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Treasury - Open Banking designation instrument (second round)

AGL Energy (AGL) welcomes the opportunity to comment on Treasury's consultation on Open Banking designation instrument (draft banking designation).

We have been an active participant in the banking consultation for the Consumer Data Right (CDR) to date, to provide context and considerations for CDR application to energy. We believe competitive markets function best when consumers can make informed choices. Therefore, we are a strong advocate of the principles behind developing a consumer data right to empower consumers.

We are concerned, however, that the current CDR framework is being developed with dual and possibly competing objectives of driving innovation through data access, and empowering consumers through data control.

The core elements of the proposed CDR framework were developed in a condensed timeframe between July and December 2018, with a focus on the needs of the banking sector. While we recognise the initial need for this focus by Treasury, the Australian Competition and Consumer Commission (ACCC) and the data standards body (Data61) was to allow a 1 July 2019 implementation date for banks, it has impacted the way decision-making has occurred and how other sectors have been engaged.

By focusing all the initial efforts on alignment with the Open Banking report to facilitate banking implementation, the energy and telecommunication sectors have had limited engagement. The results are seen through the drafting of documents such as the Treasury Laws Amendment (Consumer Data Right) Bill 2019 (CDR bill) and explanatory memorandum, the ACCC CDR Rules, the Privacy Impact Assessment (PIA) and the data standards, which are all focused on the needs of the banking industry.

This banking sector focus creates a real risk to other industries who may face costly and complicated implementation processes to try and match the banking obligations. While other sectors may experience robust consultation, we note the Federal Government has suggested that energy be designated for an early 2020 start[1] which may essentially create no material difference between the go-live date for banking and energy. This creates a real risk of inadequate consultation with the energy sector and may result in a reliance on the experience and position decided on for banking.

[1] COAG Energy Council Meeting Communique, Wednesday 19 December 2018

Should the draft ACCC CDR banking rules, or the draft banking designation instrument, be used to apply to energy there could be substantial unintended consequences and impacts to both the energy sector and the consumers within it. As we have raised previously, these unintended consequences may arise due to the unique characteristics of the energy sector that may not be comparable directly to banking. For example, accounts are set up based on meter number identifiers, and small business customers are classified by their energy usage and not the number of employees. These unintended consequences could include consumers losing confidence in the regime due to opaqueness or difficulty in understanding how their rights operate, or the regime not striking an appropriate cost/benefit structure.

We note as well that the CDR bill is yet to be reintroduced to Parliament, and as such use this submission as an opportunity to reiterate concerns on both the drafting of the CDR bill, and the process and energy consultation that has occurred.

We also provide comment on the draft banking designation documents released by Treasury on 14 June 2019.

If you have any questions, please contact Kat Burela at kburela@agl.com.au or 0498001328.

Yours sincerely

[Signed]

Patrick Whish-Wilson
A//GM Energy Markets Regulation

CDR Bill

We continue to advocate for additional consultation, consideration and amendments to the CDR bill before progressing the CDR regime further. A well-considered framework and associated materials (such as the PIA), that are developed with care and the input of stakeholders will help create confidence in both consumers and businesses in the CDR regime.

Compressed consultation process

As noted in the cover letter, we recognise that much of the initial consultation process was compressed due to the time pressure on Treasury and ACCC to have banking implemented by 1 July 2019 in line with Federal Government commitments. However, the final version of the CDR bill has had no additional consultation from when it was finalised in December 2018 and is yet to be passed by Parliament. Given the substantial concern from stakeholders (both consumer representative and industry) expressed throughout the CDR Senate Committee process[2], we believe it is prudent that greater consideration and consultation occur to address concerns raised by participants. This is especially as the banking implementation date has since been pushed from 1 July 2019 to February 2020 and could possibly change again.[3]

Several stakeholders continue to flag concerns at the cost to consumers, their data, and the privacy regime of continuing to push ahead with the current CDR bill without greater justification than the need to meet an arbitrary implementation date. For example, the Australian Privacy Foundation has noted that:

> *The CDR has been pushed heavily by business. There is no groundswell of people writing to parliament asking and begging for data portability. People already have access to their own personal information and have had that access for a significant time[4]*

We know that both Canada and the United Kingdom (UK) are developing frameworks that have features that reference Australia's CDR development.[5] These countries are looking to Australia and the lessons learned in both the development of the regime and CDR framework that strikes the right balance in promoting informed consumer participation and industry development.

