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12 October 2018

Daniel McAuliffe
Structural Reform Group
The Treasury
Langton Crescent
PARKES ACT 2600

Submitted electronically to: data@treasury.gov.au

Dear Mr McAuliffe

Submission on the Treasury Laws Amendment (Consumer Data Right) Bill 2018 (Second Exposure Draft)

EnergyAustralia is pleased to make this submission on the exposure draft of the *Treasury Laws Amendment (Consumer Data Right) Bill* 2018 (Second Exposure Draft) (the **Second Exposure Draft**) and the Treasury Laws Amendment (Consumer Data Right) Bill 2018: Provisions for further consultation proposals (the **Proposals**)

We support transparency in the energy retail market and measures to support customers making informed decisions, such as the creation of the consumer data right. EnergyAustralia believes that the Second Exposure Draft and the Proposals take further steps towards facilitating a more transparent retail energy market that makes it easier for customers to choose the right energy product and service for them.

As noted in our first submission on the *Treasury Laws Amendment (Consumer Data Right) Bill* 2018 (the **Bill**) dated 7 September 2018 (**first submission**), the introduction of a consumer data right across the energy sector will have significant implications. While we consider that the Second Exposure Draft and Proposals address some of our key concerns, we believe that there is still some further work required.

The enclosed submissions contain our key comments regarding the Second Exposure Draft and the Proposals.

In summary, while we acknowledge the steps taken by Treasury to enhance the rigour of the consultation process, we believe that this should be entirely codified in the legislation, instead of leaving aspects solely within the explanatory memorandum.

We also welcome the move for the pricing intervention mechanism to be included in the Bill, but caution against drawing on analogies between data and other facilities for a pricing intervention mechanism, given the significant differences in the nature between the two.

Additionally, we have some new concerns arising from the Second Exposure Draft and accompanying explanatory memorandum. First, the continued intention to expand the consumer data right (including the Privacy Safeguards) to business consumers goes beyond the recommendations of the Productivity Commission and the Review into Open Banking, and could be costly and onerous for CDR participants. Second, the changes to the disclosure obligations of accredited data recipients removes flexibility that existed in the previous draft by requiring consent for all disclosures, which does not allow for disclosures to be made without consent in exceptional circumstances (such as

where it is reasonably necessary to protect health and safety or for law enforcement activities). Finally, further clarity is required on the intended penalty regime, which we hope will be shared for additional consultation.

We appreciate the invitation to provide comments on the Second Exposure Draft and Proposals and encourage the Treasury, the Department of Energy and Environment, ACCC and OAIC to continue to engage and consult with the energy sector, as well as the relevant energy sector regulatory bodies, on the issues that concern the energy industry. EnergyAustralia looks forward to continuing to work with the Government as discussion regarding the application of the consumer data right in the energy sector evolves.

Yours sincerely

Lee Evans
Policy and Advocacy Lead

EnergyAustralia

The EnergyAustralia submission on the Treasury Laws Amendment (Consumer Data Right) Bill 2018 (Second Exposure Draft)

12 October 2018

Part A: Proposals

We welcome the Treasury's prompt response to many of the concerns raised in our submission. We have set out in the following sections our views and queries in respect of the Proposals. On the whole, we believe that the Proposals are a valuable step in the right direction to creating a fair regime that appropriately balances the rights of consumers and businesses.

1. Proposal 1: Derived Information

We agree with the proposal to leave the inclusion of derived data to the designation instrument and thank Treasury for acknowledging the importance of this data to businesses. We believe that this approach will provide greater flexibility to address the specific needs of each sector, and will provide greater comfort to businesses regarding the intellectual property in their derived data.

2. Proposal 2: Interaction of the Privacy Safeguards with the Privacy Act

We are grateful for the clarity provided as to the interaction between the Privacy Safeguards and the Australian Privacy Principles.

One area where we would like to receive further clarity is in respect of the CDR policy, and the idea of an "approved form" and how this will overlap with existing privacy policy requirements. We query whether this is necessary, given that no such equivalent is required for privacy policies. To assess this further, we would appreciate more information about what Treasury intends by this requirement. Our inference from the explanatory memorandum is that this would be limited to the medium in which the CDR policy is provided (eg online or in a booklet). Nonetheless, we are concerned that this requirement could also dictate the structure and format of a CDR policy. In terms of structure, we would envisage that our CDR policy would be included as an addition to our existing privacy policy. The advantage of this approach is that it will provide a single destination for customers to understand how EnergyAustralia uses, discloses and handles their data.

3. Proposal 4: Process for designation and rule-making

We are appreciative of the consideration that has been given in the Proposals to ensuring that a cost-benefit analysis is undertaken for each designation, and that timeframes for consultation will be legislated. However, we do have some concerns that remain unaddressed.

