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Australian Competition and Consumer Commission

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Consultation Hub

ACCC Consumer Data Right Rules Framework September 2018

AGL Energy (AGL) welcomes the opportunity to make a submission in response to the ACCC's Data Right Rules Framework (Framework).

AGL supports the principle that consumers should have access to and control over data that directly relates to them. AGL also supports the principles underpinning the Framework which are to encourage innovation, promote competition and have customer focused outcomes. However, AGL makes several comments on the specifics of the Framework below and within its submission.

Structure of Framework

In order to assist stakeholders adequately assess the regulatory regime which is proposed by the ACCC it is suggested that the Framework remove elements that are intended to be specific to the banking sector. As presently drafted the Framework offers stakeholders an insight into how the ACCC intends to approach the development of the Rules for the banking sector, however, it is at times difficult to determine which elements of the Framework the ACCC intends to have wider application. To ensure appropriate and timely consultation for all industry sectors AGL would encourage the ACCC to release a principles-based Framework document that is of general application.

Industry specific approaches

To avoid creating cumulative or overlapping regulatory burdens, to streamline implementation and reduce costs, AGL suggests that for each industry sector the ACCC examines if there are existing technical standards and IT platforms which could be leveraged.

For example, AGL considers that the Australian Energy Market Operator (AEMO) could have a pivotal role to play in the roll-out of the CDR regime in the energy sector. Although AGL does not regard it as appropriate for AEMO to be a central data holder, it does consider AEMO as well placed to manage the technical standards and operate a centralised dashboard for consumer consents as:

- AEMO currently provides technology platform services to the energy industry, in relation to wholesale flows and B2B processes, as well as in relation to retailer market settlements and transfer processes. Industry participants are required to comply with existing technical standards and there are controlled processes in place for changing these technical standards.
- A centralised consent dashboard would be of significant benefit to consumers and assist to ensure that appropriate consumer consent is in place.



AGL does not consider that previous consultation processes such as the Productivity Commission report¹ and Open-Banking review should be a substitute for best practice consultation with the energy industry. AGL notes that although the HoustonKemp report² can offer insights into the complexities of the energy sector, it should not be considered an alternative to robust consultation processes. It is noted that this report was initiated for a purpose other than the implementation of the CDR and as such, the energy industry provided submissions to this process with a different understanding of its overall aim and implementation.

Policy development

Finally, AGL remains of the view that appropriate process and timing should be given to properly design a robust and effective CDR across the legislative requirements, the ACCC rules and the technical standards. While AGL appreciate the mandate given to the ACCC, proper regulatory development would see these processes running sequentially rather than in parallel to allow stakeholders the appropriate time to fully consider the impacts and development of each layer as they occur. AGL therefore strongly encourages the ACCC and Treasury to push for a later implementation date to allow for fulsome consultation and policy development.

Should you have any questions in relation to this submission, please contact Kathryn Burela on 0498 001 328, kburela@agl.com.au.

Yours sincerely

[Signed]

Elizabeth Molyneux

General Manager Energy Markets Regulation

¹ [Productivity Commission, Data Availability and Use Report](#)

² HoustonKemp Economists, *Open Consumer energy data - Applying a Consumer Data Right to the energy sector*, June 2018.

