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Inquiry into Treasury Law Amendment (Consumer Data Right) Bill 2019 [Provisions]

AGL Energy (AGL) welcomes the opportunity to provide comment to the Inquiry into Treasury Laws Amendment (Consumer Data Right) Bill 2019 [Provisions].

AGL is one of Australia's leading integrated energy companies and the largest ASX listed owner, operator and developer of renewable generation. Our diverse power generation portfolio includes base, peaking and intermediate generation plants, spread across traditional thermal generation as well as renewable sources. AGL is also a significant retailer of energy and provides energy solutions to over 3.5 million customers in New South Wales, Victoria, Queensland, Western Australia and South Australia.

AGL strongly believes that individual consumers should have access to and control over data that directly relates to them. Both the Bill and the ACCC energy data model paper¹ are not focusing on the consumer as the end beneficiary but instead focus on empowering and enabling data sharing between data holders and accredited data recipients in the broadest possible sense. As a result, it does not feel as though the consumer is being put in the middle of the decision making in designing the framework. A well-designed regulatory regime should facilitate and consider consumer access and control to allow customers to seek value from their data, while also preserving incentives for efficient investment and innovation in data from businesses and fostering trust from the community in data use and privacy.

AGL has participated in the recent Consumer Data Right (CDR) consultation processes run by Treasury, the Australian Competition and Consumer Commission (ACCC) and CSIRO's Data61 group and was a representative on the technical standard working group until December 2018. Throughout these processes, AGL has continued to express concern about the timing and changing scope of the CDR Bill and we have urged decision-makers to take additional time to fully explore and assess the changes due to the significant impact they will have on consumer privacy, security as well as competition, investment and data management.

While AGL supports the development and implementation of the CDR, there are significant concerns regarding the Bill including:

- The regulatory tools (for example, the cost-benefit analysis and Privacy Impact Assessment) used in this process are insufficient/not-fit-for-purpose. These tools have not been used at the appropriate time and rely on loosely-related consultation processes, rather than allowing for appropriate

¹ ACCC Energy Data Access Model consultation paper, released 25 February 2019



stakeholder input. AGL has raised concerns with the Privacy Impact Assessment process and assessment.²

- The Bill expands CDR definitions relating to captured data and consumer beyond what was initially recommended in earlier reviews³. As a result, the legislation intentionally goes beyond the scope necessary to enable data portability and access for individuals. AGL is not aware of any assessment that has been completed to determine if the benefits of the broadened scope outweigh the cost and complexity of their inclusion.
- The introduction of new Privacy Safeguards remains unnecessarily confusing, complex and a potential risk to consumer privacy and have not been given appropriate consideration or stakeholder consultation.
- An ambitious implementation date for banking (1 July 2019) was set publicly before the detail for the regime had been determined and while the scope continued to expand. This ambition has impacted the quality and effectiveness of consultation and regime consideration and meant that energy and telecommunications have effectively been left behind in the discussions.

AGL recognises the immense amount of work Treasury and the ACCC are currently trying to complete within very tight timeframes and we commend their efforts to-date. However, we maintain that the goal should be a well-considered an appropriately measured CDR regime, focusing on consumer rights and access in line with original recommendations and expectations.

AGL has provided further comment on the process and our general concerns in the attachment below.

² AGL made a submission to Treasury on the Privacy Impact Assessment available on the [AGL Hub](#).

³ For example, the Harper Review 2016, Productivity Commission Report 2017, Open Banking 2018.



Timing

AGL's key concern on the Consumer Data Right (CDR) is the rushed nature of the decision-making process for such a fundamental shift to consumer rights, privacy laws and obligations on business. While it is claimed that the CDR has been in development for many years through the Harper and Productivity Commission reports, these reports focused on high-level policy discussions, while the governing framework has only been discussed publicly since August 2018. This is due to the significant expansions and alterations from the earlier reports, which now includes new Privacy Safeguards – and overlay of the Privacy Act and expanding definitions of data and consumer.

AGL recognises that there have been several consultation processes on various elements of the CDR to-date. However, these have occurred in condensed timeframes, touching on multiple issues at once and are being run in parallel with other consultation processes (i.e. the Rules Framework or technical standards). AGL is concerned at the fast pace of developing this regime and the short cuts taken in the engagement and analysis stages which will impact the final product and potentially result in negative impacts to consumers and competition.

AGL continue to encourage government to focus on ensuring the framework is fit-for-purpose and helps consumers instead of focusing on a specific implementation date.

Regulatory tools

While reliance on previous consultation processes may help expediate the CDR implementation process, it also has an impact on the ability to fully consider potential unintended consequences that could impact consumer privacy, trust and industry competition. For example, the following two regulatory tools should be completed at each relevant stage of legislative development – to assess changes (and in this case, expansions of scope) that may impact the community and competition.

- **Privacy Impact Assessment (PIA)** – Treasury consulted on a PIA after the final Bill was published. The purpose of a PIA is not to seek affirmation of a proposed change, but to objectively consider the risks to individuals' privacy should the proposed change occur. Despite this, Treasury completed the PIA without seeking external assistance (as is the usual process recommended by the Office of Australian Information Commissioner) and did so at a point where the Bill was unlikely to be changed further (i.e. as it was ready to be tabled in Parliament). Further, rather than assessing the risks of the Privacy Safeguards to consumers, the PIA uses the Safeguards as a mitigator of risk under the regime and there is very little transparency on this assessment.⁴
- **Cost-benefit analysis** - The financial and compliance cost impacts provided by Treasury in the explanatory memorandum⁵ lack appropriate transparency and consideration. The stated compliance cost impact for energy has been set at just 11% of that for banking. When queried on this, Treasury stated that this was largely influenced by the HoustonKemp (HK) report on Consumer Energy Data⁶ which AGL considers is not appropriate. The financial assessment within the HK report is qualified as being an assessment only of limited data sets and that "some high-level assumptions to estimate

⁴ AGL made a submission to Treasury on the Privacy Impact Assessment available on the [AGL Hub](#).