First, we query why the cost-benefit analysis will only be referenced as a requirement in the explanatory memorandum but will not be included in the legislation. The inclusion in the explanatory memorandum is of limited legal effect and does not provide the desired comfort to the industry that it will be followed by future Ministers. As stated in our first submission, for the implementation of the consumer data right in the energy sector generally (including with respect to the designation of a sector by the Minister and the development of any proposed consumer data rules by the ACCC), we suggest that the same process is implemented that currently applies in relation to the National Electricity Rules affecting data access (such as the recent Power of Choice program). This would include a formal AEMC rule change and comprehensive cost-benefit analysis of the proposed right.

Second, while the Proposal requires there to be minimum periods of time for consultation before the designation or rules will be considered effective (which we support), there is still no requirement for the Minister or ACCC to take public consultation into account when making these decisions. We remain committed to this point raised in our first submission. In particular, we remain concerned that s 56BO(3) allows the ACCC, notwithstanding a failure to consult, to make valid rules.

Third, it is unclear what will occur during the 60 day wait periods and we would appreciate further clarity on this point. Would the Minister and ACCC be required (or permitted) to

undertake further consultation during that period, or is the period intended to allow the Minister and ACCC sufficient time to consider the submissions? We would also appreciate clarity on the order in which the various steps in the consultation processes are proposed to occur, including whether any steps are expected to be taken concurrently.

We also reiterate that it is difficult for us to comment on all issues which may arise in connection with the potential designation of the energy sector prior to seeing the proposed consumer data rules and data standards alongside the Bill, given the interdependencies between these documents.

4. Proposal 5: Framework for changes for access to and use of CDR data

We welcome Treasury's decision to move the pricing mechanisms into the Bill, to provide greater structure to price interventions for chargeable data sets. We believe this will assist in ensuring that businesses can receive fair and reasonable returns, particularly in respect of value-added data sets.

However, in our view, further thought needs to be given to the criteria and mechanism set out in the Proposals and the intent of the pricing intervention. In respect of the intent, we are more supportive where the intention is to stop setting unreasonable prices in respect of facilitating an access request to avoid complying with the request (such as where there is a particularly large request from a business, and the data holder imposes a prohibitive cost to prevent these requests).

We have more concerns where the ACCC may attempt to intervene in a market set price for access to the intellectual property contained within a value-added data set, as there is a real risk that price intervention may jeopardise investment in an emerging and developing sector where innovation is important.

We believe that caution needs to be taken when attempting to draw analogies between essential facilities and data. Facilities to which ss 44ZZCA and 44CA of the Competition and Consumer Act apply are natural monopolies where it is not efficient (or in the public interest) to duplicate the asset, and therefore there is a risk that substantial market power may be held by the asset holder. We do not consider the case has been made to treat data in the same way.

In contrast to natural monopoly facilities, the types of data likely to be subject to higher charges will tend to have a level of exclusivity within them as a result of intellectual property rights created through investment in innovation. The risks of creating disincentives to investment and innovation and allowing free riding outweigh the theoretical benefits that might arise from data to be shared at prices based on traditional capital valuation methodologies.

The justification for preventing vertically integrated data holders from discriminating is also unlikely to be analogous between facilities and data sets. The investment incentives in data sets is likely to arise from integrated upstream and downstream businesses (as opposed to maximising fees from access to data), and so imposing non-discrimination requirements would act as a disincentive to investment. For these reasons, a business that has invested in developing intellectual property should be allowed to take advantage of that intellectual property throughout their business.

We also note the existing prohibition against misuse of market power in the *Competition and Consumer Act 2010* (Cth) provides a sufficient protection against anti-competitive behaviour.

Another issue relating to pricing that still needs to be resolved, is who will pay and collect the applicable fees. This was noted in our first submission.

Part B: Other Issues

In addition to the Proposals, we have set out below our additional thoughts in respect of the Second Exposure Draft.

EnergyAustralia raised a number of concerns in its first submission that have not been addressed in the Second Exposure Draft. Where we have not otherwise addressed those concerns in this submission we reiterate the points set out in our first submission. These relate particularly to ensuring that the consultation process for the energy industry is thorough and will address the unique complexities that exist within the energy industry.

5. Definition of CDR consumer

5.1. Application to businesses

We remain concerned about the extension of the CDR regime, including the Privacy Safeguards, to businesses (as clarified in the updated explanatory memorandum). We expect that part of the consideration that the Minister undertakes in deciding whether to designate particular information as CDR data will include an assessment as to whether it should apply to all CDR consumers, or a subset of consumers (as permitted under the designation instruction in s 56AC of the Second Exposure Draft).