Overview of submission

- **CDR Data leaving the CDR framework** - AGL supports the principles of enhanced consumer experience and reducing frictions or boundaries to consumer data management; but these principles need to be appropriately balanced with consumer protection principles.
- **Definition of consumer** - AGL does not support the expansion of the definition of consumer to corporations of all size. It is recommended that this definition be limited and if the definition is to be extended to corporations, existing definitions for each of the designated sectors be taken into account in the drafting of the Rules (i.e. in energy there are existing designations based on usage thresholds set out in the energy rules and laws).
- **Consents** - the model proposed by the ACCC is detailed but still has the potential for misuse. AGL offers some additional points on this, as well as information on the energy sectors' existing 'Explicit Informed Consent' (EIC) requirements. AGL also notes the current work the Essential Services Commission Victoria is undertaking to enhance EIC in the energy industry due to concerns consumers are not understanding the consents they are providing. To ensure consistency, the CDR regime should align with other regulatory obligations imposed in the energy industry.
- **Right to deletion and correction** - AGL supports the principle right of a consumer to request correction of their data held by accredited third parties but allowing a consumer to require deletion in all circumstances may give rise to issues, including the future defence of legal claims and compliance with law. AGL has suggested that the right be recast and subject to exceptions. (i.e. If a party made a representation to a customer regarding an offer, the customer requested deletion of their information but also later disputed that representation – how will the party prove/demonstrate the basis of the representation if all data has been deleted?)
- **Consent dashboards** - AGL recommends the ACCC Framework include a principle encouraging consumer simplicity and that the Framework support a central consent system be established for each industry sector. Who manages this should be set based on industry structure. In the energy sector AGL supports AEMO running a central consent dashboard, given its existing role.
- **Data scope** – principles should be applicable across industries, but many of the examples presented by the ACCC in its current Framework for inclusion are specific to the banking sector (i.e. the listed transaction data at 5.3.2) and will not be easily transferrable to other sectors. The Framework should be generalised and industry specific examples of data scope should be included in a separate document.
- **Accreditation model** - AGL supports a single tier of appropriate accreditation. A single tier will be easier to implement and manage should an ADR have its accreditation level lowered or altered.



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- **DH becoming ADRs** - AGL supports the principle for streamlined accreditation for DH, as the same principles of security/data management/privacy will apply.
 - **Authorisation and authentication** - AGL supports the principle of 'strong authentication' requirements and encourages the technical standards body to set the underlying requirements. AGL supports multifactor authentication to improve customer experience and security.



Structure of Framework

As noted above, some elements of the Framework as currently drafted may not be translatable to other sectors. For example, the environment on which the banking application has been developed (i.e. in condensed timeframe and parallel running processes) should not apply to other industry sectors that may be designated in the future. Examples of this include:

- references to phased implementation dates,
- phased application of 'data holder' and
- whether matters will be included in the first version of the Rules (presumably for Banking).

While AGL understand that the Rules for all sectors will be subject to versions, the concept of a 'minimum viable product' due to condensed timeframes should not be universally explored. This should be considered unique to banking due to the timing and mandate on government for the banking review. AGL suggest then that the principle aim should be to apply the Consumer Data Right (CDR) Framework to all designated sector participants (i.e. all data holders) at once, rather than bigger participants first.

AGL also considers this matter applicable to the scope of data discussed below.

Data scope

AGL recommend the Framework principle focus on the most basic definition of consumer data to achieve the objective of the CDR, and that additional data sets are added only in relation to their necessity in achieving the objective (i.e. metadata). Value-added data is essential to promoting competition in businesses and to promote innovation and consumer driven outcomes. If businesses are required to transfer value-added data and metadata to competitors and other third parties, this can have significant impacts on investment returns which will discourage investment and innovation by data holders.

AGL recommends the principle for the ACCC Framework should be the exclusion of metadata unless otherwise determined to meet the CDR objective – in consultation with industry.

Framework information

Based on the above principles, AGL therefore supports the customer data listed at 5.3.1 as a basis for the rules but seek further clarity on the intention and purpose of the inclusion of 'unique identifiers' associated with the listed items. If these are to include identifiers used for internal purposes they will likely offer very little value to external bodies. Given the specific banking nature of the elements captured in 5.3.2 regarding transaction data, AGL cannot offer comment on the ACCC proposal and seek clarity as to whether the principle of this section if applied to the energy sector would be to capture relevant billing information?



Further, regarding 5.3.3 AGL notes that government operated websites such as EnergyMadeEasy and Victorian Energy Compare already collect and make publicly available general product information in energy.

AGL encourages any Framework principle to be aligned to existing models such as these to reduce regulatory burden.

