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### **Open Banking and the Implementation of the Consumer Data Right: Implications for Energy Sector**

The Australian Energy Council (the Energy Council) welcomes the opportunity to comment on the potential application of the framework for implementing the Consumer Data Right set out in the Open Banking report (December 2017).

The Energy Council is the industry body representing 21 electricity and downstream natural gas businesses operating in the competitive wholesale and retail energy markets. These businesses collectively generate the overwhelming majority of electricity in Australia and sell gas and electricity to over 10 million homes and businesses.

The Energy Council supports the development of a Consumer Data Right in the energy sector. A comprehensive data right, supported by an appropriate regulatory framework, has the potential to support competition in retail energy markets and ultimately improve outcomes for customers. Access to energy consumption data, energy export data and fee and pricing information can enable consumers to compare offers in retail energy markets based on actual consumption profiles. Improved data access has the potential to aid the development of new products, services and business models, and accelerate the transition towards customer-centric energy markets with a broad range of energy services catering to diverse customer needs.

The proposed regulatory framework to implement the Consumer Data Right set out in the Open Banking report appears, broadly speaking, to be capable of delivering on these outcomes in the energy sector, subject to our comments below. We would welcome the Treasury's continued engagement with the energy sector as it develops the regulatory framework, and caution against reform initiatives in the energy sector which may diverge from that approach.

### **Background to data access issues in the energy sector**

The need for improved access to a customer's energy data – by the customer, and by third parties – has been considered by state and federal governments, rule-makers, regulators, consumer advocates and companies in the energy sector across a range of projects and a number of years. In 2017, the *Independent Review into the Future of the National Energy Market* recommended that the COAG Energy Council facilitate measures to remove complexities and improve consumer access to, and rights to share, their energy data (June 2017, recommendation 6.5). The ACCC's 2017 *Retail Electricity Pricing Inquiry Preliminary Report* highlighted the difficulties currently facing customers in accessing and sharing their energy usage data (p 140).

The AEMC has considered data access issues across two rules changes:

- *Customer access to information about their energy consumption* rule change (6 November 2014), which established a specific (and limited) right for consumers to request up to two years' historical data from their retailer or distributor; and
- *Expanding competition in metering and related services* rule change (26 November 2015), which clarifies that small customers with a smart meter may consent to third parties accessing their metering data.

In practice, many customers with smart meters now have ongoing access to their energy data provided by either their retailer, distributor or both. It is increasingly common for retailers to offer smart-phone and tablet-

based apps allowing interested customers to track their energy consumption and bills (for example, on a day-behind basis). Many retailers also provide regular email updates to their customers showing energy consumption levels and pricing on a daily, weekly or monthly basis. These services enable customers to better track their energy use, understand its bill impact and avoid 'bill shock' at the end of the billing period. Additionally, retailers and energy service providers are already providing value-added data services to customers such as additional consumption information, smart appliance monitoring, and advanced data analytics.

The provision of energy data (including consumption and export data) occurs within a heavily regulated context. Retailers are required to manage compliance risk with confidentiality obligations under the National Electricity Rules (NER) as well as privacy law. While customers currently have rights to access historical energy data under the NER, and to authorise third party access to that data, regulatory and technical challenges in sharing consumption data with third parties remain.

One of the obstacles to third party access is the difficulty of verifying the customer's identity and their consent to the disclosure. As Energy Consumers Australia (ECA) has pointed out, arrangements for third party access are made more problematic by different market participants adopting different verification and consent requirements. The ECA's *Electricity Meter Data Portability Project* proposed a market-led solution to this issue, seeking for distributors to agree to a process for providing third party access to metering data. The Victorian Government's Department of Environment, Land, Water and Planning data hub project sought, as part of its scope, a review of the NEM 12 data format file as a related key issue in creating data usable by third parties. The Commonwealth Department of the Environment and Energy has separately commissioned work to address these problems, which proposes establishing a central data hub to manage access to energy consumption data. We understand that other state governments are also considering reforms which would establish central data hubs to facilitate data access.

