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EnergyAustralia Pty Ltd
ABN 99 086 014 968

Level 33
385 Bourke Street
Melbourne Victoria 3000

Phone +61 3 8628 1000
Facsimile +61 3 8628 1050

enq@energyaustralia.com.au
energyaustralia.com.au

Sarah Court
Commissioner
Australian Competition and Consumer Commission

Submitted electronically via ACCC Consultation Hub

Dear Ms Court

Public submission on the Consumer Data Right Draft Rules

EnergyAustralia is pleased to make this submission on the exposure draft of the *Competition and Consumer (Consumer Data) Rules 2019 – Exposure Draft (29 March 2019)* (**CDR Rules**).

EnergyAustralia is one of Australia's largest energy companies with around 2.6 million electricity and gas accounts in New South Wales, Victoria, Queensland, South Australia, and the Australian Capital Territory. We also own, operate and contract an energy generation portfolio across Australia, including coal, gas, battery storage, demand response, wind and solar assets, with control of over 4,500MW of generation in the National Electricity Market (NEM).

EnergyAustralia has been actively engaged in the development of the consumer data right (**CDR**). We provided detailed submissions on the *Treasury Laws Amendment (Consumer Data Right) Bill 2019* and participated in various forums with the ACCC and Data61 (on technical standards), AEMO and other retailers. Most recently, we provided detailed submissions in response to the ACCC's consultation on energy data access models.

We support transparency in the energy retail market and measures to support customers making informed decisions, such as the implementation of the CDR. EnergyAustralia believes that the CDR is a significant step 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 responses to previous consultations, the introduction of a CDR across the energy sector will have significant implications. Further, there are challenges particular to the energy sector that should be taken into account when implementing a CDR. We therefore urge the ACCC to take into account the need for comprehensive industry consultation to ensure consistency and efficiency with respect to the scope of data provided, interaction with various regulatory regimes and operational compliance.

We consider it imperative that energy sector participants are heavily involved in the process of defining the consumer data rules that will be applied across the energy sector. We welcome this opportunity to make a submission on the CDR Rules at this stage, and will continue to be involved throughout the process to ensure that the CDR is tailored to meet the specific regulatory challenges and needs of the energy sector.

We note the following general comments in relation to the current form of the CDR Rules:

1. **The CDR Rules are tailored to the "banking model" and are not fit for purpose for the "gateway model" proposed for the energy sector**

   Although the ACCC's consultation hub states that the exposure draft CDR Rules are published for the banking sector, the text of the CDR Rules makes it clear that it is intended to be used as a model for the CDR Rules for other sectors as well. With this in mind, we would expect that the bulk of the CDR Rules would be drafted in a generic manner applicable to all sectors, with some sector-specific changes limited to schedules.

   However, as currently drafted, the CDR Rules contain many banking sector-specific provisions and structures, throughout the body of the document as well as the schedules. In particular, the current form of the CDR Rules is not appropriately tailored for the "gateway model" proposed by the ACCC in its consultation on data access models for the CDR Rules (whereby the Australian Energy Market Operator (**AEMO**) would operate as a "designated gateway" in relation to data access requests).

   To effect this model properly, we expect that significant changes to the CDR Rules would need to be made in relation to designated gateways, including provisions relating to data access requests, dashboards and consent models. Alternatively, if the "gateway model" is used for the energy sector, the ACCC could clarify that it intends to draft a separate set of rules tailored for the gateway model.

2. **The current implementation timeframe for the energy sector is too ambitious**

   As we have noted in previous submissions, the implementation timeframe for the first half of 2020 (which the ACCC has noted in its previous consultation for data access models under the CDR) is too ambitious. This is made clear in reference to the CDR Rules, which would require significant amendment and further consultation in the energy sector in order to design a CDR Rules regime that is fit for purpose in the energy sector.

   We understand that the ACCC is focusing in this consultation on the development of the CDR Rules. However, given the complexity of implementing the CDR more generally, and the fact that significant matters remain unresolved, we urge the ACCC to work to a practical and achievable rollout date that properly takes into account sectoral differences and does not rely too heavily on a banking-focused regime.