Consumer Data Right ecosystem

This section focuses on section 12 of the Framework regarding the *use of data*.³ For the purposes of this section, the term CDR 'ecosystem' refers to scenarios where the Framework and relevant protections continue to apply to consumer data subject to the CDR (i.e. Safeguards and the right to correct, deletion etc).

AGL in principle supports the scenarios proposed in 12.1.2 (*to an outsourced provider*) and 12.1.3 (*to an intermediary*) as described by the ACCC. This is primarily because the data does not leave the CDR ecosystem. However, AGL does not support the proposal to allow CDR data to leave the CDR Framework or 'ecosystem'. While the ACCC has attempted to address the balance between protecting data and allowing simple management of data for consumers, AGL has concerns about the practical impacts of CDR data leaving the ecosystem.

In section 12.1.1 (*specified entity directed by the consumer*) of the Rules Framework⁴, there is only a brief consideration of the benefits of allowing data to leave the ecosystem for purposes of consumer convenience and direction. The information contained within the Framework does not articulate or address the potentials for a 'consumer direction' to be manipulated or misused by third parties and is discussed further below.

While section 12.1.1 tries to limit the acquisition of CDR data by non-Accredited Data Recipients (ADR) by requiring the explicit direction of the consumer, it is unclear what 'direction' will be defined as. For example:

- Could an ADR merely prompt a consumer to give a direction to release their consumer data to a non-accredited data recipient? Depending on how this was phrased, it could simply form part of the overall CDR consent collection process. This could be as simple as "we are able to send this data to your accountant if you direct us to do so. Would you like to do this during this call?"
- What if the ADR is affiliated to an accounting firm that is not accredited and informs the CDR customer "we can offer additional services, where you would consent to your data being sent to *CashAccountants* firm who could provide you with full-service management for tax and other financial purposes. This data would no longer be covered by the CDR framework but would remain protected under the Privacy Act".

AGL consider that it is very likely that the consumer will believe they are receiving the same level of protection as within the CDR framework but have allowed the data to leave the ecosystem.

³ [ACCC Consumer Data Right Rules Framework](#), p49-51

⁴ Rules Framework, p49



To address these issues in the interim, AGL recommends the ACCC set a principle to allow for a simplified mechanism for the CDR consumer to request a copy of their own data for the purposes set out in 12.1.1. While this may add an additional step for the consumer, the cost of this step would ultimately outweigh the risks to privacy and protections that the alternative would result in.

Additional information provision requirements could be imposed to inform the consumer that if they choose to share the information with others they may not have the same CDR Framework protections. This could be provided for in the Rules by outlining the specific rights and obligations that should be imposed to give effect to the right of consumers being able to directly access their data and therefore understanding the implications of sharing outside the ecosystem.

Definition of consumer

AGL supports the ACCC's proposed principle approach regarding former, offline and large customers. There is a high level of customer churn in energy compared to the banking sector and as such the Rules will need to consider solutions that account for a high volume of customer churn in terms of authentication and dashboard management which is discussed further below.

AGL does not support the draft legislations broad definition of consumer, extending it from the individual to include corporations of all sizes. As highlighted in AGL's submission to the Treasury legislation amendments⁵, the application of the CDR should be limited within the Rules to individual consumers. The CDR was intended as a human right and can have very different implications for designated industries depending on their set up.

However, if the CDR is to apply more broadly (and include corporations), the ACCC principles should be to consider the approach based on the unique landscape of each industry. For example, the energy sector has its own definition of small and large businesses which are based on the business' energy usage on an annual basis. AGL would prefer the CDR framework apply to individual consumers and small businesses, who are likely to rely on the CDR for similar types of services. The National Consumer Protection Framework (NECF), which provides for energy specific consumer protections applies to residential and small businesses and AGL recommends the CDR should align with and apply to the same energy consumer type.

