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The Treasury
Langton Crescent
PARKES ACT 2600

12 October 2018

Treasury Laws Amendment (Consumer Data Right) Bill 2018: Provisions for further consultation

AGL Energy (**AGL**) welcomes the opportunity to make a submission in response to additional provisions on the Treasury amendments for enacting the Consumer Data Right (CDR) in Australia.

AGL welcome the steps taken by Treasury to address several issues stakeholder raised from the initial consultation round. AGL supports Treasury strengthening the consultation requirements to ensure best practice regulation and rule setting occurs.

However, while the amended provisions are a positive step in improving the CDR application in Australia, there are still several matters that need to be addressed to ensure the CDR Framework meets the dual objectives of empowering consumers and driving innovation. In particular:

- The Privacy Safeguards remain confusing and should instead be extensions of Australian Privacy Principles (APPs).
- Value-added data should not be captured, and any exceptions should be provided for in legislation.

AGL continues to be concerned at the pace at which this legislation is being put together and the ambitious timeframe of Treasury. The initial drafting consulted on only seven weeks ago introduced several concepts that had not previously been discussed, scoped or costed (such as the broad extension of the definition of data for value-added data) and the development of Privacy Safeguards.

The CDR represents a significant change to the Australian economy and without proper care in drafting, may lead to severe unintended consequences. These consequences will not just be to competition, innovation and investment but also for consumer protection and consumer confidence in markets. AGL strongly recommends the Government amend the timeframes to allow for more effective consultation across all relevant stakeholders to develop fully considered legislation.

Additional information is available below. Should you have any questions in relation to this submission, please contact Kathryn Burela on [redacted], [redacted].

Yours sincerely

[Signed]

Elizabeth Molyneux

General Manager Energy Markets Regulation

Best practice regulation and law-making

AGL supports the development of a CDR in Australia and recognises the benefits it can bring to both competition and consumers in the portability and management of their data. However, AGL is firmly of the view that appropriate and effective rule-setting cannot be rushed. The ambitious timeframes that both Treasury and the Australian Competition and Consumer Commission (ACCC) are working towards does not allow stakeholders time to properly assess for unintended consequences and therefore put in place mitigating measures to ensure consumers maximise the benefits of the framework.

AGL is not aware of a cost-benefit analysis that has been undertaken to ascertain the impacts of the proposed broad scoping of the Treasury amendments (such as the extension to value-added data and corporations) and note that the solution for these questions is to confer more powers on to the ACCC in their Rule making ability.

AGL considers the Privacy Safeguard unnecessary extensions that will impose greater burden and complexities on industries in trying to manage dual privacy requirements. While the amendments to limiting the Privacy Safeguards are a positive step, it is likely to become redundant as many participants in the CDR framework are both data holders and accredited data recipients. AGL is not aware of cost-benefits and scoping that have been undertaken to determine the necessity of Safeguards over extending the Privacy Act and the costs to business in having dual privacy requirements.

AGL is also concerned about the heavy influence the banking sector has had on what is to be a nation-wide and economy wide right, both through the ACCC Rules Framework as well as the drafting of the legislation. As a result of the processes that have occurred in banking (i.e. the Open Banking review), the banking sector is much better positioned than other industries (such as telecommunications and energy) to respond to and shape this process. This is evident in the drafting of both the ACCC Rules Framework (that draws heavily on examples from the banking sector[1]) and the Treasury drafting. This results in exceptions drafted into legislation to account for banking specific requirements.

For example, as far as AGL is aware, the extension of the definition of data to include value-added data was to capture the unique requirements of Know Your Customer (KYC) highlighted in the Open Banking review. [2] The KYC exception is distinct to banking and does not apply to telecommunications and energy, and yet the drafting then opens the floodgates for all value-added data. This is discussed further below.

Timeframes

AGL continues to be concerned with the fast-pace and therefore the duality in process that is currently occurring with CDR through the ACCC Rules and Treasury legislation. These compressed

[1] https://www.accc.gov.au/focus-areas/consumer-data-right/accc-consultation-on-rules-framework

[2] Open Banking review - https://treasury.gov.au/consultation/c2018-t247313/

timeframes have resulted in three key issues that will impact the efficacy of the system and may undermine the effectiveness of the CDR:

1. Drafting errors that are being quickly worked through
2. Not enough time to assess cost benefits (as per Privacy Safeguards)
3. Difficultly to develop ACCC framework without having the enabling legislation locked down – with a Framework that focuses heavily on the banking sector.

Not allowing an appropriate amount of time to consider legislation on a matter as important as consumer privacy and data can have severe unintended consequences. Importantly, if not properly and adequately scoped it can damage consumer confidence in markets and impact competition through business innovation and investment.

AGL note that other related processes have taken substantially more time to ensure that as many potential issues were addressed or mitigated before being implemented. For example, the Harper Review to amend sections of the ACCC's power under the Competition and Consumer Act, the Privacy Act reforms and the UK Open Banking development.