3. **The privacy safeguards for the consumer data right duplicate the Australian Privacy Principles and add a layer of complexity that increases regulatory burden**

   We also reiterate EnergyAustralia's previous submissions regarding the application of the privacy safeguards and duplication of regulatory compliance models, in particular our response of 12 October 2018 to the ACCC's draft CDR Rules Framework.

   We note that the CDR Rules contain some clarifications on key questions regarding the privacy safeguards, such as reasons for refusal of an access request. However, the regulatory complexity of managing privacy under the CDR regime is increased because of requirements to refer to the CDR Rules as well as the data standards, the proposed CDR legislation and the *Privacy Act 1988* (Cth) in certain cases.

   In our view, these privacy requirements are duplicative and all participants in the CDR regime, including consumers, would benefit from harmonisation of the privacy requirements and centralisation of the applicable rules.

In addition to the above overarching matters, the enclosed submissions contain our detailed comments regarding the current draft of the CDR Rules.

We appreciate the opportunity to provide comments on the CDR Rules and encourage the ACCC, in conjunction with the Treasury, the Department of Energy and Environment and the Office of the Australian Information Commissioner (**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 ACCC as discussion regarding the application of the consumer data right in the energy sector evolves. If you would like to discuss the submission please contact Shawn Tan [redacted] or Selena Liu [redacted] in first instance.

Yours sincerely

Sarah Ogilvie
Industry Regulation Leader

EnergyAustralia

EnergyAustralia submission on the Competition and Consumer (Consumer Data) Rules 2019 – Exposure Draft

10 May 2019

1. Introduction

1.1. EnergyAustralia's response to the CDR Rules

EnergyAustralia supports the ACCC's development of the *Competition and Consumer (Consumer Data) Rules 2019 – Exposure Draft (29 March 2019)* (**CDR Rules**) in a manner that is appropriate for implementation of the *Treasury Laws Amendment (Consumer Data Right) Bill 2018* (**CDR Bill**) across all proposed sectors, including the energy sector.

However, in our view, the CDR Rules are not yet sufficiently adapted to address the unique needs of any sectors other than the banking sector. While we understand that the current form of the CDR Rules has been prepared with the banking sector in mind, in our view, the current form should be amended to either:

(a) create a standardised set of CDR Rules, similar to the current structure but delineating the generic aspects of the CDR Rules from sector-specific aspects, in particular moving banking-specific aspects to the relevant schedules and incorporating changes specific to the "gateway model"; or

(b) clarify that particular CDR Rules are sector-limited, with a commitment from the ACCC to develop separate sectoral rules as separate documents.

In either case, the draft CDR Rules will require considerable amendment to be appropriate for sectors other than the banking sector.

We also note that a position has not yet been adopted for cross-sector data sharing, and the complexities (including technical and privacy concerns) which would arise from such an exchange of data between sectors and between different data access models. If cross-sector data sharing is adopted, the CDR Rules would need to address these complexities.

1.2. Structure of this response

At the appropriate time, EnergyAustralia will welcome the opportunity for further detailed consultation on CDR Rules tailored to the energy sector. There are a range of matters that will require further assessment at that time, particularly in relation to the data access model, the existing regulatory regime and the scope of data.

At this stage, however, our responses to the CDR Rules are limited to some key comments regarding the consumer data right (**CDR**) more generally. Some sector-specific observations are made in the comments below, but for the most part our comments are applicable to the CDR Rules for each proposed sector.

Our submissions are grouped into the following categories:

(a) **key concepts** – data access model, sector-specific customer categories, the disclosure of data to non-accredited persons and cross-sector disclosure of CDR data;

(b) **data requests, access, use and disclosure** – the data minimisation principle, circumstances in which access may be refused, obligations to notify the ACCC after refusal of access and prohibited uses of CDR data;

(c) **customer-specific issues** – sector-specific issues regarding the identity of CDR consumers, joint account holders and issues regarding former customers; and

(d) **privacy safeguards and security requirements** – linkages between the privacy safeguards in the CDR Bill and CDR Rules, exceptions to the use or disclosure of CDR data, and additional requirements on data holders relating to quality and correction of CDR data; and

(e) **other matters** – dispute resolution processes, record-keeping and reporting, audit rights, and application of the civil penalty regime.

