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Competition and Consumer (Consumer Data Right) Amendment Rules (No. 1) 2022 (Draft Amending Rules)

EnergyAustralia is one of Australia's largest energy companies with around 2.4 million electricity and gas accounts in NSW, Victoria, Queensland, South Australia, and the Australian Capital Territory. EnergyAustralia owns, contracts, and operates a diversified energy generation portfolio that includes coal, gas, battery storage, demand response, solar, and wind assets. Combined, these assets comprise 4,500MW of generation capacity.

EnergyAustralia welcomes the opportunity to make this submission to the Draft Amending Rules. We provide a perspective from a seller of NBN internet services bundled with energy plans, and as a Tier 1 Energy Retailer that is currently implementing its Data Holder obligations for the energy CDR.

As an overarching comment, we note that many of the changes in the Operational enhancements are significant expansions to the CDR framework. These changes were not presented for consultation before the Draft Amending Rules. An earlier consultation before the Draft Amending Rules, similar to Treasury's other design papers, would have provided two-way benefits. It would have allowed Treasury to rigorously test the concepts before investing substantial effort into drafting Rules (which will be difficult to amend for fundamental changes), and it would have also provided stakeholders with a better understanding of the intent behind the changes. We recommend that Treasury use earlier Design Papers for future operational enhancements.

Our key points on the substance of the Draft Amending Rules are:

- Regarding the rules for the telecommunications sector, we largely agree with many of the decisions that have been made. However, we question the limit of Required *Consumer* Data to products that are publicly offered. This may inadvertently limit customers that can share data about their current telecommunication product, where that product was not publicly offered. This limitation did not apply to the energy CDR Rules, and we are concerned it could exclude many customers from the CDR, but also recognise this might not be the intended effect of the definition. We raise it in our submission for completeness and as an issue for clarification.

- Regarding the operational enhancements, we support the development of an exemption for pilot/trial products. However, the numerical thresholds (1000 customers and 6 months) risk being arbitrary and are extremely difficult to set across sectors and different businesses. An

alternative to using numerical thresholds would be to adopt a stronger qualitative definition of trial product which reflects the product is not being offered "at scale" and is only temporarily offered. If Treasury prefers the certainty of numerical thresholds, we suggest that Treasury could adopt higher thresholds (e.g., 1% of customer base and 18 months) with a stronger qualitative definition of trial product to ensure the higher thresholds do not inappropriately capture products that would not reasonably be considered a trial product.

- The business consumer statement disclosure is a significant expansion of data disclosure to recipients outside the CDR regime. Treasury should only progress this expansion if there is a clear use case. The risks of this expansion are increased with the extension of the maximum length of a business consumers consent from 12 months to 7 years. This seems excessive and unnecessary, particularly for consent to *disclose CDR data outside the CDR regime* (as opposed to consent to *use* CDR data).

- EnergyAustralia strongly opposes changes to delay reciprocal Data Holder obligations for newly accredited persons that hold CDR data. This significantly dilutes the reciprocity principle which has been a central principle of the CDR since its inception, and is intrinsically unfair.

- We also comment on various other issues, including the changes to the Data Holder obligations as part of the operational enhancements and how much time we need to implement them.

If you have any questions in relation to this submission, please contact me (Selena.liu@energyaustralia.com.au or 03 9060 0761).

Yours sincerely,

Selena Liu
Regulatory Affairs Lead

1. Rules to extend the CDR to the telecommunications sector

We generally support the Draft Amending Rules as they relate to extending the CDR to the telecommunications sector.

We strongly support the adoption of the 30,000 services in operation threshold (below which Carriage Service Providers (CSPs) will be exempt from Data Holder obligations). This appropriately reflects that the telecommunication sector has a "longer tail" of very small retailers that will lack the scale to support CDR costs, relative to other sectors like the energy sector. As previously submitted, the smallest cohort of telecommunication Retailers (3% of the retail telecommunications market) is spread over about 325 CSPs[1], while in energy the last 6-8% is spread over 31 Energy Retailers.

EnergyAustralia also agrees with Treasury's telecommunication sector eligibility criteria, which will exclude offline customers and large-scale commercial accounts.