The many different reviews occurring across different jurisdictions create a risk that competing data access schemes will be developed in the energy sector. While these reviews are aimed at delivering principles similar to the Customer Data Right, there is a risk that the alternative policy approaches proposed would not, if implemented, provide a sufficient data right or regulatory framework to meet the Productivity Commission's recommendations for a Consumer Data Right. The multiplicity of reviews create a risk of divergence in data creation and provision, leading to increased implementation and compliance costs and risking poor customer outcomes with inadequate customer protections.

### **The need for an economy-wide and Commonwealth-led approach**

In the absence of the broader regulatory reforms envisaged in Open Banking, energy-specific reforms are not capable of addressing the key challenge at the heart of access to data issues: the privacy law implications of facilitating third party data access. This is a product of the legal and governance framework of the energy sector and the constitutional arrangements which underpin it. The energy rules, the rule maker and the regulator are empowered under uniform state laws resulting from agreement at the COAG Energy Council. In contrast, Privacy Act is a Commonwealth enactment, and it follows that OAIC is empowered under Commonwealth legislation. From a constitutional perspective, a state-based regulatory regime is not capable of addressing compliance risks that arise under Commonwealth legislation and which are enforced by a Commonwealth regulator. Addressing privacy law issues requires a federal solution.

The Open Banking framework provides an approach which has the potential to address both the practical issues around customer verification, consent and data standards, as well as the legal risks that currently arise around compliance with privacy law. The Energy Council sees potential benefits to adopting the same framework and approach in the energy sector as will apply to the banking sector and other sectors, subject to sector-specific requirements (some of which we raise below). In particular, we support:

- a decentralised approach to data access, enabling customers and third parties to access data from a data holder;
- promoting consistency between sectors and interoperability of energy data with data from other sectors;
- the application of the Consumer Data Right to customer data and transaction data; and

- the role of the ACCC and OAIC in establishing and regulating the data access framework.

Separate reform initiatives from state and federal governments aiming to facilitate access to energy data (including through creating any centralised data hub) risk:

- delaying consideration and application of the Consumer Data Right framework to the energy sector;
- if implemented, imposing costs on Government and industry, without a commensurate benefit to customers; and
- being surpassed and made redundant by the open data access regime, once the Consumer Data Right is extended to the energy sector under the framework proposed in the Open Banking report.

It is imperative that any sector-specific reforms which are progressed prior to the application of the Consumer Data Right to energy are consistent with the aims and ultimate framework to apply.

### **General comments on Open Banking regulatory framework**

We hold concerns about whether it is appropriate for parties who are accredited to access data from one sector to be automatically accredited for other sectors. This approach could have significant consumer implications and should be carefully considered.

Similarly, we expect disclosure of energy consumption data to raise different consumer protections issues than banking data (or data from other sectors). Energy consumption data provides insight into when people are in houses, and what activities they are doing. This has clear implications the safety of persons and property, including in family violence contexts. The application of the Open Banking framework to the energy sector should carefully consider how these risks can be managed, to minimize risk to customers (and indirectly, to retailers who face reputational and compliance risks if the consumer protections framework around data access is inadequate).

The graduation of risk-based accreditation, and related graduation of risk-assessed data sets, should be carefully considered, with particular consideration given to different issues that arise with data from different sectors. It may be that the implementation of the framework for the banking sector cannot adequately address some of the issues that may arise in these (and other) areas when the framework is rolled out to other sectors. To address these issues, the legislation underpinning the Consumer Data Right should establish a framework for the data regime while details of data-risk assessments, accreditation and access arrangements could be left to more flexible instruments such as the regulations and rules.