2. Key concepts

2.1. The CDR Rules have been targeted to the banking sector, but appear to be drafted for broad application to all sectors

As noted in our covering letter, we are concerned that the CDR Rules, although stated to apply to the banking sector, have broader application to other sectors. We ask the ACCC to provide more clarity on this issue.

Although the CDR Rules as currently drafted are listed as "CDR draft rules (banking)" on the ACCC's website and consultation hub, these rules appear to be general in nature (with the exception of some specific rules relating to banking). In addition, the draft CDR Rules include specific references which indicate that the CDR Rules will apply generally, to be "…amended at a later time to deal with additional sectors of the economy".[1]

EnergyAustralia is concerned that any issued form of the CDR Rules will next apply to the energy sector, without the chance for adequate consultation to understand and incorporate the unique needs of the energy sector. In our view, it is unlikely that the consumer data rules for one sector can be directly lifted and transferred to another. We strongly believe that each sector will have its own complexities, and that issues that result from the application of the consumer data rules in each sector may not be fully realised until they are used in practice.

Our comments in the following sections of this submission reiterate these key concerns.

2.2. The proposed CDR Rules do not adequately cater for the "gateway model"

It is highly likely that the gateway model will be utilised for the energy sector

In its most recent consultation on the implementation of the CDR in the energy sector (the **Data Access Models Paper**), the ACCC requested feedback on the model to be used for data access. Three models were considered:

(a) the "AEMO centralised model" (where AEMO would act as sole data holder for a centralised data set and would be responsible for responding to data access requests);

(b) the "AEMO gateway model" (where AEMO would act as a "designated gateway", as defined in s 56AL of the CDR Bill, acting as a pipeline for the transfer of data from data holders and being responsible for responding to data access requests); or

(c) the "economy-wide model" (where various participants in the energy sector would each be considered data holders, each data holder being responsible for transferring data to consumers and responding to data access requests) – this was also referred to as the "banking model".

EnergyAustralia supported the use of a gateway model in its submissions to the ACCC on 22 March 2019. The gateway model also appeared to receive the most support at the consultation forum held by the ACCC on 18 March 2019. While a final decision has not yet been made, we believe that it is highly likely that the "gateway model" will be utilised.

[1] CDR Rules, paragraph 1.6(11). Also, see CDR Rules, Schedule 2 more generally.

The CDR Rules are not tailored to properly address the "gateway model"

While the ACCC has had the benefit of its own research into the various data access models, in addition to submissions on the proposed data access models (which includes details on the "gateway model") and the current drafting of the CDR Bill and explanatory memorandum (which includes details on the role and responsibilities of "designated gateways"), the proposed CDR Rules still do not contemplate the "gateway model".

If a "gateway model" is adopted in the energy sector, we are concerned that the CDR Rules as currently drafted would severely impact the application of this model. We set out an example of changes that may be required below:

