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Consumer Data Right
Australian Competition & Consumer Commission
GPO Box 520
Melbourne VIC 3001

RE: Competition and Consumer (Consumer Data) Rules 2019 Exposure Draft

ERM Power Limited (ERM Power) welcomes the opportunity to respond to the Australian Competition and Consumer Commission (ACCC) Exposure Draft: Consumer Data Rules 2019, which makes draft rules for the Treasury Laws Amendment (Consumer Data Right) Bill 2018 ('the legislation') to apply to all designated sectors of the economy.

About ERM Power

ERM Power is an Australian energy company operating electricity sales, generation and energy solutions businesses. The Company has grown to become the second largest electricity provider to commercial businesses and industrials in Australia by load¹, with operations in every state and the Australian Capital Territory. A growing range of energy solutions products and services are being delivered, including lighting and energy efficiency software and data analytics, to the Company's existing and new customer base. The Company operates 662 megawatts of low emission, gas-fired peaking power stations in Western Australia and Queensland.

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General comments

ERM Power supports the development of an innovative energy market where consumers are empowered and mobilised to make decisions in their best interests based on all available information. The Consumer Data Right (CDR) provides a framework to assist consumers to easily authorise transfer of their identifiable data from a data holder to an accredited third party. We believe that the effective and efficient operation of the CDR is dependent on governing rules which ensure there is transparency, clarity and maximum usability for all participants. This is essential to ensure consumer trust and confidence in the CDR.

ERM Power is supportive of the CDR framework. The ACCC have provided advice that the draft rules are intended to serve as a 'general' set of rules that apply to all sectors, with sector-specific rules to apply in subsequent publications of schedules. We suggest that there are complexities that are required to be addressed if the draft rules are intended to be implemented economy-wide. ERM Power believe that the complexities to be addressed have arisen as a result of attempting to apply general draft rules across different sectors of the economy. As the CDR process has advanced to varying degrees across different sectors, consequently with different information available, this presents difficulty for sectors attempting to provide industry feedback on generalised rules. ERM Power believe there is further detail and consultation required to ensure the draft rules are appropriate for the energy sector.

In relation to the draft rules which apply to all sectors, ERM Power believe that:

¹ Based on ERM Power analysis of latest published financial information.



- It is critical that the energy sector is provided detail on what data is intended to be defined under the draft rules and legislation for the energy sector
- Further detail must be provided on the process required to allow consumer consents, specifically for a third party provider to access to consumer data as a subsidiary of a data holder

Energy data

The definition of data under the CDR framework determines the nature of how the CDR works for consumers and industry. It is critical that the specific datasets intended to be classed as CDR data for the energy sector is explicitly defined and consulted on with industry.

The underpinning principle of the legislation is based around the CDR consumer as an identifiable or reasonably identifiable entity, including individuals and business enterprises. If an entity is identifiable or reasonably identifiable from data, the entity is considered a CDR consumer as the data, or associated data that is already held by the data holder or accredited data recipient, 'relates' to that entity.

This underpinning principle of 'relation' is intentionally broad to optimise the rights of the consumer. This highlights the critical requirement to outline in detail what data is intended to be defined as CDR data for designated sectors. Currently, the draft rules define CDR data through the legislation, which points to the definition in the designation instrument for a sector, as well as any information that is derived from that data. This includes product information or records of usage of a good or service.

It is clear from the legislation that the data that is defined as CDR data for the energy sector is dependent on what is defined in the designation instrument. The designation instrument for the energy sector has not yet been made for public reference. However, with the exclusion of *Schedule 2 – Provisions relevant to the banking sector*, the draft rules are intended to apply across all designated sectors. It is not possible to assess the appropriateness of the draft rules for the energy sector in accordance with the legislation and designation instrument without the designation instrument being made and subsequently, relevant datasets specified, for the energy sector.

It is critical that the energy sector be provided with adequate information to assess the appropriateness of the draft rules due to the complexity of energy-related data and the differences in jurisdictional rules which permit its collection across States and Territories. Further information must be provided to assess the draft rules against the available energy market data. There is also potential for interrelation between the CDR and existing energy laws, with potential for conflict of duplication with the CDR.

The implementation of systems and processes required to comply with the CDR will be dependent on the specific datasets identified as relevant for compliance with the CDR. The type of CDR data identified will have implications on the ability of CDR participants to provide standards and management of data consistency across the industry. The Explanatory Memorandum on the legislation circulated by the Treasury states that matters to be covered in the data standards will be subject to the consumer data rules, specifically the ACCC may make rules about when data standards are mandatory or voluntary. Without knowledge of the defined CDR data and data standards, it is not possible to make a comprehensive assessment on whether the rules are appropriate in relation to the data standards.

The definition of CDR data for the energy sector is critically important and must be defined prior to seeking comment on the draft rules. The energy sector cannot provide a comprehensive assessment of the appropriateness of the draft rules without knowledge of what data they are expected to cover. We understand that the ACCC intends to release the draft rules for a secondary consultation process. ERM Power therefore



recommends that the designation instruments for designated sectors be released for consultation prior to any subsequent consultation on draft rules. Further discussion on specific issues related to data definitions are discussed below.

