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Senate Standing Committees on Economics
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Treasury Laws Amendment (Consumer Data Right) Bill 2019

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 provide the Committee with our comments on the Treasury Laws Amendment (Consumer Data Right) Bill 2019. The Bill is part of an overall framework (the Framework) that will include Rules made by the Australian Competition and Consumer Commission (ACCC) and Data Standards which are currently being developed by Data61. Understanding of the Bill has been significantly enhanced by the availability of the ACCC's *Consumer Data Right: Rules outline,* though we note the ACCC has acknowledged the outline does not address all possible issues and is explicitly focused on "matters that are essential to the commencement of the CDR in the banking sector."[1] In our submission to Treasury and ACCC consultations we noted that this has highlighted the lack of clarity of the object of the reform and the process of designating a sector.

We have not at this stage engaged in any detail on the data standards work. We are concerned that the approach of focussing on the data standards for Open Banking first has resulted in a set of standards that are excessive for many of the practical use cases of the Consumer Data Right.

We note that section 56BA(2) of the Bill notes the ACCC rules may set out:

a) different rules for different designated sectors; or

b) different rules for different classes of CDR data; or

c) different rules for different classes of persons specified, as described in paragraph 56AC(2)(b), in an instrument designating a sector under subsection 56AC(2); or

d) different rules for different classes of persons who are able to be disclosed CDR data under the consumer data rules.

We consider that this is a practical provision but remain concerned that the focus on an 'economy wide' right is resulting in insufficient consideration of the provisions of this subsection.

[1] https://www.accc.gov.au/system/files/CDR-Rules-Outline-corrected-version-Jan-2019.pdf

In the remainder of this submission we first review the background to the Bill, and then we outline Energy Consumers Australia's interest in the Consumer Data Right. We then make some specific comments about the Bill before moving to some additional comments about the Bill motivated by the ACCC's initial work on the rules framework.

We repeat in this submission some proposals for amendments to the Bill that were made on the exposure draft, however, if asked whether we would prefer the Bill in its current form or not at all we would recommend the Parliament pass the Bill.

Background

The Bill is in large measured based on the Productivity Commission's (PC) Inquiry Report *Data Availability and Use.*[2] This report covered a broad range of issues about the ability to make better use of data in the economy. An important feature of the PC's recommendations was the focus on the use of data rather than the ownership of data. The PC report suggested the creation of a new Comprehensive Right to access and use digital data:

> *RECOMMENDATION 5.1*
>
> *Consumer data must be provided on request to consumers or directly to a designated third party in order to exercise a number of rights, summarised as the Comprehensive Right to access and use digital data. This Comprehensive Right 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*
> - *direct data holders to transfer data in machine-readable form, either to the individual or to a nominated third party.*
>
> *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.*

This recommendation draws an important contrast with existing consumer rights which are provided through the Privacy Act. The origin of this Act is the 1983 Australian Law Reform Commission (ALRC) report *Privacy (Report 22).*[3] That report's timing allowed for a highly evocative opening:

> ***1984 Arrives***
>
> *Ever since George Orwell wrote Nineteen Eighty-Four, that year has stood as a symbol of the way in which authoritarian attitudes and intrusive modern technology could undermine freedom and individual privacy. Now, on the brink of 1984, the Law Reform Commission publishes the results of a seven-year inquiry into the threats to privacy in Australia. It concludes that privacy is in danger, both in actuality and, even more so, in prospect. This report describes the chief sources of the dangers. They include :*
>
> - *Growing Official Powers. The powers of increasing numbers of public officials to intrude into the lives and property of Australians are growing.*

[2] https://www.pc.gov.au/inquiries/completed/data-access/report/data-access.pdf
[3] http://www.austlii.edu.au/au/other/lawreform/ALRC/1983/22.html

- *New Business Practices. New intrusive practices have developed in recent years, such as electronic surveillance, credit reporting and direct marketing.*
- *New Information Technology. The computerisation of personal information has enormous advantages, but it also presents Australian society with new dangers, now well documented and understood. The amount of personal information that can be collected and distributed has grown enormously. The ever-increasing speed and the ever-diminishing costs with which it can be retrieved puts a great deal of information about all of us at the fingertips of a few. Computers can now manipulate information supplied from many sources, match and compare it and build detailed personal 'profiles'. The linkage of computers by telecommunications brings such information across the street or across the world. The computerists, those who operate computers, do not, as a group, have even the imperfect checks and restraints that the older professions are subject to. The new technology is international. Control of it can readily be centralised in relatively few hands.*

The Act has seen many amendments since, as outlined in the Office of the Australian Information Commissioner (OAIC) history of the Act.[4] These changes extended the coverage of the Act from Government to private sector organisations and revised the privacy principles. Throughout these changes the Act has continued to have a focus on the collection of information. Protections on dissemination of information are seen through this lens as simply further protection from secondary collection.