Value-added data

While AGL supports the narrowing of the data sets by Treasury, the changes are still insufficient to justify the broad scope and powers for the ACCC and the Minister to include value-added data into the regime. Legislation should be designed tightly to ensure protection and clarity to those who rely on its drafting to implement the CDR framework.

As far as AGL is aware, the extension of the data definition has been prefaced on the need to be able to cater for one-off exceptions such as KYC under anti-money laundering requirements. By seeking to set the definition in such a way as to allow one-off exceptions is not within the spirit of the law.

AGL recommends Treasury consider an alternative, such as including the exceptions within the legislation and amending the legislation as exceptions occur. The current process will essentially confer decision-making power on to the ACCC to recommend the designation to the Minister, define through the rules, and potentially even set fees for, value-added data sets. The risk of over-reach and impacts to business investment and certainty are too great to justify such a grant and extension of power.

The principle the legislation should be setting is that the ACCC is the Rule enforcer and provides advice and to the Minister who is responsible for significant changes to the Framework. The Minister can then apply an independent eye on the ACCC recommendation and make an objective policy decision. Allowing the ACCC to set (and enforce) the Rules on important policy matters such as what data is or is not captured by the framework carries a real or perceived conflict.

Privacy Safeguards

While AGL supports the narrowing application of the Safeguards to data holders, serious questions about the need for both APPs and Safeguards remain. AGL remains concerned with the overall approach of dual privacy requirements and considers the overall approach remains confusing, and at

times, inconsistent with the Privacy Act. The Privacy Act has been developed over several decades, is well understood, embedded in industry practices and appears to be working well. AGL recommends that the APPs form the basis of the rights and obligations of the CDR and be extended where necessary.

Ultimately, as CDR rolls out across different industries, there will be an increase in businesses that are both recognised data holders and accredited data recipients. It is therefore likely that despite Treasury's attempt to mitigate the confusion of dual systems, dual systems will inevitably continue to run and add unnecessary complexity into the system.

AGL considers that the data sets should be treated the same irrespective of who in the system is managing that data and as such a single (but extended) Privacy Act requirement is the logical basis for this approach. AGL recommends Treasury consider the APPs as the basis of requirements as a tested and known requirement amongst key participants – and that amendments can be incrementally introduced as the framework evolves.

AGL also notes drafting concerns with the Safeguards that create unusual obligations on participants beyond the APPs that appear unnecessary in its application to the CDR framework (examples are below).

- **Privacy Safeguard 10** – *quality of CDR data* - removes the test of 'reasonableness' and shifts the requirement to be that an entity 'must ensure' the quality.[3] This higher threshold has not been explained in any of the materials and will create unclear compliance obligations for entities.
- **Privacy Safeguard 11** – *security of CDR data* – the amended proposal for this requirement is that data holders will be required to provide amended data (i.e. if data was corrected) to previous recipients of this data. AGL is of the view that such drafting would require data holders to disclose CDR information to non-accredited data recipients in the event a data recipient having their accreditation revoked. It is unclear where the onus of confirming valid accreditation status sits and irrespective the drafting should be amended to address this.
- **Privacy Safeguard 12** – *correction of CDR data* - requires entities to either correct customer data or provide a statement as to why the correction has not occurred.

  Under the APPs currently for example, if a customer disputes call notes on their account, AGL will append a comment on those notes that the customer does not agree with them.[4] This process is appropriate and manageable for data such as call centre notes that may be read individually and used for the purposes of managing the account in a free-text call notes field. However, this process cannot easily be replicated for other data sets. It is unclear what process Treasury expects will occur for disputed data under the CDR and how this can be managed through different systems and records – particularly those that do not include free-text and are instead figures, algorithms, and other sets of data. AGL request further information on how

[3] See APP 10 – quality of information "an APP entity must take such steps (if any) are reasonable) in the circumstances to ensure that the personal information…"

[4] This is in line with guidance under APP 13.4 in ensuring statements are associated to information.

businesses will be expected to meet the obligations under Safeguard 12 if it is not linked to a free-text data set (i.e. aggregated data sets, owed billing amounts (that may be disputed) etc.

Additional comments on proposals

AGL would also like to offer the following comments on other aspects of the Treasury amendments:

- AGL supports the additional rigour around ACCC and Minister consultation requirements and timing and the use of Regulation Impact Statements. We recommend this same obligation and rigour should apply to the ACCC Rule-making powers and require consultation with industry.
- There should be clear legislative terms for the ACCC to be bound by when deciding whether to intervene and set fees. Further, it is unclear if the fees will be set per data holder or per industry. Setting the fee per industry may be more efficient for the ACCC but would not be a fair representation of the different values business have invested in their intellectual property.
- AGL believes the emergency rules setting powers remain too broad – there have been no specific examples provided that could justify this extension of power. This matter was raised in AGL's previous submission to Treasury and there does not appear to be any further justification or need for this additional power when compared against other emergency setting powers.
- Further information is required on proposal 5 – particularly how Treasury proposed to draft the ACCC powers (drawing on 44CA) and what criteria will be set? AGL requests further consultation occurs on these matters.