement that the data be destroyed once used.

This raises an interesting question around data used in providing advice when that advice could be part of a subsequent legal action (for example, a case that the guarantee under Australian Consumer Law is invoked). This suggests that in some circumstances the data standards may warrant the data provider being required to keep a copy of the data that was provided to a data provider who has an obligation to destroy the data.

These considerations in consent are, unlike the considerations about process, consistent with the Framework and become relevant in developing specific rules.

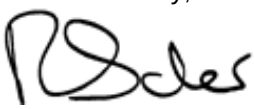
Conclusion

The early delivery (ideally by December 2019) of the CDR for energy is critical to achieving developments in the market that will make electricity more affordable and reliable. The sector is well placed to move forward rapidly once the legislation is in place and the relevant agencies can provide support.

We understand that the CDR for banking is fully utilising the capabilities at the ACCC and Data61 for this development. We believe that AEMO is well placed to provide an initial focus of activity on data standards and, with assistance from the AER and Energy Consumers Australia, draft rules. We recommend that the ACCC and Data61 be requested to work with AEMO in this regard.

Please do not hesitate to contact David Havyatt on david.havyatt@energyconsumersaustralia.com.au or 08 9220 5500 if you would like to discuss this submission further.

Yours sincerely,



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