The ACCC's Digital Platforms Inquiry Preliminary Report suggests that this approach to the management of data collection is ineffective.[5] The ACCC found (sections 5.3 and 5.4):

- *Many digital platforms seek consumer consents to their data practices using clickwrap agreements with take-it-or-leave-it terms that bundle a wide range of consents.*
- *These features of digital platforms' consent processes leverage digital platforms' bargaining power and deepen information asymmetries, preventing consumers from providing meaningful consents to digital platforms' collection, use and disclosure of their user data.*
- *Many digital platforms' privacy policies are long, complex, vague, and difficult to navigate. They also use different descriptions for fundamental concepts such as 'personal information', which is likely to cause significant confusion for consumers.*
- *Despite consumers being particularly concerned by location tracking, online tracking for targeted advertising purposes, and third-party data-sharing, these data practices are generally permitted under digital platforms' privacy policies.*

While the protections in the Privacy Act are ineffective in managing the collection of data, they prove to be all too effective in frustrating consumers' access to and use of their own data. It is instructive that the ACCC found that the central construct of the Privacy Act — 'personal information' — is likely to cause significant confusion for consumers.

[4] https://www.oaic.gov.au/about-us/who-we-are/history-of-the-privacy-act
[5] https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry/preliminary-report

Thirty-five years after 1984 it is time that we had an approach to data that referred to the use and management of data. The first requirement of that use and management is the security of data and that the use of data should be meaningfully controlled by consumers.

The Consumer Data Right Bill acts on part of this agenda; though it should more properly be referred to as the Consumer Data Use Right Bill. A fundamental issue of concern for some is that we should not be making it easier for organisations to obtain data without first rectifying the underlying issues around consumer consent to the use of data by data holders.

The alternative view is that such an approach perpetuates the problem that the only person who doesn't benefit from their data is the consumer themselves. The Consumer Data Use Right provides the opportunity to provide some clear rules that will allow use while imposing better controls than provided by the Privacy Act.

Energy Consumers Australia's interest in the CDR

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.*[6]

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.

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.[7] 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

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

[7] 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.

On 6 November 2014, the AEMC made new rules which they said would "make it easier for consumers to obtain information about their electricity consumption from distribution network companies and retailers in an easy-to-understand, affordable and timely way."[8] These rules required retailers and networks to provide the data in electronic form within ten days in a format specified by the Australian Energy Market Operator (AEMO). The retailer or network was required to provide it to a customer authorised representative at the request of the customer.

The rule required that the retailer or network provide information to a customer authorised representative,

> *after having first done whatever may be required or otherwise necessary, where relevant, under any applicable privacy legislation (including if appropriate making relevant disclosures or obtaining relevant consents from retail customers)*

In July 2017 we published a discussion paper on *Electricity Meter Data Portability*.[9] That paper proposed a framework similar to the CDR that built on the existing requirement for networks to provide access to data. The paper proposed an accreditation scheme for third parties to be operated by networks collectively.

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 was hampered by concerns the networks hold about how they would manage their risk under the Privacy Act. The difficulty is that no one can provide any comfort to the networks on whether the proposed process would meet requirements under privacy legislation and there was no means for managing compliance and enforcement of the third parties (the customer authorised representatives).

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."[10]

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

> *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),*

[8] https://www.aemc.gov.au/rule-changes/customer-access-to-information-about-their-energy
[9] http://energyconsumersaustralia.com.au/publication/electricity-meter-data-portability-discussion-paper/
[10] http://www.coagenergycouncil.gov.au/publications/call-submissions-facilitating-access-consumer-energy-data

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.[11]

At its meeting in December 2018 the COAG Energy Council was advised the ACCC is working towards a first half 2020 application of the CDR for energy.

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[12] 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.

For consumers with 'smart meters' (an increasing number of residential and small business users have these through contestability arrangements) energy usage is measured in half hour increments. New pricing plans that have time of use bands (or other variations to a single consumption price) have the ability to reward consumers who manage to use electricity at the times where it is cheaper to produce and transport. Determining an estimate of annual bills on these plans requires a calculation based on the half hourly data. A well implemented CDR will enable this data download and calculation at the click of a button – or a verbal authorisation for consumers on the phone.

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.

The Bill

Object of the Part

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

The ACCC's *Rules Framework* issued in September states on page 11 that "the CDR aims to give consumers more access to and control over their data."[13] This misrepresents the objectives – a misunderstanding that flows from the way the objects are described in the Bill.

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11 http://www.coagenergycouncil.gov.au/sites/prod.energycouncil/files/publications/documents/Consumer%20Energy%20Data%20final%20report.pdf

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

13 https://www.accc.gov.au/system/files/ACCC%20CDR%20Rules%20Framework%20%28final%29.pdf we note that this was not included in the more recent *Rules outline*

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 better outcomes for consumers and 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 for consumers 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'.

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 both benefits [(i), (ii), (iv) and (v)] and potential costs [(iii) and (vi)] and these should be more clearly delineated. The four elements of benefits really can be simplified to 'promoting the efficiency of relevant markets through promoting competition and data-driven innovation.'