We have a query around the definition of Required *Consumer* Data which links to a "product that is publicly offered":

- "product specific data in relation to a relevant product that is publicly offered, is used by a CDR consumer, and relates to a relevant account"
- "usage data that: relates to a relevant product that is publicly offered"

This is different to the equivalent definitions of tailored tariff data and usage data in the energy sector. It could mean a customer can only share data about their current product, where that product is publicly offered. Therefore, if the customer is on a product that was not publicly offered (such as a below the line offer or possibly a product that has been withdrawn from the market) they will not have access to their data. Below the line offers are common in the energy sector, where the customer is offered discounts which are not publicly offered (typically to dissuade them from switching to another retailer). We understand that below the line offers are common in the telecommunications retail market as well. The reference to publicly offered products (if it excludes below the line offers) could therefore be read as excluding a large proportion of customers from the benefit of CDR data sharing and the benefit of being able to compare their current product with other products in the market. This might not be the intent of Treasury, but we note it here for completeness and suggest it be clarified.

To be clear, we agree with the publicly offered description applying to Required *Product* Data as it makes sense for publicly available products to be used by ADRs when identifying available alternative products for the customer. Our issue is with it applying to Required *Consumer* Data (the data about the *customer's* current telecommunication product).

2. Operational enhancement amendments

2.1 Exemption for pilot/trial products

Relevant issues

EnergyAustralia strongly supports an upfront exemption from data sharing obligations for small-scale, publicly offered pilot/trial (trial) products and its application to the energy sector.

We consider that the objective is to exempt genuine trials in recognition that for trial products that are only temporarily trialled and withdrawn after a short period, the cost and effort of implementing CDR Data Holder obligations is not justified.

[1] See EnergyAustralia's previous submission for more detail.

We note the following relevant issues that support the exemption and inform the definition of a trial:

- **Genuine trials could be characterised by:**
  - **Their purpose i.e. test and learn or proof of concept purpose**
  - **That the product is not being offered "at scale", meaning the product is not fully commercialised. This could mean the product has gone through a shortened product development or that it is being marketed on a more limited basis, compared to permanent product lines.**
  - **The product has a temporary duration i.e. The trial has a defined end date and is open for a fairly short period.**

  Treasury uses customer numbers and trial length to try to define what a trial is, but these are only possible indicators that might show that the product is not being offered at scale and is temporary. An alternative approach would be to adopt a stronger qualitative description of trial product in the definition, in line with the concepts above, see below.

- The CDR compliance cost is not only on the Data Holder's side. In the energy sector, product trials are increasingly testing new innovations that are markedly different from traditional electricity plans today. For example, electricity plans are increasing bundling with new technology such as solar and battery and testing new value streams such as rewarding the customer for moving their energy use to non-peak times or allowing their Energy Retailer to optimise their battery's use to create savings and value. Importantly, innovative trials might involve fundamental changes to product and pricing structures, which will require the Data Standards Body (DSB) to make changes to the CDR product data fields (data payloads). There is little point in requiring the DSB to update its data payloads for a product that is only temporary.

- Further, because of the different product and pricing structures of trial products, trial products are unlikely to be comparable to the more standard, traditional products in the electricity market (this means the customer will not benefit from the primary CDR comparison use case anyway).

- Without an exemption, compliance with CDR obligations might disincentivise those trials to begin with, with adverse impacts on innovation, competition, and consumers. In the energy sector, very few trial products are adopted at scale because quite often they are meeting specific needs and do not have widespread appeal. Many trial products are also unprofitable. In this challenging context, CDR compliance could be cost prohibitive and time consuming, and have a real impact on whether a trial proceeds. In the energy sector, recent reforms to create a regulatory sandbox to exempt trials have been implemented due to similar concerns that the regulatory framework might present a barrier to trials and innovation.[2]

- This disincentive effect is exacerbated where trial products are hosted on separate, peripheral systems to the Data Holder's core customer system. This means that incorporating trial products into the CDR will result in a significant, incremental cost of integrating another system, over and above compliance for the general customer base.

- A further reason for the trial product exemption is that disclosing data about a trial product could result in sharing of confidential and proprietary material with competitors (where they are ADRs).

[2] Regulatory Sandboxes | AEMC

- Lastly, EnergyAustralia recognises that any exempt trial product should no longer be exempt where they reach scale and are expected to be moved into mainstream processes and systems.

Proposed definition of pilot/trial

We recognise the need for Treasury to clearly define the exemption to ensure that only genuine trial products are captured. However, as above, an alternative to using numerical thresholds would be to adopt a stronger qualitative definition of trial product which reflects the product is for test and learn purposes, not being offered at scale and is temporary (see first dot point in the above section).