Definition of CDR data, directly derived data and indirectly derived data

The potential of the CDR to encourage innovation and competition in the energy market is dependent on the datasets which are identified as CDR data, directly derived data and indirectly derived data. Without the designation instrument for the energy sector, the impact of the inclusion of these definitions in the draft rules without amendment is unclear. There is a risk that a designation instrument for the energy sector may be general in nature, and not provide the detail required in designating specific data sets. In this case, the rules would provide an option to refine the definition of the designated data sets. The inclusion of these definitions in the current draft rules would not allow for the opportunity for future refinement if required. They should be considered in sector-specific rules only.

Definition of required product data and required consumer data

The general draft rules define these terms as relevant to the banking sector. Due to the sector-specific nature of this definition, they are inappropriate for inclusion on the general draft rules. They should be considered in sector-specific rules only.

Intellectual property

As stated in Treasury's Explanatory Memorandum, the intention of the legislation is to require the Minister to consider the impact of the CDR on the intellectual property rights of CDR participants. The Minister may also designate data and the circumstances for which specific persons can charge a fee for data use or disclosure. This includes a potential circumstance under which a dataset is identified as intellectual property and designated as a chargeable data set. The ACCC is required to consider the same matters as the Minister prior to making rules. This includes the impact of the rules on innovation and competition, including the consideration of the inclusion of intellectual property, its acquisition, and related chargeable fees.

The assessment around intellectual property is difficult due to the lack of clarity around what is included in the definition of CDR data in the legislation.

As currently written, the ACCC do not provide detail on the specific consideration of intellectual property in the general draft rules. The rules should specify the circumstances under which intellectual property would be considered for inclusion, and how this complies with the legislation. ERM Power do not believe there is sufficient evidence provided to warrant the inclusion of intellectual property or value-added consumer data within the CDR framework.

'Data minimisation principle'

The rules apply a data minimisation principle to dictate that an accredited person does not collect or use more CDR data that is reasonably needed. Considering the powers of the Minister in making a designation, it is not clear what is considered 'reasonable' in this context for the energy sector. We do not believe there is evidence that including value-added data or intellectual property would be beneficial under this principle, and request further detail on how the rule applies to different sectors.



Privacy safeguards detail

The draft rules are unclear on the circumstances in which deletion or deidentification of redundant data would be required, respectively. The draft rules indicate that it is at the discretion of the accredited third party to either delete or deidentify the redundant data. Clarity would be beneficial if this is not the intention.

Consent models

Privacy and consent is a critical component of the CDR. ERM Power supports the ACCC approach to ensure that consumer privacy and consent for data access and use is safeguarded to protect the rights of consumers as a priority.

The legislation states that the consumer data rules may provide requirements about clarification of the Privacy Safeguards. Draft rule 4.16 3(c) defines that the accredited person must ask for the CDR consumer's express consent for CDR data uses, in accordance with the 'data minimisation principle' (draft rule 1.7). Draft rule 1.7 defines the data minimisation principle as requiring the accredited data recipient to not collect or use more CDR data than is reasonably needed in order to provide goods or services under a CDR contract. A CDR contract must not allow for the prohibited use or disclosure of CDR data².

ERM Power believe it is important to provide further clarity in the rules as to whether a subsidiary of a data holder must apply for separate consent from a CDR consumer to access their data. ERM Power supports draft rules 4.10 3(c) and 4.16 3(c) specify that an accredited person could not infer consent, or seek to rely on an implied consent. Therefore, we seek further clarification in the rules as to the frameworks governing the authority provided to a subsidiary of a data holder obtaining consent from a customer for collection and use of data. ERM Power believe it is more efficient and accessible for a CDR consumer to provide consent for third party access to a subsidiary of a data holder as part of the contracting process between the CDR consumer and data holder.

Conclusion

ERM Power is supportive of the ACCC's work to provide open and transparent consultation on the CDR draft rules. However, we believe it is difficult for the energy sector to assess the validity of the draft rules to apply across all sectors, without further publication and consultation on the definitions of the CDR data for the energy sector. We also seek that the ACCC provide greater clarity on what circumstances would warrant the sharing of intellectual property under the CDR, and the appropriate consent models which would apply to subsidiaries of data holders. Given the complexities of how these matters would impact different sectors, ERM Power reiterate that the timelines for the consultation process should be extended to ensure this detail is able to be properly considered by industry.

Please do not hesitate to get in touch with any questions.

Yours sincerely,

Emma White
Policy Adviser

² Draft rule 4.16 5 states that the accredited person must not ask the CDR consumer to give consent to use CDR data for prohibited use or disclosure, defined as selling the data, using the data (including through aggregation) for the purpose of identifying, compiling insights in relation to any person who is not the CDR consumer for that data and did not make the consumer data request. Prohibited disclosure under this draft rule also prohibits disclosing the CDR data other than to an outsourced service provider.