Reference	Application of this rule to the "gateway model"
Rule 1.14(1) – Consumer dashboard	This rule requires data holders to provide an online dashboard to the consumer to manage authorisations to disclose CDR data in response to a request. At this stage, it is unclear how this dashboard obligation will operate under the gateway model. If each data holder were to operate its own dashboard, this may present its own operational problems. In particular, if a data holder remains obliged to provide a separate dashboard, it is unclear how the data holder will ensure that the information presented in its dashboard is accurate and up-to-date, taking into account the various actions undertaken by AEMO as the designated gateway.
Rule 2.3 – Product data requests	It is not clear whether product data requests under this rule would be managed by AEMO as the designated gateway, similar to other data access requests. We expect that this would be the case, and accordingly, rule 2.3 would require updating to ensure that it is fit for purpose under the "gateway model" as contemplated by section 56BG(2) of the CDR Bill.
Rules 3.3 and 4.4 – Consumer data requests made by CDR consumers and accredited persons	These rules require data holders to disclose CDR data in response to a request from a CDR consumer or an accredited data recipient (as applicable). If AEMO acts as a designated gateway and data access requests cannot be made against data holders directly, this process will require substantial redrafting.
Rules 4.11, 4.17, 4.24 and 4.25 – Withdrawal of consent or authorisation	The consent and authorisation procedures in rule 4 would require an update to take into account the intermediary role that AEMO would adopt as a designated gateway under the "gateway model". For example, it is not clear whether a consumer may revoke their consent or authorisation under rule 4.11, 4.17 or 4.24 by communication with the designated gateway instead of the accredited person or data holder. Similarly, it is not clear if the data holder or the designated gateway would have an obligation to cease providing CDR data where an authorisation is withdrawn or expires under rule 4.25.
General consent and authorisation procedures	As noted in our response to the ACCC's Data Access Models paper on 22 March 2019, it is currently unclear how the designated gateway will perform consent and authorisation obligations when interacting with customers on behalf of a data holder.

2.3. The data access processes available to "CDR consumers" in the energy sector may need to differ for large customers and small customers

We noted in our previous response on the CDR Rules Framework that the extension of the CDR to businesses in relation to their energy data requires further consideration, particularly with respect to how this right may work in practice.

In our view, it is unnecessary to characterise other commercial and industrial businesses as CDR consumers in the context of the energy retail sector, particularly given that the rights available to "large customers" (defined under the National Electricity Retail Law and other applicable rules by reference to the customer's energy requirements) differ significantly to those available to "small customers" (also defined in the National Electricity Retail Law and other applicable rules). In many cases, commercial and industrial businesses (ie, "large customers") are account managed and are provided with access to detailed reports about their energy usage. These customers are already managing their energy data in a highly sophisticated manner and extending the CDR to this customer cohort is redundant.

In addition, the application of the same CDR Rules across the board, to all CDR consumers in the same way, has the potential to duplicate or complicate data access services already provided to commercial and industrial businesses. Although noting that that definition of CDR consumer (and scope of CDR data) is yet to be determined, the CDR Rules should take into account the potential of consumer-specific access exclusions or differences.

2.4. Disclosure to non-accredited third parties

EnergyAustralia has significant concerns about the potential for a consumer's CDR data to be disclosed to "another person" (for example, a consumer's accountant, lawyer or financial counsellor) as is currently being considered by the ACCC (see rule 7.5). We assume that this other person would not be an accredited person under the CDR regime. There is a potential for this disclosure to compromise the security of a consumer's data and the protections that are otherwise available for CDR data that is handled by CDR participants.

With this in mind, while we would expect that such disclosures (and subsequent use and disclosure by that other person) would be limited in the same ways that the use and disclosure of CDR data by the accredited person is limited, we query how this would be achieved under the current CDR Rules without undermining the protections granted to that CDR data under the CDR regime.

The ACCC's proposed rules regarding the disclosure of information to these third parties have not been detailed. EnergyAustralia would expect that these rules would be provided up front for review by participants in the CDR regime, and urges the ACCC to provide further detail on these additional rules and their application.

2.5. Cross-sector access to CDR data

EnergyAustralia recognises the opportunity for further innovation if broader cross-sector data sharing is enabled, as originally proposed in the CDR Bill and explanatory memorandum.[2] Access to rich customer datasets from different sectors, if accurately data-matched, has the potential to drive powerful customer insights and deliver meaningful service improvements.

However, we note that the CDR Rules do not currently contemplate this possibility in detail. If cross-sector sharing of CDR is adopted, there are a number of technical and privacy issues which must be addressed. The technical mechanism through which data will be transferred between different data access models and across entities in different sectors is yet to be addressed. Additionally, there are potential privacy concerns with a broad cross-sector sharing of customer data, as this allows for more detailed customer profiles to be created

[2] Explanatory Memorandum, Treasury Laws Amendment (Consumer Data Right) Bill 2018 [1.160].

and potentially exploited (for example, by financial services entities acting as accredited data recipients having access to a customer's energy bill payment history).

