EnergyAustralia
LIGHT THE WAY

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Sarah Court
Commissioner
Australian Competition and Consumer Commission

Submitted via ACCC Consultation Hub

Dear Ms Court

Consumer Data Right Rules Framework

EnergyAustralia is pleased to make this submission on the Consumer Data Right (**CDR**) Rules Framework outlined in a consultation paper released 11 September 2018.

EnergyAustralia is one of Australia's largest energy companies, with over 2.6 million household and business customer accounts across NSW, Victoria, Queensland, South Australia and the Australian Capital Territory.

We note, based on the paper and attendance at an ACCC-led stakeholder workshop, much of the focus to date has been on the application of the CDR in the banking sector and that draft rules for that sector will be released for comment in December 2018. Given this, our comments in this submission are made at a principle level and EnergyAustralia looks forward to participating in consultation on those draft rules and/or any further rules proposed to apply in the energy sector.

We also note that the consultation paper was written based on the first draft of the *Treasury Laws Amendment (Consumer Data Right) Bill 2018* (Cth) (the **Bill**), parts of which have subsequently been varied and are subject to further consultation by the Australian Treasury (the **Treasury**).

EnergyAustralia supports transparency in retail energy markets and measures to support customers making informed decisions, such as the creation of the CDR. EnergyAustralia believes that the proposed CDR is a significant step towards facilitating more transparent retail energy markets that makes it easier for customers to choose the right energy product and service for them.

The introduction of a consumer data right is consistent with the approach that EnergyAustralia has been undertaking with respect to consumers' data. We currently provide our customers with access to their energy information through our online portal, *My Account*. This service allows customers to see their usage data, pay bills, set payment and usage reminders, update account information and seek payment extensions. We have seen a significant growth in use of *My Account* since it was introduced in 2014.

However, we note that the introduction of a consumer data right across the energy sector will have significant implications. At a time when energy affordability is an extreme focus governments and regulators must ensure that any regulatory costs are demonstrably outweighed by the resulting benefit.

We therefore urge the ACCC, in establishing the CDR rules framework, to prioritise customer and business simplicity, and operational efficiency to deliver the CDR in the most effective and efficient way for consumers.

Areas of Support

There are several areas of the CDR rules framework outlined in the consultation paper that EnergyAustralia supports as currently proposed, including:

- Data recipient accreditation process: It is important that the accreditation process is clear, consistent and to a high standard. We consider that the criteria for accreditation, steps data recipients must take to protect consumer data and powers to revoke accreditation for non-compliance are all set out appropriately in the consultation paper.

  We support the ACCC's proposal to initially have one tier of accreditation. We consider that multiple tiers of accreditation will be needlessly complex. Having a single tier of accreditation also removes the risks associated with automatic cross-sector accreditation – which the ACCC is silent on but has been discussed publicly by Treasury – which has the potential to create competitive imbalances.

- Consent provisions: We strongly support that where consumer consent is required under the consumer data rules, that consent should be freely and voluntarily given, express, informed, specific as to purpose, limited to 90 days and easily withdrawn. The success of the CDR will depend on consumers having confidence in it and these principles will go a long way to enabling that. We are particularly supportive that consent should be time limited, unconditional and the use of the data be clearly explained to the consumer.

  We also support a robust but flexible approach to data security. We recommend that once the specified purpose of the data has expired that the accredited data recipient be required to destroy that data or where they choose to retain in it, de-identify it and store it in a secure location consistent with **Australian Privacy Principle 11.**

  We note the proposal by the ACCC that both joint account holders be notified of any data request. Whilst this may be appropriate for the banking sector, it may not be as clear cut in the energy sector where occupants of a residence may not be an account holder.

  In our submission to the Treasury we suggested that the CDR consumer for the energy sector must be an account holder. Granting a CDR consumer with the ability to request data if that consumer is not an account holder would be near impossible to manage and may cut across existing regimes with respect to consent and identity management.

  We are particularly concerned that data holders may be required to disclose consumer data to former household members in circumstances where disclosure would be inappropriate and potentially dangerous (for example, where there is domestic abuse or other potential safety risks to a CDR consumer).