Using numerical thresholds risks being arbitrary and is extremely difficult to set across sectors and different businesses. If Treasury prefers the certainty of numerical thresholds, Treasury could adopt higher thresholds (e.g., 1% of customer base and 18 months) together with a stronger qualitative description of trial product to ensure the higher thresholds do not inappropriately capture products that would not reasonably be considered a trial product. For example:

> **Meaning of trial product**
>
> (1) For these rules, a product is a trial product in relation to a particular sector if:
> (a) it is a product of a kind specified for the purpose of this paragraph in the relevant sector Schedule; and
> (b) **it is a product that is temporarily being offered for test and learn, or proof of concept purposes**; and
> (c) it is offered:
> (i) with the description "pilot" or "trial"; and
> (ii) with a statement of a period for which it will operate as a pilot or trial that ends no more than **18 months after the initial offering** (the trial period); and
> (iii) on the basis that the number of customers supplied with the product for the purposes of the trial will be limited to **no more than 1% of the data holder's customer base.**
> **[(iv) deleted]**

This definition should be subject to further consultation.

Alternatively, Treasury could consider making sector-specific definitions of trial products. Treasury appears to not prefer this approach because of a general policy preference of making the CDR framework as consistent as possible across sectors to minimise the cost for ADRs (which we support). This makes sense where standardised data fields and API interfaces into the CDR, will minimise the cost of ADR integration and set up. However, this issue does not apply to the definition of trial which will *exclude* the product from the CDR to begin with, and so will not have any impact on ADR integration/set up.

Below we discuss the potential shortcomings of the 1000 customer and 6-month threshold.

1000 customer threshold

The 1000 customer threshold is very arbitrary. We understand that Treasury is using customer numbers as a proxy to indicate that the product is a trial product e.g. it is not being offered "at scale". However, the appropriate threshold will be different based on industry size, business size and risk appetite of the business, e.g., a 1,000 customer threshold would not be appropriate for an energy Data Holder with 10,000 customers (10% of their customer base).

A threshold based on a percentage of the Data Holder's customer base would be more appropriate (e.g. 1%) and would allow for the threshold to adjust for at least industry

and business size. The customer number threshold should reset where there are material changes to the trial product which essentially mean a new product is being tested.

Data Holders should still have the ability to apply to the ACCC for individual exemptions for trial products above this percentage, however this would reduce the benefits of providing an upfront exemption by way of providing certainty and not disincentivising innovation.

6-month threshold

We also have issue with the reference to 6 months in the definition. The intent of Rule 1.10E is ambiguous. We read this as requiring either:

- The trial length (time the product is offered to market) is up to 6 months only, i.e., trial applications open for 6 months; and/or
- That the products themselves must have a 6-month contract term.

The intent appears to align with the first dot point on trial length. If this is the case, **at a minimum the definition should be 18 months**, again with the ability to apply to the ACCC for an individual exemption for longer trials. The trial length threshold should again reset where there are material changes to the trial product.

We also note that the ACCC appears to have issued exemptions for trials much longer than 6 months. On 18 June 2020, the ACCC granted an exemption to Indue Ltd for its Cashless Debit Card product, delaying all its CDR obligations for potentially three years (earlier of 1 July 2023 or 12 months from the date the product is no longer a trial).[3] The ACCC example also highlights that **Data Holders should be given a "grace" period (12 months) to implement CDR compliance after the trial ends.**

The variety of trial lengths demonstrates that it is inherently difficult to determine what is the right trial length across a myriad number of businesses, sectors, and product types. The appropriate length of a trial might vary on a case-by-case basis. As above, we recommend that Treasury qualitatively define a trial product as temporary, and if needed choose a trial length at the upper end (18 months).

If Treasury's intent is the second dot point (6 months relates to contract term) this is irrelevant to defining a trial product and could result in unintended consequences of excluding products that happen to have a longer contract term. If this is the case, a 6-month term is not suitable for the energy sector:

- Electricity plans are typically ongoing with a price and discount that is usually in place for 12 months and can change thereafter. Retailers typically set a price for 12 months because it helps to smooths out seasonality (higher prices in summer/winter) across the year.

- For electricity plans that are not ongoing and have a fixed term, the term is often longer than 12 months (i.e., two years) to distinguish from typical products and the customer is rewarded for that longer tenure e.g., with a fixed price.

- The electricity industry is also currently evolving. Increasingly, Electricity Retailers will seek to supplement electricity from the grid with electricity generated or stored in assets at the customer's home e.g., solar and battery. As these assets are higher value, the contract term for some of these products might be far longer than 12 months. For example, EnergyAustralia's solar home bundle product has a contract term of 7 years and includes the

[3] Exemption for Indue Ltd | ACCC

provision of solar PV and battery assets alongside the supply of electricity from the grid and those assets.

If the intent is to set the contract term, then we would submit a minimum of 12 months is appropriate for the energy sector.