### **Sector-specific issues for the energy sector**

Some of the features of the energy sector that should be considered in any proposed application of the Open Banking framework to the energy sector are set out below. This is by no means an exhaustive list and we would welcome the opportunity to engage further regarding the particular challenges of data sharing and ensuring consumer protections in the energy sector. We also recommend that the application of the Open Banking framework to the energy sector should be subject to a cost benefit assessment via a Commonwealth Regulatory Impact Statement. This is to identify any unintended consequences. At a time when energy prices are in the spotlight, we must be careful to ensure that costs are demonstrably outweighed by the consumer benefit.

<p><b>What data would the Consumer Data Right apply to?</b></p>	<p>Extrapolating from the principles set out in the Open Banking report, the Consumer Data Right would apply to ‘customer data’ and ‘transaction data’. In the energy sector, this could possibly include:</p> <ul style="list-style-type: none"> <li>a) energy consumption data at the customer’s connection point;</li> <li>b) energy export data at the customer’s connection point; and</li> </ul>
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	<p>c) fees and charges under the customer’s contract.</p> <p>In relation to (a) and (b), the relevant data is considered metering data (which is data collected from the meter and processed by the metering data provider, for transfer to participants).</p> <p>Other data types – such as battery storage data or data from individual monitors – should not need to be provided. From a regulatory standpoint, if a customer has a device that records energy consumption which is <i>not</i> a meter, that device (and often the party who installed it) is not part of the energy regulatory framework. It would mark a significant shift if the Consumer Data Right was extended to apply to these parties and sources of data (analogous in the banking context to applying the Consumer Data Right to information on a personal finance app that is not run by an Authorised Deposit-taking Institution). Our preliminary view is such an extension of the data right would not be appropriate.</p>
<p><b>Who is the consumer?</b></p>	<p>It is not always clear who the customer is for a given residence. This issue arises as:</p> <ul style="list-style-type: none"> <li>a) sometimes a retailer will not know the identity of anyone at a residence – there are obligations to supply which mean that a retailer will continue to supply energy even without knowing who the customer is;</li> <li>b) there may be several people living at a house, but only one of whom is on the bill and known to the retailer; or</li> <li>c) the person who is on the bill may no longer live at the residence, unbeknown to the retailer.</li> </ul> <p>These issues differentiate energy from banking and must be considered in the context of who could authorise data access, and who has a right to prevent access. We note the question of ‘who is the customer’ has also been considered in other regulatory contexts in the energy sector, which could provide a useful starting point to considering the issues in a data access context.</p>
<p><b>Who is the relevant data holder?</b></p>	<p>The National Energy Market relies on different parties using different data for different reasons, consistent with their respective regulatory roles. This includes retailers, metering data providers, distributors and AEMO. The precise data held by each party depends on their requirements.</p> <p>The retailer at a connection point holds a customer’s energy consumption data, energy export data and also information about the fees and prices applicable to the customer at a given point in time. It would appear appropriate therefore that retailer would be considered ‘data holders’ under the framework in the energy context.</p> <p>While there may be a role for other parties (eg AEMO) to also be considered ‘data holders’ under the framework, it is important to consider whether such parties would ordinarily hold the relevant data for their operational purposes. Our preliminary view is that the framework should not require any party to provide new datasets to another party in order to facilitate data access under the framework. Rather, a decentralised approach should be adopted to facilitate customers accessing data where it is held.</p>