  We strongly believe that the data holder should not be obliged to disclose information that may put any individual at risk, or should be relieved of liability for any such disclosure in circumstances where the data holder is required to disclose the data under that framework. In our view, it is essential that the CDR framework allows a data holder to assess these issues on a case by case basis and to exercise discretion where there is a reasonable belief that disclosure may put any individual at risk. This may be framed as an exception to the access right, which could be included in the CDR legislation or in the rules. The grounds for refusing access to personal information under Australian Privacy Principles 12 could be used as a starting point to guide when it may be reasonable for a CDR participant to refuse to disclose CDR data. We would encourage the ACCC to discuss this matter with the Treasury to confirm where exceptions to CDR participants' disclosure obligations is best placed (ie in the Bill or in the consumer data rules).

- Prohibition on on-selling of data and direct marketing: We support the principle that accredited data recipients should be prevented from on-selling data or using it for direct marketing purposes. We imagine that most consumers would not appreciate unsolicited

selling of their data and there is a risk that unfettered movement of data may encourage this behaviour. However, we believe that the rules must: (1) clarify the meaning of both "on-selling" and "direct marketing"; and (2) require arrangements to be put in place by a disclosing party to prevent data disclosed to a contracted third party for one purpose being used for a secondary purpose to market another product to the CDR consumer.

- Authorisation and authentication process: EnergyAustralia supports the principle that consumers should be able to easily know what authorisations they have given to which parties to access their data. The 'dashboard' approach appears to be sensible to enable this and the rules should allow for this to be updated (by the consumer, data holder and accredited data recipient) as easily and quickly as possible. We support the proposal that both accredited data recipients and data holders are able to cancel or amend any authorisation where directed to by the consumer. This is the simplest approach for consumers. Whichever party is amending the authorisation should be required to retain a copy of the direction (eg. phone call, email, online dashboard update, etc) for compliance purposes. Where there is enduring authorisation within the 90 day period and the accredited data recipient is varying or revoking an authorisation, the data holder should be informed to ensure no data is inappropriately shared.

  Section 9.7 of the consultation paper outlines that the rules will prohibit data holders from offering additional or alternative services to the consumer during and as part of the authorisation process. EnergyAustralia does not support this prohibition as drafted as it may be detrimental to the interests of the consumer. We recommend that data providers should be able to offer products and/or services that would be beneficial to the consumer at the time of seeking authorisation if it chooses (for example, a data holder being able to provide a service for free that the accredited data recipient is charging the consumer for).

- Dispute resolution possesses: We support both accredited data recipients and data holders: (1) having clear internal dispute resolution processes; and (2) being members of recognised external resolution schemes. Where possible, the rules should align the dispute resolution processes with existing sectoral rules and arrangements. For the energy sector this would be the National Energy Retail Rules (**NERR**). Under the NERR, all energy retailers and distributors are required to be members of jurisdictional Ombudsman schemes in jurisdictions in which they operate. We note that this will be problematic for non-retailer/distributor accredited data recipients and must be considered further when the energy sector rules are developed.

  However, we are concerned with the proposed introduction of a right for consumers to bring action for any civil penalty provision under the consumer data rules as proposed by the initial exposure draft of the CDR legislation.

  Where non-compliance with the consumer data right could attract a right of action for consumers in a wide range of cases (even for minor or technical breaches), this may increase compliance costs significantly. We suggest that the right of action should only be permitted where expressly specified under the consumer data rules, rather than by default. We encourage the ACCC to consider in more detail the circumstances where providing consumers with a right of action against a CDR participant is appropriate, to ensure that the rights of action granted to an individual are proportionate to the loss that might be suffered under the relevant aspect of the consumer data right.

Areas for further consideration

The energy sector has a number of unique characteristics that differ to how the CDR has been conceptualised for the banking sector. As outlined in our first submission to the Treasury on the CDR legislation, the consumer data rules will need to be tailored to address (among other things):

(a) the number and diversity of energy sector participants who may hold or require data (eg retailers, distributors, the Australian Energy Market Operator (**AEMO**), third party

sales and comparison websites, other service providers, metering coordinators and meter data providers);

(b) the existing legal and regulatory regime relating to the retail energy sector, including the handling of metering data, and the differences between various legal and regulatory regimes, which differ significantly in some States and Territories;

(c) the nature of data held by energy sector participants, and how they differ from other industries (such as the banking and telecommunications sectors);

(d) the nature of CDR consumers in the energy sector;

(e) the cost-benefit to the energy sector participants and consumers of introducing any new consumer data rules (whether as part of the Ministerial designation or as part of a formal rule change by the Australian Energy Market Commission); and

(f) the state of competition in the energy sector, including existing mechanisms in the sector that have been designed to enhance competition.