Our final point is that the purpose behind proposed 1.10E(1)(b)(iv) is uncertain:

> (iv) with a statement that the product may be terminated before the end of the trial period and that, if it is, the CDR data in relation to the product may not be available.

This seems to imply that if the product has a contract term over 6 months, then CDR data holder sharing will be required after 6 months. We submit it should be removed, as contract term seems irrelevant as to whether a product is a trial product.

2.2 Business consumer disclosure consent

The new business consumer disclosure consent (BCDC) will allow business consumers to consent to their ADR to share their data with other third parties.

We understand that business customers have requested this, but it is unclear what specific use cases this will enable. Treasury should obtain some worked examples of specific use cases to gain a greater understanding of the benefits and risks given this is a major expansion of CDR data which will leave the CDR ecosystem.

Currently, data can leave the CDR ecosystem where it is disclosed to Trusted Advisors, or where it is a 'CDR insight' which can be disclosed to anyone. The disclosure to Trusted Advisors was acceptable to some extent as they are regulated professions, and although CDR insights could be disclosed to anyone, the definition of CDR insights was at least limited to specified categories of data. The new business consumer disclosure consent has neither of these boundaries (other than it only applies to businesses), meaning all CDR data can be disclosed to anyone. Once disclosed that CDR data will not have the CDR ecosystem's protections, including key data security protections and crucially, customer redress through guaranteed complaint processes and access to ombudsman schemes. This means if a customer had problems with how a third party used their data they would have no recourse against that third party, including potentially no contract given the ADR disclosed it to the third party.

We are also concerned that the BCDC could allow for businesses to obtain a full set of CDR data without accreditation, circumventing one of the main safeguards of the CDR framework. It is therefore critical that the disclosure to the third party must be for the purpose of enabling the *Accredited Person* to provide goods or services to the customer (and not the third party's purposes)[4] (as currently drafted). This will provide some mitigation by providing a link back to the Accredited Person's goods or services provided to the customer.

Further, Data Holders will have no visibility over where their disclosed CDR data has been on-supplied to, beyond the ADR. While this is an issue with Trusted Advisors and CDR insights, they were contained categories which could be clearly described to customers. It will be more difficult to resolve/redirect complaints about Business consumer disclosures.

Ideally, Data Holders and at a minimum the ACCC should have transparency of which third parties their data is being on supplied to. The Draft Amending Rules require that Accredited Persons report to the ACCC on the number of BCDC *consents.* We suggest that there also be reporting on how many disclosures are made and the number of third parties' data was disclosed to (in line with reporting on Trusted Advisors).[5]

Given the above limitations around BCDCs, mainly the data is leaving the CDR ecosystem, it will be even more important that the customer's consent, which allows for it, is current. The extension of business consumer consents from 12 months to 7 years, will cover Trusted Advisor disclosure

[4] 1.10A (7)(b)
[5] Rule 9.4 (vii)

consents, insight disclosure consents, and this new BCDC. This does not seem necessary as the 7-year change appears to go to reducing the risk of an *ADR* being required to delete data due to a customer not renewing their *use* consent.

The other reason for the 7-year change is to remove the burden of unnecessary consent renewal, however in our view frequent consent renewal is critical to protect against the real risk, that the customer will forget it is in place; especially as there will be no authorisation renewal to provide that reminder to consumers (Data Holders are not involved with these disclosures).

We agree with the new Rule 7.9(3A) which will require ADRs to notify the consumer about the new business consumer statement disclosures on their CDR dashboard. This is a salient addition to provide transparency to consumers over these disclosures.

2.3 Extended maximum consent duration for business customers

The Draft Amending Rules also extend the maximum consent that may be obtained from 12 months to 7 years for certain consents given by CDR business consumers. As described above, it is not appropriate that this extends to disclosure consents which relate to disclosures of data to unaccredited businesses outside the CDR ecosystem.

We also question whether the 7 years change for consent to use CDR data is appropriate more broadly. Treasury should be cognisant that most ADRs will default to this 7-year setting in their consent requests to the consumer. A period of 7 years does not seem to reasonably reflect the typical length of goods and service contracts even in the digital context.

2.4 Enhancements to CDR representative arrangements and CDR outsourcing arrangements

EnergyAustralia agrees with many of the amendments relating to direct and indirect Outsourced Service Providers (OSPs) and CDR Representatives to the extent that they streamline data exchanges between OSPs working for the same ADR. We also welcome the improvements to the liability provisions to ensure that the "parent" ADR e.g., CDR principal is liable for their CDR representative and any OSPs connected to providing the service.