Large corporations operate outside the NECF and are based on bilateral commercial arrangements between a retailer and a large corporation. Often these commercial arrangements address how a retailer captures, stores and shares data with the large corporation. It would be inappropriate that a CDR framework stifle the innovation these bilateral agreements can generate. Once the CDR framework is in place a retailer and a large corporation may decide to operate under the same Rules or alternative arrangements based on the special needs of the corporation and the commercial arrangement they decide upon with the retailer.

⁵ [AGL Submission on CDR Treasury Bill](#)



AGL supports the ACCC's proposed approach regarding former and offline customers and not that due to the high level of customer churn in energy, the Rules principle on this topic will need to consider solutions for how former customers can prove that they had a right to data at a certain point.

Consent

AGL supports the general principle of the consent requirements listed at 8.3.1 of the Framework as a broad base of ensuring consumer protections. AGL agrees that consent should be freely given, express, informed, purpose and time-limited and easily withdrawn.

However, there are certain elements that require further consideration. While AGL supports the specified information, outline described by the ACCC⁶, AGL is concerned for the potential for this level of information to simply be ignored or overlooked by a consumer – particularly where engaging on digital platforms that allow terms and conditions to be clicked and agreed to.

Consumer comprehension

There is a range of research that has considered consumer behaviour in reviewing and understanding terms and conditions. For example, the Consumer Policy Research Centre (CPRC) recently released a report titled *Consumer Data and the Digital Economy* that acknowledged the big business in big data and the need to enable *genuine* consumer choice.⁷ The most relevant finding from this report is that 94% of consumers did not read the privacy policies for the products or services they signed up to (see figure 1 below).⁸

⁶ Rules Framework, p36

⁷ [Consumer Policy Research Centre report on consumer digital data](#)

⁸ [Consumer Policy Research Centre Full Report](#), p31

Figure 1: CPRC research findings

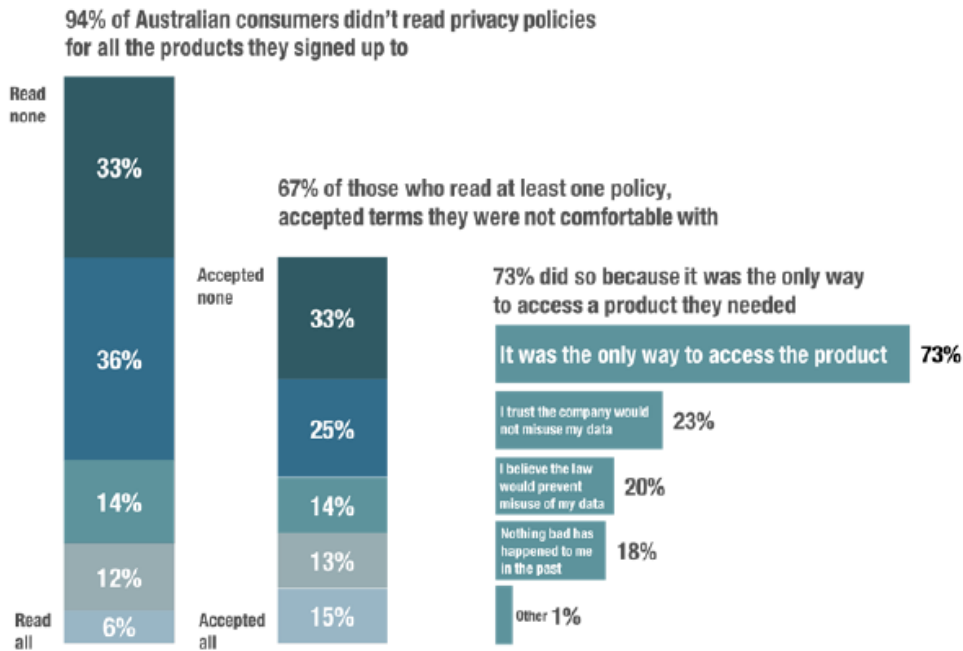


Figure 3: Reasons why Australian consumers accepted policies despite feeling uncomfortable. Where percentages add to 101%, this is due to rounding error; percentages are rounded to the nearest whole number.