Further, the UK Open Banking system had had relatively low take-up by consumers in the first 12 months at about 9% of consumers using an API based app[6]. More time to develop and implement does not put consumers at risk, but rather ensures that the regime is fit-for-purpose, robust and well-considered.

Stakeholder concerns

The CDR Senate Committee process made it evident that many stakeholders (including consumer groups) share common concerns about the implications on consumer data and their rights under the proposed regime that have not been fully or appropriately considered and can be broadly summarised as:

- Whether the definition of data needs to be defined as broadly or can be limited with exceptions within the legislation (e.g. to accommodate for Know Your Customer exceptions or similar).[7]

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[2] See Parliament of Australia – Treasury Laws Amendment Bill, March 2019.

[3] See for example, article in Australian Financial Review, *Open Banking faces delay due to data concerns*, 4 July 2019. *Assistant Minister for Financial Services Jane Hume said the legislation, known as the Consumer Data Right bill, needed to be passed before the end of this month, when Parliament rises for the winter break, to enable the sector enough lead time to implement the changes.*

[4] See for example, Australian Privacy Foundation submission to ACCC banking Rules consultation, 10 May 2019

[5] See for example article *Open Banking convergence new offshore frameworks reveal shared thinking on data sharing*, June 2019.

[6] See for example article *Open Banking slow burn means just 22% of consumers have heard of the concept*, November 2018.

[7] This has been raised by several stakeholders previously such as the Business Council of Australia in previous Treasury consultations.

- Whether the existing privacy regime in Australia is the appropriate structure for CDR privacy related obligations, rather than the introduction of new safeguards[8] and the potential need for a holistic consumer data right that provides effective protections to all Australians and empowers them in the use of their data, not just consumer data portability right.[9]
- Whether dual privacy regimes may come at the cost and confusion of customers trying to understand their rights[10], and for businesses attempting to manage two regimes.
- Legislative drafting concerns that may undermine the operation of the CDR regime.[11]

We therefore encourage Treasury to re-open consultation processes on the CDR bill, or at a minimum outline how concerns raised by stakeholders and/or the Senate Scrutiny Committee will be addressed or mitigated.

Energy consultation

To date, there has been limited consultation with energy sector participants on the CDR.

We note that the summary of proposals released with the draft banking designation instrument states that there are safeguards against access rights to derived data becoming too broad. We wish to draw attention to the first point of these safeguards below which we have separated in to two parts:

> *(1) Access to derived data can only occur if the Minister specifies that data in the designation instrument (a disallowable legislative instrument).*
> *(2) For future sectors this will only occur after public consultation by the ACCC on the proposed designation and provision of publicly available advice to the Minister. The Open Banking Review and Treasury conducted this consultation for Open Banking.*[12]

In relation to the first part, we note that there are extensive obligations in the CDR bill on matters that must be considered before a sector is designated by the Minister, such as consultation, to act as these safeguards[13]. However, Treasury introduced an exclusion to consultation obligations with the energy sector within the latest version of the CDR bill which removes these safeguards for energy and would mean that Parliament would not be able to disallow the instrument on the basis of consultation. We also note that legislative instruments, made by the executive, are not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.[14] As such, we do not consider that this is an appropriate safeguard for the energy sector.

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[8] See for example Australian Privacy Foundation comment that *"the [Consumer Data Right] framework as it currently stands, unnecessarily exposes people to harm because the fundamental privacy safeguards are not in place and risks have been severely underestimated by the government."* Senate Committee Hearing, 1 March 2019.