Specifically, the following positions outlined in the consultation paper will require further consideration for the energy sector:

- Definition of a CDR consumer: We note that the consultation paper proposes that the banking sector rules will delineate which consumers the CDR will apply to (initially all consumers with online access). For the energy sector we are very supportive of a consumer data right which enhances competition in the energy retail sector by granting energy data access to individuals and small businesses who are "small customers" under the National Energy Retail Law and Victorian Energy Retail Code. However, in our view, it is unnecessary to characterise other commercial and industrial businesses as CDR consumers in the context of the energy retail sector.

  In many cases commercial and industrial businesses are account managed and are provided with access to detailed reports about their energy usage. They are already managing their energy data in a highly sophisticated manner, therefore extending the CDR to this consumer cohort is redundant. Further, requiring compliance with the privacy safeguards in respect of businesses creates layers of uncertainty and additional compliance costs for CDR participants.

- Setting of fees: Although we understand Treasury has proposed to remove the fee setting power from the consumer data rules, the following is based on the proposition that the fee setting power will remain in the consumer data rules. However, it may also provide the ACCC guidance as to when it may be appropriate to intervene in the price setting by CDR participants if the Treasury proposal is adopted.

  EnergyAustralia continues to support the current approach contained in the NERR which entitles a small customer (or their authorised representative) to receive their energy consumption information free of charge up to four times a year where it is in the format set out in industry-agreed procedures.

  However, EnergyAustralia does not support extending this fee-free approach to the full scope of the CDR framework as appears to be recommended for the banking sector. The CDR will require data holders to establish extensive infrastructure to ensure high service levels and meet compliance obligations. The cost of energy has never been more front of mind for consumers, governments and regulators. We would not support a proposal that imposes the cost of meeting certain CDR obligations on consumers who do not use the service.

  In that context, we consider that it is appropriate that a data holder be able to charge a fee (if it chooses to) that is commensurate with the cost of providing the data where it is beyond existing obligations to small customers in the NERR. The fee should reflect any reasonable

costs incurred or attributable to implementing and maintaining systems to provide the data, maintaining the customer dashboard and responding to customer queries or complaints (such as contact centre costs).

Further, our view is that it would be premature for the ACCC (or any other organisation) to be given a role in the setting of fees for access to value-added data. This is because the threat of regulation may stymie investment in a sector that is developing and innovating. Value-added data is the intellectual property of the data holder, and the market should be permitted to place a fair value on that intellectual property rights attached to that data and promote further investment in creating value-added data. If pricing or access issues emerge in the future in respect of value-added data, then they can, at the first instance, be addressed through the general protections under the *Competition and Consumer Act 2010* (Cth) (including the prohibition against misuse of market power). Sector specific price regulation should only be introduced when there is a clear case to do so, which is not yet established in Australia.

- Notification to the customer: Section 9.3.2 of the consultation paper outlines the notification the data holder must give to the consumer when authorising a data request, including the name of the accredited data recipient, the data being requested and the expiry date of the request. Understandably, this approach assumes that the accredited data recipient is seeking data directly from the data holder. This is not the data delivery model we understand is being envisaged for the energy sector with a central role for AEMO being proposed. Once the model has been confirmed, further thought can be given to the appropriate notification requirements. For example, the energy rules will need to determine whether it is AEMO or the data holder(s) who is responsible for seeking the authorisation.

- Reporting and record keeping: EnergyAustralia supports robust and rigorous reporting and record keeping obligations under the CDR. We support these obligations being considered on a sector-by-sector basis to ensure there is alignment with existing obligations on that sector to maximise efficiency and reduce the risk of technical compliance breaches.

  For example, the approach to reporting for data holders on elements like API performance will need to be considered in the context of what data delivery model is used. Where data is provided from a centralised point, such as AEMO, this type of reporting may be best done from that point owner.

  We note that the rules indicate that reporting would be required to provide to the ACCC and to the Office of the Australian Information Commissioner. This unusual reporting model has the potential for inefficiencies (such as providing the same information to both agencies) so we encourage the ACCC to consult extensively with CDR participants and make reporting obligations clear to the minimise the regulatory burden associated with the scheme.

We welcome the ACCC's stakeholder engagement to date and encourage further consultation as the CDR framework evolves. Given there are several parts of the CDR framework evolving in parallel. we consider it imperative that energy sector participants are heavily involved in the process of defining the scope of CDR data and the consumer data rules that will be applied across the energy sector.

If you have any questions regarding any material contained in this submission I can be contacted on [redacted].

Yours sincerely

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EnergyAustralia