While the ACCC has acknowledged that consent should not be bundled and should be subject to specific information, risks remain in this approach. Ultimately, the current proposal will rely on the consumer being engaged and time-wealthy to review and understand that information. AGL notes that the length of the defined specified information proposed in the Framework is half a page long⁹ and even described in their briefest form may not retain consumer attention. AGL recommends the ACCC undertake appropriate consumer testing to determine the model and method of providing information and consent, not just in terms of whether it is easy to read; but to understand methods for highlighting the key information to customers up front (i.e. a headline statement about the purpose of the consents information and consequence of agreeing).

Revoking all or partial consents

The Framework also provides for scenarios in which consumers can manage and direct parts of data authorisation in different ways. Consumers can stop providing consent to ADRs but allow them to keep the data, or they can remove consent completely and require deletion. It is unclear how these matters will be understood by the consumer when the purposes for retaining data may not be clear. It would be useful to understand the principles the ACCC will apply in the Rules regarding ensuring

⁹ Rules Framework, p36



consumers are informed and understand the differences between continued purpose and revocation of all or partial consent.

Deletion and correction

AGL supports the principle right of consumers to request correction of their data held by accredited third party recipients. However, there are legislative and policy reasons that data holders should not be required to delete data in all circumstances. In energy, there are obligations under the National Energy Retail Law (NERL) and Rules (NERR) for record keeping which would conflict/restrict the ability for a consumer to request deletion.¹⁰

Additionally, there are other matters that may impact whether an ADR should be required or able to delete the information. For example, if a comparator website reviewed a consumer's data and made a recommendation for a better offer based on that data, and then the consumer asked for that data to be deleted; if there was a legal dispute in the future, there would be no way to prove or determine whether the recommendation by the comparator website was fair/reasonable/in the customer's interest. Rather it is suggested that the right to deletion be recast as, subject to use in accordance with the exceptions listed below:

- a right to require that data be archived and no longer used by the data holder;
- a right to require deletion if the collection or processing itself was in excess of the original consent granted or if the deletion is necessary to correct the data.

The right should also be subject to exceptions including if the data holder is required to keep and use the data:

- as required by any applicable law or any legally binding order of any court, tribunal, authority, or administrative or judicial body; or any government agency, stock exchange or other regulatory body; or
- for the defence of legal claims.

Dashboards

In the interests of simplicity for the consumer, AGL recommend the ACCC consider options for a single consent dashboard – or at least one centralised dashboard per designated industry sector. This would be in line with the ACCC principle that the CDR should be as frictionless as possible for the consumer.

Consumers who no longer want to participate in the CDR framework should have the ability to easily revoke consent to all ADRs without having to seek out and manage consents through separate platforms. Consumers would not be restricted from seeking to revoke consent through the ADRs, but the mechanism would be similar to the obtaining of consent – the obligation would be on the

¹⁰ For example, section 40 of NERL on record of EIC, section 68 of the NERR on retailer record obligations including all energy marketing activities, telephone calls and visits, and distributor record requirements under multiple sections of the NERR.



ADR to inform the data holder or central body that consent has been withdrawn and the data holder could manage the updates to the consumer permissions or a central authorisations/gateway body, such as the Australian Energy Market Operator (AEMO) in the energy sector for example.

Reauthorisation

AGL support the proposal to have simplified reauthorisation processes for data consents but considers a limited consent period of up to 90 days is insufficient in the context of the energy sector – this is particularly as the billing cycle for customers is commonly between one and three months. A longer period of six to nine months would improve the customer experience of not having to renew grants of authorisation and simplify processes for industry. This would also streamline the customer experience where data holders are responsible for the industry specific consents dashboard.

Energy Explicit Informed Consent (EIC)

In energy, strong EIC requirements already exist under the NERL and NERR. Obtaining EIC is a condition tied to retailer licences/authorisations and as such retailers invest heavily to ensure regulatory compliance and rigour. Where energy retailers utilise third party sales channels (such as iSelect), retailers have commercial agreements in place to ensure that the retailer obligations are managed by the third parties, such as EIC. Any breach of these obligations is the retailers' responsibility in terms of reporting and enforcement action by regulators.