[9] See for example Financial Rights Legal Centre at CDR Senate Committee, referenced in final CDR Senate report.
See also comments by Senator Ketter comments during the CDR Senate Committee hearing stating that CDR should be renamed to the Consumer Data Portability Right, as it is not a comprehensive set of consumer data rights, but a set of rules outlining how consumers can take their data elsewhere and the digital systems that must facilitate this

[10] See for example, comments by the Legal Council Australia (LCA) regarding the privacy safeguards and how it remains unclear on how these will interact with provisions of the Privacy Act and may create unnecessary complexity in addition to any state or territory legislation. Additionally, the LCA showed concern for how the privacy elements wrapped around the CDR could create a situation where the same data may be both CDR data and personal information. The consequences of which would result in the data being dealt with under separate and potentially inconsistent, privacy regimes.

[11] See Senate Scrutiny Committee Digest, 2019

[12] Consultation on Open Banking designation instrument (second round) 14 June 2019, p.2

[13] See for example Sections 56AD, 56AE, 56AF and 56G of the CDR Bill

[14] See Senate Scrutiny Committee Digest, 2019

In relation to the second part, Treasury uses the Open Banking Review conducted by Treasury in consultation with the banking industry. This robust review occurred following the Productivity Commission Report and has formed the basis of the structure and approach Treasury has used to develop the CDR bill (which will impact all industries, not just banking). However, we are yet to see such a robust consultation process occur with the energy sector.

If the energy sector were to expect such consultation by the ACCC, such an exclusion for energy would not have been included in the CDR bill for energy. To date, the only ACCC consultation with energy since the draft CDR bill was consulted on by Treasury has been the ACCC energy models consultation paper released in March 2019. This paper did not focus on all the matters necessary for consultation under the CDR bill, but rather explored the concept of allowing for a designated gateway and understanding what, if any, role the Australian Energy Market Operator (AEMO) should play in the CDR regime.

Our assumption is that the HoustonKemp Final Report *Facilitating Access to Consumer Energy Data* (HK report), is considered as consultation for the purposes of the bill exemption which we are concerned about.[15]

When the Council of Australian Governments Energy Council (COAG EC) engaged HoustonKemp, it was to examine existing access rights to data under the National Energy Rules and Laws following the Power of Choice reforms. COAG EC requested that HoustonKemp make recommendations on how the existing data sharing obligations and processes could be improved. In the draft report released by HoustonKemp in February 2018, the development of a CDR appears only as an acknowledgement of work but does not form the basis of their review nor influence their recommendations.[16]

The final HK report was then amended to make recommendations on how the CDR regime could be applied in energy. The HK report specifies a recommendation about what data sets should be designated by the Treasurer and which data holder should be designated.[17] This last minute amendment to the purpose of the report means that stakeholders were not fully engaged or understanding of the scope or the intent that would form the final recommendations. This lack of transparency and engagement is further impacted by the fact that at the time, even HK were unaware of the scope of the CDR framework (e.g. that Treasury would be extending the definition of data or introducing privacy safeguards) and could therefore make limited CDR recommendations.

Further, the HK report is being used by Treasury as the basis of an assessment of the costs to industry which we do not consider is appropriate. The financial assessment within the HK report is qualified as being an assessment of limited data sets and using "some high-level assumptions to estimate ballpark figures of what each option would cost".[18] Specifically, the HK report focused on interval meter data rather than expected CDR data sets. We therefore maintain that appropriate energy consultation has not yet occurred regarding the CDR regime and its application.

AGL disagrees with the above statement by Treasury suggesting that sufficient safeguards are in place for industries other than banking.

[15] A list of our submissions is available on our submissions page here.
[16] See HoustonKemp consultation paper *facilitating access to consumers energy data,* February 2018
[17] See for example comments by Energy Consumers Australia on the history of the HK report in Hansard
[18] Facilitating Access to Consumer Energy Data – Final Report, HoustonKemp, 1 March 2018

Banking designation instrument

The definition of what data is captured has evolved over time, with an initial narrow scope proposed by the Productivity Commission[19], to necessary exceptions required for banking through the Open Banking Report[20], to a broad then slightly amended definition contained within the CDR bill. While we have appreciated Treasury's previous acknowledgement that the definition of data needed to be limited, we remain concerned that the scope of data – both within the CDR bill and the draft banking designation instrument - remains unnecessarily broad.