3. Data requests, access, use and disclosure

3.1. Application of the data minimisation principle

Use of terms "reasonably needed" and "goods and services"

Whilst we agree that the use of an explicit data minimisation principle is appropriate, and can be used to limit the "over-collection" of CDR data by accredited persons, EnergyAustralia is concerned about how broadly this principle is defined in rule 1.7.

Under the current draft CDR Rules, an accredited person is not permitted to "…collect more CDR data than is reasonably needed in order to provide goods or services under a CDR contract" and cannot use CDR data "…beyond what is reasonably needed in order to provide goods or services under a CDR contract". In our view, this principle is undermined as a result of the following:

(a) the term "reasonably needed" is not consistent with the use of similar language in other contexts (such as the Privacy Act); and

(b) the term "goods and services" is expansive and open to broad descriptions or self-interpretation of an accredited data recipient's goods and services.

By way of comparison to privacy and data protection laws:

(a) the Privacy Act contains a data minimisation principle in Australian Privacy Principle (**APP**) 3 – the language used in that principle is "reasonably necessary" and "…for one or more of the entity's functions or activities." This language is then supplemented by interpretive guidance issued by the OAIC;[3] and

(b) the General Data Protection Regulation (in the European Union) also contains a data minimisation principle in Article 5(1)(c) – the language used in this principle is "necessary" and "…in relation to the purposes for which they are processed".

In our view, both of these regimes provide a more robust structure for the application of an effective data minimisation principle. We suggest that the use of the "reasonably necessary" language of the Privacy Act should be employed, which allows the ACCC to leverage the pre-existing body of interpretative guidance on the meaning of this wording. This should be complemented by clearer purposive language that links to the consents obtained by the accredited data recipient as opposed to a general reference to goods or services.

Application of the data minimisation principle to requests by a CDR consumer

We also note that the data minimisation principle only applies where a request is made by an accredited person making a request on behalf of a CDR consumer, and not in relation to a direct request made by a consumer under rule 3.3. The data minimisation principle would not apply when the CDR consumer is making a request under this rule.

This is potentially concerning because it allows for circumstances where a CDR consumer could be coerced or encouraged to make a request for their own CDR data by a third party (such as a business involved in predatory lending practices) which then requires the CDR consumer to forward this entire data set on to the requesting entity, thereby circumventing protections afforded by the data minimisation principle. Our comments at paragraph 2.4 above also apply to this issue.

[3] Office of the Australian Information Commissioner, APP Guidelines at [B.112]-[B.117] and [3.8]-[3.15].

3.2. CDR Rules overlay to accredited data recipient contracts

We note that the restrictions in rule 1.8 on what may be considered a CDR contract may have unintended consequences on contracts which apply more broadly with customers and deal only incidentally with the CDR. In the energy sector, this may further complicate the process of managing energy contracts that are already highly-regulated, noting that the National Electricity Retail Law and other jurisdictional rules contain prescriptive rules on the structure of energy contracts.

This process would increase complexity and may discourage the uptake of the accredited data recipient regime. In our view, this would not be an efficient regulatory outcome and the regulatory burden and complexities of including a mandated set of contractual provisions should be closely considered against the benefit available to a consumer by this mechanism, particularly in the context where sector-specific rules already provide detailed rules on the form and manner of contracting.

3.3. Refusal of access to CDR data

Circumstances in which a data access request may be refused

EnergyAustralia is concerned that inappropriate disclosure of CDR data may potentially be very harmful, and have far-reaching effects. In the energy sector, this could include:

(a) a wrongful request by a landlord to their tenant's energy usage data; or

(b) former partners of consumers seeking access to energy usage data or other CDR data, where the consumer is at risk of domestic violence.

In relation to this second point, EnergyAustralia has made submissions to the ACCC on this matter previously, in its response to the CDR Rules Framework.