That said, the CDR representative and CDR outsourcing arrangements are extremely complex, in a context where they were already complex. There is a real risk that businesses opting to become a CDR representative or OSP will find it very difficult to fully comprehend their extensive CDR obligations. We recommend that Treasury work with the ACCC to develop clear guidance materials on all version 3 business CDR models and the new changes in the Draft Amending Rules.

We support the further protections suggested at paragraph 69 of the Exposure Draft Explanatory Materials, namely OSPs should be required to comply with the relevant privacy safeguards and CDR representative CDR policies should disclose if an OSP is based overseas.

2.5 Delaying reciprocal data sharing obligations for newly accredited persons

EnergyAustralia strongly opposes changes to delay reciprocal Data Holder obligations for newly accredited persons that hold CDR data for the following reasons:

- A central principle for Open banking was reciprocity which appropriately reflects fairness and competitive neutrality concepts, i.e., if an ADR is obtaining data from potential competitors, it should, like its competitors, be providing that equivalent data to the CDR ecosystem.

- If a Data Holder is triggering the reciprocity mechanism in the CDR Rules, then it has either commenced its mandatory CDR obligations earlier or it is exempt but is choosing to opt in as ADR. We do not think the former is likely and focus on the latter.

- We view becoming a Data Holder as the appropriate exchange for receiving the benefit of CDR data as an ADR.

- Further, if a business is in the position to become an ADR, then they have the capital backing and technological maturity to become a Data Holder at the same time, especially when the business can effectively set its implementation date. I.e., It will not be subject to the tight time pressures of a mandatory deadline, and therefore already has an advantage over its competitors that face mandatory obligations.

2.6 Various changes to Data Holder obligations

There are around five amendments to the Rules that will affect Data Holders and require us to implement the changes.

Implementation timeframe

Tier 1 Energy Retailers are implementing their CDR obligations for mass market customers for a 15 November 2022 go live. Should the Draft Amending Rules be made before that date, it will not be possible for EnergyAustralia to scope in those changes for the 15 November go live. The second phase for large customer and complex requests will go live for Tier 1 Retailers on 15 May 2023. Where we have views on the substance of the amendments to the Data Holder obligations, we discuss them in turn below.

Data Holders must now include details about amendments to authorisations on a consumer's dashboard

We seek more detail on the specific details that will need to be presented on the consumer's dashboard. Will this require us to include the details of what aspects of the consent have been amended? If the amendment to the authorisation is a mirroring response to an amendment to the customer's consent, then an additional notification on the Data Holder's dashboard is unnecessary and could confuse the customer.

Data Holders may now include the ability for consumers to request disclosure of corrected CDR data on consumer dashboards

The intent of this change is ambiguous. There are two possible interpretations:

- The consumer can *request* the corrected data be disclosed to ADRs via their dashboard.
- The consumer can request that the *corrected data* itself be disclosed on the dashboard.

We consider the first dot point is the more likely interpretation. We accept this amendment provided it remains a "may" obligation. It should not be changed to a "must" obligation as this would effectively change the current rules which contemplate that the Privacy Safeguard 11 process around corrected data can be implemented outside the dashboard and notifications can be delivered by electronic means like email. For Data Holders adopting non-dashboard / email channels, a must obligation would require this process to be incorporated in the dashboard, which would be inconsistent with the original policy intent, and it would also be a material IT change.

New requirement for Data Holders to keep CDR complaints

Data Holders will need to revise their complaint handling processes to ensure CDR complaints can be recorded, kept, and retrieved should customers seek a copy.

Ability for consumers to request Privacy safeguard 13 requests via their dashboard

Treasury seeks feedback as to whether it would be helpful if Data Holders could also allow consumers to make requests for the purposes of privacy safeguard 13 on their consumer dashboards. Privacy Safeguard 13 requires Data Holders who receive a request from the consumer to correct their CDR data, to acknowledge and either correct or qualify the data if appropriate, and then provide a notification to the customer on what was done.

We accept Treasury's suggestion if the change is a "may" requirement only. Importantly, the customer's ability to request a correction of CDR data via the dashboard should **not** be mandatory. Making it mandatory would be inconsistent with the original intent, that the current process around Privacy Safeguard 13 can be provided outside of the dashboard, e.g., the acknowledgement of the customer's request can be provided over the phone and the notification of how the issue was resolved can be via email.

Further, the correction/complaint processes for the CDR can sit in a Retailer's general complaints system and process. To require Retailers to incorporate the data correction and complaints process into their CDR solution will result in duplication and will be a significant IT build.