Based on the current drafting there remains the risk that a broad scope could discourage data-related innovation and investment to the detriment of customers because businesses who invest or innovate need to account for the possibility of inclusion of their value-added data in the future. This is particularly relevant given the ACCC's commitment to rolling out versions of the CDR in banking and energy as time passes.[21]

The following section considers three key questions in relation to data:

1. Should derived data be included in a designation instrument?
2. How should *significantly more value* be defined?
3. What should be expressly included or excluded?

Should derived data be included in a designation instrument?

AGL continues to advocate for a framework where exceptions are better placed in a schedule or outlined within the legislation, rather than seeking to draft a broad net to capture unforeseen data sets.[22]

We note that Treasury has stated that derived data is defined in the *Privacy Act 1988*, to include any data which is not raw. However, the Privacy Act does not actually refer to, or define, derived data. Further, the definition of 'materially enhanced' is suggested as necessary to protect consumer's information. However, this approach ignores that any personal information collected by a business will be subject to the privacy protections under the Privacy Act. Developing new privacy safeguards on the assumption that the existing APPs cannot be amended to suit the needs and completing the Privacy Impact Assessment (PIA) against the new safeguards rather than the existing privacy regime, will allow gaps and uncertainties to develop. This is another example of why it is imperative that an independent external body complete a PIA and consider the privacy implications of the regime.[23]

Significantly more value

The draft designation instrument introduces the test of whether the value added to data can be considered as 'significantly more value'. However, we do not believe this matter is addressed in the CDR bill and this leaves substantial discretion and subjectivity in the test, for example:

- It is not clear who decides whether value has been added. Value may be perceived differently to the data holder, the consumer, competitors of the data holder and the ACCC (or other government regulators).

[19] See Data Availability and Use Report , May 2017
[20] See Final Report, May 2018
[21] See for example section 7.3 on future implementation of energy data in Consumer Data Right in ACCC Energy Consultation Paper: data access models for energy data, published February 2019.
[22] See previous AGL submission on draft bill
[23] See previous AGL submission on Privacy Impact Assessment

- It is not clear what will be considered “significantly more value”. For example, would this be calculated in purely dollar terms, or is value also intangible and therefore incalculable?

The uncertainty this test creates is problematic for a number of reasons including the determination of compliance by CDR participants. For example, a CDR participant may choose to withhold provision of particular data because they believe it has been materially enhanced, but the consumer and/or the ACCC disagree. As a consequence, the data holder may be in breach of its obligations under the CDR regime. By erring on the side of caution, data that may have been intended to be excluded is then captured and shared in an attempt to be compliant with the obligations. Such an approach could be damaging to investment in data-related innovation by CDR participants, which would be counter to part of the objective of the CDR regime.

We suggest Treasury consider an alternative approach to the test, for example:

- Introduce a test that is based on change rather than value. Where a party can demonstrate they have added some form of insight that has changed the data, and is not immaterial, then that should be considered value-added. This approach would help address Treasury’s previous concerns regarding the addition of trader names (e.g. Coles) to customer transaction lists for their online transaction history; or
- Define a material enhancement as any enhancement, excluding those which are said to be “immaterial” (as set out in s 10(3) of the Designation).

What should be expressly included / excluded?

In general, we support the specific exclusions listed in section 10(3) of the draft designation instrument for banking. However, we note that some have the potential of being too broad and therefore exposing risk to businesses and competition. For example:

- 10(3)(e) excludes any information that identifies a person. However, the identification of a person may be part of the value-add; and
- 10(3)(h) excludes any information that results from filtering according to date, period, amount or classification. While information that has solely resulted from filtering would not be materially enhanced, it is possible that filtering according to a particular factor may be an element of the value-added data.

The drafting of any exclusions in the Designation needs to be narrow enough that it does not prevent value-added data from including elements from the list, provided there is an additional enhancement to the data set.