In our view, the circumstances for refusal set out in rules 3.5 and 4.7 ought to be aligned with the equivalent reasons for refusal under the Australian Privacy Principles (specifically APP 12.3) and expanded to address additional matters where an individual may be at particular risk, where the request is frivolous or vexatious or where certain authorisation procedures have not been met. In this final respect, we refer the ACCC to the Victorian Essential Service Commission's recent consultation and draft decision on Energy Retail Code Changes to Support Family Violence Provisions for Retailers, which contains relevant recommendations regarding account security considerations in the context of domestic violence situations.[4] We also consider that the "adverse impact" reason for refusal under rule 4.7(1)(b) should be expanded to address the data holder's systems more generally, and not only the specific sub-set of systems which the data holder uses to receive requests – noting that many interrelated systems may be impacted by excessive requests for CDR data, even if those systems do not directly receive the requests.

Finally, we note that rule 3.5(3) states that further grounds for refusing disclosure may be set out in the data standards. Whilst this enhances regulatory flexibility, we consider that it unnecessarily adds to the complexity of the regulatory regime and the relevant reasons for refusal could be set out in the CDR Rules directly without significant difficulty. Under the current framework, data holders would be required to refer to the proposed legislation, the CDR Rules, the data standards, and any ancillary documents mentioned within the standards, simply to work out whether a disclosure request may be refused.

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[4] Essential Services Commission 'Energy Retail Code Changes to Support Family Violence Provisions for Retailers: Draft Decision' (Draft Decision, 19 March 2019) [4.4.2] <https://www.esc.vic.gov.au/electricity-and-gas/electricity-and-gas-inquiries-studies-and-reviews/family-violence-resources-review-2018>.

Providing the ACCC with notice of a refusal to provide access

The requirement under rule 4.7 to inform the ACCC of a refusal to disclose in response to a consumer data request within 24 hours is a particular area of concern. We query the need for the ACCC to receive notice of these actions within such a short period of time and query why the reporting provisions provided in Division 9.3 of the CDR Rules are not sufficient. In our view, a 24 hour notice period is impractical, as it would require the data holder to investigate, gather information and provide a formal response to the ACCC within a very short period of time. The requirement to report in a short period of time may result in unintended consequences, such as data holders approving technically invalid consumer data requests more easily (possibly without sufficient oversight), to avoid non-compliance with the reporting obligations.

By way of contrast, the Australian Energy Regulator's (**AER's**) Compliance Procedures and Guidelines include a two business day timeframe for notification of serious breaches (such as a wrongful de-energisation of vulnerable small customers), along with a quarterly and half yearly reporting regime as part of the AER's oversight function. In circumstances such as a refusal to disclose CDR information, which is not on its face considered a breach of the CDR Rules, more limited reporting ought to be sufficient and would strike a fairer balance between compliance costs, complexity and consumer outcomes.

Further, a large volume of data access requests under the CDR regime may result in system performance and reliability issues, particularly if there are multiple automated requests made that are then refused. We note that the equivalent rule (regarding refusal of access) under APP 12.9 simply requires the relevant entity to provide the requesting individual reasons for a refusal, with certain details regarding that refusal. Notice to the relevant regulator is not required under the APPs and, in our view, it should equally not be required under the CDR Rules, particularly given the regular reporting regime in Division 9.3 of the CDR Rules is sufficient.

3.4. Prohibited uses and disclosures of CDR data

The 'prohibited use or disclosure' restrictions in rules 4.8 and 4.16, defined in rule 1.7, operate to prevent the CDR data from being on-sold or used for the purpose of identifying, compiling insights or profiling any person who is not the CDR consumer for that data. EnergyAustralia would welcome clarification in the CDR Rules to better describe how this restriction would operate in practice. Particularly, it would be useful if the ACCC were to expand on how this may apply to the use of analytics to develop group-level insights where no consumers are specifically identifiable (or able to be re-identified) in the final group-level data set.

3.5. The product data request rules duplicate existing mechanisms

Under rule 2.3, any person may request that the data holder discloses certain CDR data relating to the products offered by that data holder.

As noted in the Data Access Models Paper, there are existing processes that exist in the energy sector that allow consumers and third parties to access product data. For National Electricity Market jurisdictions, this information is currently provided by energy retailers to the Australian Energy Regulator, and made availability via the 'Energy Made Easy' comparison website. In Victoria, this information is uploaded to the 'Victorian Energy Compare' website. For reasons of simplification of the CDR regime, we query whether a duplicative regime is necessary in the energy sector.