⁵ [Treasury Law Amendment \(Consumer Data Right\) Bill 2019 Explanatory Memorandum](#)

⁶ [HoustonKemp Consumer Energy Data report](#)



ballpark figures of what each option would cost”. Specifically, the HK report focused on interval meter data rather than expected CDR data sets.

Energy consultation

In previous versions of the Bill there was an exemption to ACCC consultation requirements for industry designation that was intended to apply to banking only due to the Open banking review and intense banking sector consultation. The current CDR Bill extends this exemption to energy, stating that consultation has already taken place.⁷

AGL continues to consider that the HK report is insufficient to count as consultation in the energy sector as it was developed for another purpose⁸ and done so before the scope of the CDR regime was fully understood by Government or industries. This includes an absence of consideration of the expanding definitions as are described below, or the cost implications for businesses that may need to run dual privacy systems under the Australian Privacy Principles and the new Privacy Safeguards. AGL continues to support the development of a CDR and its application in the energy sector but consider appropriate consultation and consideration should be afforded to such a fundamental shift in consumer rights.

Derived data

The definition of data captured under the CDR was originally centred on transaction/service use data. No previous review recommended the inclusion of value-added data and Treasury has provided little comment as to its’ inclusion in the legislation – this is a new concept that AGL does not consider has been appropriately scoped. AGL is not aware of any detailed assessment completed by Treasury to weigh the value of expanding the data definition for the purposes of future-proofing the legislation against the potential risks to business investment and innovation in doing so.

- The Productivity Report determined that derived data (that is, data that has been created by a data holder through the application of insights or analysis such that it cannot reasonably be considered the consumer’s data) should be included in consumer data only with industry negotiated agreement.⁹
- The Review into Open Banking specifically stated that value-added customer data (that is data that has been created by a data holder through the application of insight, analysis or transformation of transaction data) should not be included.¹⁰ The report notes an exception for banking specific value-added data for identity verification.

Consumer

The same concerns noted above regarding data definition expansion applies to the definition of consumer. The Bill broadly sets the definition of consumer as an individual, small, medium or large business. The Productive Commission recommended that the CDR apply to individuals and small and medium sized businesses but did not recommend the inclusion of large businesses.¹¹ The Bill again allows the ACCC to limit the definition of

⁷ See [Treasury Law Amendment \(Consumer Data Right\) Bill 2019 Explanatory Memorandum](#), section 1.40.

⁸ The COAG Energy Council requested that HoustonKemp assess consumer access to energy data under existing energy rules and frameworks due to concerns that there lacked industry consistency and efficiency in providing relevant energy data to consumers in a usable way.

⁹ [Productivity Commission Report No. 82 March 2017](#), Data Availability and Use

¹⁰ [Open banking Report December 2017](#)

¹¹ [Productivity Commission Report No. 82 March 2017](#), Data Availability and Use p.15



individual on a sector by sector basis through the designation recommendation and Rule making process, which we note above the ACCC is partially exempt from in Energy under the Bill.

Despite the above points, the CDR Bill has been deliberately drafted on its broadest definition to future-proof legislation on potential other exemptions that may arise in sectors not-yet-considered. AGL recommends that exemptions, such as the one identified above for banking identity verification should be listed as an exception to the definition of data within the legislation. Legislation should be designed in an efficient way in line with government's stated intention, rather than catering for an exception or potential future-matter.

Privacy

Introduction of the Privacy Safeguards represents a massive shift in Privacy Law applications. Treasury changed the scope and application of the Safeguards within a month (between the first and second consultation papers), with residual stakeholder concerns and questions left unanswered. In particular, AGL is concerned that:

- Having two regimes will mean that the same data will be treated differently at different points – this increases the complexity for consumers to understand what their rights are and when.
- Despite altering when the Safeguards apply to different CDR participants, the distinction between data holders and accredited data recipients will unlikely matter as most companies who are data holders are likely to become recipients too. As a result, businesses will ultimately be required to comply with two separate privacy regimes at the same time for datasets, depending on how that information has come to the business.
- Consents fatigue and informed consent continues to be a matter of discussion and consideration by relevant bodies. The ACCC noting that consumer education is an important bedrock of an effective CDR regime but not addressing vulnerable consumer protection requirements (i.e. where English may be a second language).

It is not clear why the Australian Privacy Principles in the Privacy Act have not simply been updated to accommodate CDR requirements, instead of developing near identical Safeguards to apply to some participants at different times. AGL consider that the PIA should have assessed the introduction of new Safeguards and how they support the APP's or create further complexity.

AGL also note that the concept and application of the Safeguards rapidly evolved between August and December 2018 with very little ability for stakeholder input on their application or use. Indeed, the second draft Bill included revised provisions as well as questions for stakeholders to inform provision drafting in a latter version. Stakeholders did not get to see or comment on the final version before it was released by Treasury in December 2018.