<p><b>How is energy data transferred?</b></p>	<p>There are existing energy data transfer arrangements that could be taken into account in applying the Consumer Data Right to the energy sector.</p> <p>In particular, whether the B2B hub and SMP data transfer processes could be utilised to provide access to data from different sources should be considered. These are processes that have been developed by industry to facilitate the complex data flows necessary in the National Energy Market. We would be happy to further discuss their potential application of existing data arrangements with Treasury.</p>
<p><b>How would the framework interact with the energy sector regulatory regime?</b></p>	<p>Sector-specific regulations relating to consumer energy consumption data are primarily set out in the NER, although the National Energy Retail Rules (NERR) and jurisdictional equivalents may also be relevant.</p> <p>A customer’s metering data is confidential information under the NER. Retailers, distributors, metering coordinators, metering data providers and other market participants have confidentiality obligations as set out in NER 8.6. Importantly, the NER includes carve-out to the confidentiality provisions including where:</p> <ul style="list-style-type: none"> <li>a) the disclosure is required by law; or</li> <li>b) where a customer has consented to the disclosure.</li> </ul> <p>If appropriately framed, the Consumer Data Right could satisfy each of these requirements to minimise compliance risk under the NER. It may also be appropriate for the AER to issue guidance on its intended approach to NER compliance in the context of the Consumer Data Right, to provide industry with confidence that the regimes interact appropriately.</p> <p>We note also that the Open Banking report includes a concept of explicit informed consent as the acceptable level of consent required for grant third party access. ‘Explicit informed consent’ is a regulated concept in the National Energy Retail Law and the NERR and has a very particular meaning associated with particular processes. It is not clear to us that the Open Banking report has this energy-specific consent threshold in mind – and we would consider it problematic for the same terminology to be adopted to develop a new consent requirement. We would welcome further discussion about appropriate consent threshold and terminology to be used in the data context.</p>
<p><b>What would be the role of energy market bodies?</b></p>	<p>The framework should consider the appropriate role for AEMO and energy regulators, including the AER and other jurisdictional regulators. Consistent with a nationally-consistent and economy wide approach to data regulation, we support the ACCC playing the primary role in regulating the data access framework, including through:</p> <ul style="list-style-type: none"> <li>• writing rules and standards; and</li> <li>• accrediting companies to access data.</li> </ul> <p>OIAC would also clearly play an integral role.</p> <p>Our preliminary view is that:</p> <ul style="list-style-type: none"> <li>• AEMO, as market operator, has technical expertise which could be usefully utilised in establishing data standards and potentially also</li> </ul>

	<p>in accreditation (in respect of any technical requirements for accreditation);</p> <ul style="list-style-type: none"> <li>• The AER would play a role in ensuring compliance with existing confidentiality obligations and customer protections under the NER and NERR; and</li> <li>• other jurisdictional regulators (eg ESC) may also play a compliance role in respect of energy-specific regulations, where the AER has not been adopted as the regulator in a jurisdiction.</li> </ul> <p>The AEMC may play a role if any rules changes are required under the NERR or NER to complement the regulatory framework.</p> <p>AEMO may also play a role in establishing and chairing industry working groups that can consult on these matters. AEMO has a track-record of industry engagement in technical issues and considerable expertise that may be drawn on.</p>
<b>Implementation issues</b>	<p>Given the complexity of energy data systems within retailers and other market participants, any new data obligations and related systems architecture pose particular challenges for market participants. Retailers have recent experience in this regard when implementing the competition in metering rule change, which required a major systems overhaul. We note at the outset that from retailer’s perspectives, implementation commences when the final requirements including data standards and access requirements are established. Sufficient time should be allowed from that date to build and test any data systems.</p> <p>Customer outcomes can be better achieved where adequate time is afforded for retailers to adopt and test the appropriate systems. We would urge close consultation with retailers when developing implementation timelines for the application of the data right to the energy sector.</p>

**Conclusion**

The matters raised in this paper focus on the issues that rise in the national electricity market. They do not consider in detail any issues that arise in other energy markets, including:

- gas markets;
- Western Australian electricity market;
- Northern Territory electricity markets; and
- other large grids and microgrids which are not connected to the national electricity market.

Particular issues in these contexts would also need to be considered during the application of the Consumer Data Right to the energy sector.

We would welcome further engagement with Treasury as the Open Banking framework is further refined. Any questions about our submission should be addressed to Tess Fitzgerald at [Tess.Fitzgerald@energycouncil.com.au](mailto:Tess.Fitzgerald@energycouncil.com.au) or by telephone on (03) 9205 3115.

Yours sincerely,

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