Additionally, we note that under the current frameworks only "generally available plans" are accessible on the public comparison portals. These are plans that are available to any customer in the appropriate distribution zone with the appropriate metering configuration. This does not extend to "restricted plans" which are specifically targeted at an individual or exclusive group and tailored to the specific circumstances of that customer and their

need(s). The product data request framework should mirror this distinction, and only provide for "generally available plans" to be publicly available through the CDR.

4. Sector-specific issues regarding customer identification

4.1. The identity of the CDR consumer should be the account holder

As mentioned in EnergyAustralia's previous response to the ACCC on the Data Access Models Paper, in our view, the CDR consumer for the energy sector must be an account holder.

In our view, granting a CDR consumer the ability to request data if that consumer is not an account holder would be near impossible to manage. 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, as noted above. If, however, the CDR were to be extended to persons other than the account holder, at a minimum, this should be managed by requirements for consent by the account holder and other persons, similar to the joint accounts rules set out in Schedule 2 of the CDR Rules in relation to joint accounts for the banking sector.

4.2. Access to CDR data of former customers of the data holder

Another issue that arises in relation to account holders is the mechanism that would apply for requesting data of former customers. In the context of energy data, it is relatively common for consumers to switch providers multiple times, even in a short period of time. This can occur where a consumer changes their provider to take advantage of a new plan or offer, or where the consumer moves houses. This may result in a chain of data holders, only the most recent of which has up-to-date details of the CDR consumer. While to some extent, the process of obtaining data from multiple data holders can be managed by the accredited data recipient or designated gateway, there are still identification and consent issues that arise where a data holder is asked to verify the identity of a former customer.

In our view, the consent and authorisation procedures set out in the CDR Rules and (where applicable) the data standards should take into account this possibility.

4.3. Access to household-level CDR data by former residents and new residents

The rules should also take into account the automatic revocation of ongoing authorisations when the consumer moves house. Without this mechanism, it may be possible for former occupants of a premises to obtain data regarding the new occupants' energy consumption, whether deliberately or inadvertently.

5. Privacy and security safeguards

5.1. Rules relating to privacy safeguards ought to be in the Bill and not the CDR Rules

Division 7.2 of the CDR Rules sets out additional rules relating to privacy safeguards. However, as noted in our covering letter to this submission, it is unclear why these rules are not simply included in the CDR Bill instead. The practical implication of the current approach is that reference to multiple complex documents is required in order for consumers and CDR participants to understand and properly apply the privacy safeguards. We consider this an unnecessary and confusing division of regulation.

5.2. Inconsistencies between privacy safeguards and equivalent APPs

In addition to the complexities of dual privacy regimes, we note that there are particular aspects of the APPs that would be relevant, but do not appear in the privacy safeguards.

For example, privacy safeguard 6 and rule 7.5 of the CDR Rules together set out rules that apply to the use and disclosure of CDR data. The equivalent provision in the Privacy Act is APP 6. This principle includes additional exceptions for the following situations:

(c) a "permitted general situation", referencing the list of permitted general situations in section 16A of the Privacy Act;

(d) a "permitted health situation" – referencing the list of permitted health situations in section 16B of the Privacy Act; and

(e) law enforcement activities undertaken by a law enforcement body.

These exceptions deal with threats to life, health or safety of individuals, public safety, taking action in relation to unlawful activity and similar matters. While certain exclusions do apply under the CDR Bill and CDR Rules, they do not address all of the APP 6 matters and we urge the ACCC to consider this list of disclosure exceptions in preparing the CDR Rules.

Similarly, as previously noted, there are various justifications for a refusal of access under APP 12. In our view, equivalent allowance for refusal should apply under the CDR Rules.

5.3. Privacy safeguard 11 – quality of CDR data

If a data holder realises that CDR data disclosed to a consumer or an accredited data recipient was inaccurate, out of date or incomplete, the data holder is required to advise the CDR consumer of that fact.