Particular attention needs to be given to the different issues that apply to residential consumers, as opposed to small, medium or large businesses. We addressed these differences in our first submission. In particular we note that:

(a) there are differences in how large businesses are managed at an account level by energy retailers;

(b) the energy industry has different requirements for small and large customers; and

(c) there may be additional costs in complying with requests from larger consumers.

We still seek further clarity on the rationale of extending the Privacy Safeguards to all business customers, given that this would provide more rights than are provided to personal information under the *Privacy Act 1988* (Cth) (**Privacy Act**). While maintaining the confidentiality of CDR data of a business is clearly a justifiable requirement, consistent with other regulatory regimes (such as obligations of confidentiality under the National Electricity Rules), the expansion of a broader privacy right to businesses is unprecedented, and compliance could be costly and onerous. We note that the idea of a "receiving data holder" considered in the explanatory memorandum and s 46AG(4) of the Second Exposure Draft could be used as a mechanism to place business customers outside of the scope of most of the Privacy Safeguards.

Related to the Privacy Safeguards, it also remains unclear how data breach notification obligations are expected to apply to businesses.

5.2. Application of consumer data right to households

We remain concerned that the proposed CDR regime does not adequately address the complexities associated with circumstances where a household has multiple individuals who may be "CDR consumers" but are not account holders.

We refer to the concerns raised in our first submission. In particular, we reiterate that we firmly believe "CDR consumer" should only refer to the account holder(s), and not to all members of a household or relatives, due to complexities and impracticalities of enforcing the consumer data right in any other way in the energy sector. The amendments to the definition of CDR consumer (that now includes wording relating to an "associate" within the meaning of section 318 of the *Income Tax Assessment Act 1936* (Cth)), does not remove the complexities of verifying whether a person is the relevant CDR consumer in the energy context.

6. Consents and notification of disclosure

We are concerned about the operational implications of the requiring an accredited data recipient to:

(a) obtain consent for each disclosure of CDR data under Privacy Safeguard 6; and

(b) to notify the CDR consumer for each disclosure of CDR data under Privacy Safeguard 10.

We understand and appreciate the intent behind the introduction of these terms - the CDR system is, and should be, driven by the CDR consumers. However, we are concerned that potential unintended consequences may result from a blanket requirement for consent, and we believe that additional nuance is required to guide the operation of these requirements.

One particular issue relates to the disclosures that EnergyAustralia and other organisations make in the day-to-day operation of their businesses. This includes disclosures made to outsourced service providers (which can include cloud based services). Mandating consent to be obtained for each disclosure to these service providers could mean that organisations are unable to effectively comply with their CDR obligations, or that requests for consent either become long, complicated and difficult for consumers to understand, or a frequent nuisance for customers. This may also be the case for notifications of disclosures, which run the risk of becoming "white noise" if they are required for each disclosure to an outsourced service provider.

We are also concerned that requiring consent in all circumstances may be impractical and not in the best interests of the public. For example, Privacy Safeguard 6 (use or disclosure of CDR data) does not include exceptions for a "permitted general situation" or "permitted health situation" (as described in sections 16A and 16B of the Privacy Act) or enforcement related activities, which appear in the APP equivalent (APP 6 (use or disclosure of personal information)). These exceptions deal with threats to life, health or safety of individuals, public safety, taking action in relation to unlawful activity and similar matters. Although these circumstances may infrequently arise for an accredited data recipient, it is important for the CDR regime to also recognise that there are limited scenarios where requiring consent may not be in the best interests of the public. Presently the only exemption would be to comply with an Australian law or a court order, which is unlikely to provide the necessary flexibility.

These issues may be partially resolved by the concept of a "receiving data holder" (to which s 56AG(4) of the Bill will apply) but it is likely that some gaps will remain. More details about how the consumer data rules treat this concept will be required to make a more fulsome assessment.

7. Right of data holder to be notified where consent is revoked

One change proposed in our first submission that has not been addressed in the Second Exposure Draft is a right for the data holder to be notified when a consent has been revoked. We reiterate that customer identity verification and management will be a significant issue to address in the context of the energy sector, and request that our submission in this respect be given further consideration.

While we understand that some of this detail may be set out in the consumer data rules, we suggest that the Bill set out clearer obligations in respect to maintaining consent and further guidelines regarding when consents are no longer considered current and valid.

8. Penalties for breach of Privacy Safeguards

We welcome Treasury's decision to provide further consideration to the CDR penalty regime. We note that the Second Exposure Draft still has placeholders for penalties to apply to each Privacy Safeguard, but suspect that these placeholders have been retained while the penalty regime is considered in a more fulsome manner. However, if the intent is still for each Privacy Safeguard to have its own penalty, we would ask the Treasury to consider our concerns set out in the first submission further.