In relation to ADRs under the CDR framework, the commercial agreements would not be able to mitigate risks of third party practice in obtaining sufficient consent to access consumer data and can have substantial impacts, both for the customer and for their trust in the data holder. Commercial arrangements would not be able to address the CDR obligations on third parties in a way that adequately protects the data holder and consumer understanding of the nuances of the frameworks consent process. While the accreditation model and subsequent reporting may assist to mitigate some risks, given the limited resources the ACCC enforcement team must pursue matters, AGL recommends alternative models be considered.

For example, the energy EIC requirements could be extended and applied to ADRs in relation to CDR requirements, with the AER responsible for auditing and enforcement. Alternatively, AGL asks that the ACCC consider requiring ADRs to provide reports to data holders to demonstrate customer EIC for the purposes of recording these consents against customer accounts, as retailers currently have these types of arrangements in place with third party providers for energy consents.

Authorisation and authentication

AGL support the Framework principles regarding strong authentication mechanisms to ensure a frictionless customer experience. AGL encourages the ACCC to consider principles that will support technical standards reducing the number of redirects a customer experience. Additionally, fewer redirects are better for businesses from an IT security perspective. AGL support the use of



backchannel authorisation flows that allow the systems to communicate together without forcing the consumer to wait for redirect.

The ACCC principles on this matter should take into consideration the level of security required to protect bank account details as distinct from a customer's energy bill. Using account numbers as an identifier can carry different concerns and expectations in the energy sector. The use of driver's licenses or other identity documents is not applied in energy the same way as banking and the same regulatory rigor on external confirmation of this data does not exist. This could pose risks of fraud and error if required across all industries under the Framework

AGL also supports multifactor authentication to improve customer experience and security.

Data holders

AGL strongly recommend the Framework also account for the different types of data holders that may be relevant for different industries. As AGL raised in its submission to the recent Treasury consultation on the law amendments, there are government and non-government organisations that should potentially be captured within the CDR regime. These bodies offer services that should be captured as part of the CDR regime due to the nature and purpose of the data that they collect and disclose (such as the example of the NSW Government AGL included in its previous submission).¹¹ Non-government organisations also offer services such as financial counselling, energy recommendations and services and should be captured by the regime. For example, CHOICE Transformer, for a small fee, offers consumers the opportunity to have it search the market for a better energy deal on an ongoing basis.¹² These services require the provision and disclosure of information that would likely be consumer data sets designated in energy. There are also potential combinations of government and non-government joint services that need to be considered in this process, such as the Victorian Government's recent tender process to work with a community agency to source better deals for low income households.

Energy sector circumstances

As noted in our cover letter, unlike the banking sector energy has a central body to help the interface and processes across the different energy players. Without AEMO, the energy sector would have been required to build interfaces across all retailers and network businesses. However, AEMO offer the B2B processes infrastructure and businesses accredit themselves against the AEMO requirements.

AGL consider that AEMO have a role to play in the roll-out of the CDR framework, but distinct from the key recommendation in the HoustonKemp report. Specifically, the cost to industry can be reduced significantly if the technical standards and foundations that industry currently use for the eHub and B2B is utilized for the technical standards in CDR. The Framework principle therefore

¹¹ AGL submission on CDR Treasury Bill

¹² [CHOICE Transformer](#)



should be that consultation will occur with each industry to determine the unique existing regulatory and technology infrastructure to help minimize costs and remove friction in implementation. AGL consider that AEMO should not be the central data holder, but they could manage the technical standards and B2B elements of the process, and AEMO could operate as the central service for customers on the consents dashboard.

The data and authorisations (i.e. passwords for customers) should continue to be owned and managed by the energy retailer, but if many of the IT elements are built and standardized at the market level, this will reduce costs. Given the high focus on energy affordability, this would be a way to ensure costs do not unnecessarily increase.