While EnergyAustralia acknowledges the need for a rule that addresses these issues, we note that categories of data in the energy space can be particularly voluminous, complex and arise from multiple sources, resulting in discrepancies that require some time to be resolved. The requirement in rule 7.7(3)(b) to provide notice within 24 hours is particularly short and, in our view, would not provide consumers with substantially more benefit. We suggest that the language "as soon as practicable" is retained, but that a fixed timeframe is not provided.

5.4. Privacy safeguard 13 – correction of CDR data

Privacy safeguard 13 requires the recipient of a request to correct data under s 56EP of the CDR Bill to action that request within 10 business days after receipt of the request.

This requirement under rule 7.10(b) does not reflect the equivalent provision in the Privacy Act, which allows for a "reasonable time" for actioning the request. Non-binding guidance issued by the OAIC recommends that 30 days is a reasonable period, which is significantly shorter than the period proposed under privacy safeguard 13. In our view, the CDR Rules should align with the equivalent rule under the APPs, requiring a "reasonable time" for correction.[5]

6. Other obligations and compliance

6.1. Dispute resolution

We note that the dispute resolution requirements for data holders set out in Part 6 appear to apply specifically to banking entities, referencing the Australian Securities and Investment Commission Regulatory Guide 165, which applies to financial services providers. We suggest that the CDR Rules are made more general, so that the dispute resolution provisions are applicable across sectors, or alternatively the provisions are tailored for each sector.

In the energy sector, the dispute resolution provisions should be aligned to existing sectoral rules and processes. We note that there are a number of territorial Ombudsman services, of which energy distributors and retailers are required to be a members, but this does not extend to third parties such as accredited data recipients.

[5] Office of the Australian Information Commissioner, APP Guidelines at [13.57]

6.2. Record keeping and audit rights and requirements

We note that the CDR Rules include detailed record-keeping and reporting obligations which may become particularly onerous in the event that high volumes of data access requests are made. EnergyAustralia queries whether it is necessary for the volume of data referenced in Division 9.3 of the CDR Rules to be provided to the ACCC on a regular basis.

We also note the interaction between the audit rights set out in Subdivision 9.3.2 of the CDR Rules (and equivalent rights of the OAIC under sections 56ER and 56ET of the CDR Bill). In our view, these audit rights contain limited detail when compared to equivalent compliance audit rights of other regulators, such as the rights of the Australian Energy Regulator under Part 12 of the National Energy Retail Law.[6] In that instance, the legislation addresses details such as the cost of audits, compliance report requirements and additional guidelines for the conduct of audits. While the nature and scope of audit rights might differ under the CDR regime, in our view, the procedures that apply to the audit rights that may be exercised should be made clear to CDR participants in advance.

Finally, we understand that there have been some discussions regarding AEMO, as a relevant regulator in the energy sector, having some level of audit right as well. If this is incorporated in the CDR Rules, AEMO's right to audit should be limited to the technical specifications relating to the CDR and the energy market more broadly, particularly given its possible role as a designated gateway. Audits on more general compliance with the CDR, however, fall more comfortably within the purview of the ACCC and the OAIC, as already described in the CDR Rules.

6.3. Civil penalty provisions

We note the ACCC's comment that it is still considering those sections of the CDR Rules that will be subject to civil penalty provisions. As noted in our previous submission in relation to the CDR Rules Framework, 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 CDR Bill. Where non-compliance with the CDR 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 encourage the ACCC to consider in more detail the circumstances where providing consumers with a right of action against a CDR participant is appropriate. The civil penalties regime should ensure that the rights of action granted to an individual are proportionate to the loss that might be suffered under the CDR regime. We encourage the ACCC to avoid granting rights that would allow consumers the use of the CDR regime for frivolous or vexatious matters or in a way that undermines the dispute resolution mechanisms already available to consumers in the energy sector.

Once the ACCC has considered the civil penalty circumstances in more detail, we look forward to engaging further on the scope of these rights under the CDR Rules.

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[6] *National Energy Retail Law (South Australia) Act 2011* (SA).