The phrase 'regulatory impact' is imprecise. 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, that is implementation and ongoing compliance costs.

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[14]; 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.[15]

Obligation for a public process of designation

The Bill has significantly improved on the exposure draft by requiring that the ACCC and OAIC must be consulted by the Treasurer before he makes a designation instrument and that these reports must be published on the agencies' websites.

Section 56AH however provides a catch-all exemption that the failure to comply with these requirements does not invalidate a designation instrument. This is now a common drafting approach to reduce the risk that small technical breaches do not result in invalid instruments that may have already resulted in extent compliance investment. The Parliament may wish to consider whether there is a preferable approach to these types of clauses such as imposing time limits within which the designation can be invalidated and a fast response consideration. However, this is not a provision that causes particular concern to Energy Consumers Australia on this Bill.

Privacy Act and Privacy safeguards

We support the intent of the inclusion of the Privacy Safeguards so that they apply as a clear test for the purposes of the obligations of Data Recipients (such as a Comparator website) while leaving Data Holders (such as a network or retailer) 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

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

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

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 reduce privacy rights.

The intention is to facilitate the use of data at the consumer's direction that might otherwise be impeded by privacy law.

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 by following the ACCC rules the provision of the data is not breaching their privacy obligations.

However, we do share the concerns expressed by others that the Privacy Act is not effective in the way it manages the consents provided by consumers to data holders. While the right to privacy is a human right, the expectation of consumers that the data they provide in the course of ordinary transactions will be held securely and not shared without their explicit consent is an important contributor to consumer confidence in data.

Markets are fundamentally based on trust and the collapse in trust of corporations and governance institutions is becoming a significant economic issue.

Accordingly, we recommend that in addition to enacting the Consumer Data Use Right the Parliament should institute a review of the rest of the framework for management of consumer rights and expectations over the use of data. The Parliament could include this as a legislative requirement as part of this Act, such as requiring the Treasurer to initiate an inquiry and provide a report to Parliament by a certain date.

The rules framework

As noted above the ACCC's *Rules outline* is explicitly restricted to rules for the implementation in banking. However, there are aspects to these rules that suggest legislative guidance currently provided may be insufficient.

Where the consumer data right is designed to provide an aid to consumers in decision making (e.g. price comparison or dimensioning solar panels prior to purchasing) rather than the establishment of an ongoing relationship, the effective implementation requires the consumer to be able to obtain that service with minimal engagement.

Put simply the ideal would be a nice shiny standard format 'button' on comparison websites that is an ACCC supported mechanism that effectively says 'I authorise you to get my usage data for the purposes of providing me with a price comparison service. I acknowledge that you will not provide me with that data and you will destroy the data as soon as it has been used to make the calculations for the comparison.'

As implemented for banking even a price comparison service could not access consumer data without the consumer having to have an online relationship with their data holder (bank). This would not provide a useful service to a consumer simply trying to decide on a good credit card option. The data standards consideration of consent also seemed to be presuming that consent would only be granted online rather than possibly being granted in person or on the phone.

Similarly, the ACCC rules partially defeat the value of a Consumer Data Right creating clarity of process for data holders and recipients by importing the vagaries of the Privacy Principles on consent. This in our view is inconsistent with the ACCC's view of consent in its digital platform review.

To this end we think additional guidance for the ACCC in making rules should be added to section 56BP. In the Bill the ACCC is only required to have regard to the issues the Minister has to consider in s 56AD in designating a sector (noting that we have separately identified improvements on these above). The additional guidance should direct the ACCC to making rules that:

1. Promote consumer confidence in the sector and the management of data;
2. Minimise the burden placed on consumers in exercising their rights to use their data; and
3. Provides specific forms of consent that can be advertised by data recipients as being an endorsed ACCC form of consent.

Conclusion

The delivery 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.

The specific value in the CDR for this sector is the ability to specify clear rules that can be followed so that data holders know that they are not breaching their obligations under the Privacy Act.

We believe the Bill could be improved by:

1. Amend the objects in s56AA to put the focus on the end goal of the creation of economic value for consumers rather than the means to that goal which are competition and choice.
2. Amend the matters the Minister must have regard to in s56AD to more clearly reflect the consideration of benefits and costs and provide better guidance to the ACCC.
3. Consider whether there is a better mechanism to avoid small defects in process invalidating instruments other than the broad approach of s56AH.
4. Include in the Bill a requirement for the Treasurer to review and report to Parliament on further changes to data protection legislation, including the Privacy Act, to provide greater confidence to consumers about the use of their data.
5. Provide additional guidance to the ACCC through including that they have regard to consumer confidence, ease of use by consumers and standardised forms of consent in developing the rules.

We believe these amendments would strengthen the Bill and make the introduction of the Consumer Data Right more effective. However, if presented with a choice between the Bill in its present form and having no legislation at this time, our preference would be the Bill in its present form.

Please do not hesitate to contact David Havyatt on david.havyatt@energyconsumersaustralia.com.au or 02 9220 5500 if you would like to discuss this submission further.

Yours sincerely,

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