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Privacy Impact Assessment – Consumer Data Right

AGL Energy (AGL) welcomes the opportunity to comment on Treasury's Privacy Impact Assessment (PIA) for the Consumer Data Right (CDR).

AGL continues to support the principles of the CDR in allowing consumers access to their own information, to increase competition and foster innovation. We support the development of the CDR regime however, to ensure we implement a regime that provides consumers with confidence to participate and therefore obtain the full benefits we urge Treasury and other policy makers to take the appropriate time to carefully consider and consult with all stakeholders. We are concerned at the fast pace these changes are currently occurring, the short cuts taken in the engagement and analysis stages and therefore the impact this will have on the final product and possible negative impacts to consumers.

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). This impacts the ability of stakeholders to fully consider the broad range of potential outcomes and impacts each new proposal brings with it, and therefore impacts the quality of assessment that can be completed in reliance of these processes.

While reliance on previous consultation processes may help expediate the PIA process, the focus of submissions, such as those made on the exposure draft, were on the construct of the framework, expansions of powers and technical drafting matters, rather than specifically on matters concerning privacy.

Our previous submissions have raised privacy issues, either in relation to the construct of the Safeguards generally, or the rushed nature of the Safeguards' development. We have not provided a robust analysis of privacy issues to date due to timing constraints in the consultation processes as well as the prioritisation of other matters such as the scope of captured data, timing of designation and the general introduction of Safeguards in the first place.

AGL welcomes Treasury's version 1 of the PIA and acknowledge the work that has gone in to producing this document. Below we provide our feedback on the timing and content of the PIA.



Privacy Impact Assessments

As stated above, we recognise that reliance on previous consultation processes can help expediate the consultation process and that timeframes are being condensed for the CDR to ensure delivery by the committed 1 July 2019. However, in seeking to achieve a set timeframe important regulatory steps are not receiving the full attention and consideration they should for such a massive change to the Competition and Consumer Act (CCA) and Privacy regimes.

We therefore have concerns about the timing of this assessment. It is particularly unusual for an exposure draft consultation to occur at the same time as Rules / Requirements through a regulator, and technical implementation standards for industry and before a PIA. For PIAs, it is recommended by the Office of the Australian Information Commissioner (OAIC) that they be 'completed as part of a project's planning process, not as an afterthought, while it is still possible to influence the project design or reconsider proceeding with the project'.¹

We note also that the purpose of the PIA is not to seek affirmation of a proposed change, but to objectively consider the risks to individuals' privacy should the proposed changes occur. As a result of this, there is a level of importance in seeking external assistance in completing PIA where the same regulatory or government body is responsible for the delivery of the final program of change.

Our position is that a PIA completed at this stage of the process is unlikely to have any material impact on the proposed project design or whether the project should proceed, particularly with the exposure draft being finalised by Treasury and expected to be tabled in February.

Completing an assessment

We also have concerns about the detail of the PIA and whether it is robust or as transparent as it should be. For example, we note that the PIA uses subjective language in its' assessment and is not completed with reference to the privacy regime as it currently exists. There are also incomplete elements to the risks matrices within the PIA which make it difficult for an external stakeholder to understand how risks have been determined and how residual risk ratings have been finalised.

Reference to existing framework

A PIA should be completed with reference to the privacy regime as it exists, but instead has been completed with reference to the possible framework that will exist (currently subject to finalisation) through technical standards, Rules and the Safeguards. The Safeguards and their application to different parties continued to change throughout Treasury consultation, and in AGL's opinion continue to present risks. AGL notes for example that the scenario-based assessment does not reference the Australian Privacy Principles as we would expect to see in a PIA. There is also the use of broad language such as "privacy risk"² without outlining what the risks are in terms of the APP's or breaches of other data related obligations.

Language

¹ *Guide to undertaking privacy impact assessments*, OAIC March 2014.

² See for example pages 56 or 62 of the PIA.



AGL considers that the PIA should use objective language in its' assessment of the risks to individual privacy and to provide detail on assessments of the risk matrices. In AGL's opinion, this version of the PIA uses subjective language in the description of benefits and risks associated with the CDR regime that mirrors the language in the exposure draft and the Australian Competition and Consumer Commission (ACCC) CDR Rules.³

AGL recognises the importance of the CDR regime and is supportive of the work Treasury is doing to implement these changes. However, there is an importance in ensuring robust assessment and transparency in those decisions.

Risk assessment consistency and detail

The risk assessments contained in the PIA could include more detail.⁴ For example, the assessment matrices rate the risks with respect to their likelihood and severity, but do not detail how the risk rating has been reached. This detail forms an important part of the PIA, to give transparency on, and understanding of, the considerations given to each of the concerns. We note that the PIA detail instead focuses on the proposed/possible mitigants, and then makes an assessment of residual risk. Again, it is not clear how the resulting residual risk rating has been determined through those mitigants, particularly when some of the mitigants relied upon have yet to be finalised.

Of lesser importance the matrices also use inconsistent references for the risk assessment tables and the mitigants tables. This makes it difficult to properly review the information that is provided.

Other matters

We would also like to take this opportunity to raise a related concern on the CDR Exposure draft released by Treasury at the end of December 2018. We note that the final version exempts the ACCC from consultation with industry for the purposes of designation recommendations. Treasury stated that this exemption is due to consultation already occurring in both industries.

AGL recognise that the report completed by HoustonKemp (HK)⁵ offers an insight into data management in the energy sector, but we do not consider this process was robust enough for the introduction of an entirely new framework and its' designation on energy. Especially as the report was completed before the draft legislation for the CDR regime was developed, and the fact the report was initiated for a purpose other than the CDR regime.

The energy industry currently lacks transparency and has not been consulted on the Government and ACCC's intention for energy designation of the Australian Energy Market Operator (AEMO) as a designated gateway and how that role will be fulfilled. Having a central source of data for the energy sector has a higher privacy breach risk and will generate higher management costs through multiple data holders having to input and update data. Should AEMO be designated as a central data holder for all designated data sets, this would pose a substantial privacy risk due to being a richer source of data for hackers/phishing. There

³ See for example page 19 or 20 on the intention of the CDR in the PIA.

⁴ See pages 54 – 63 of the PIA.

⁵ HoustonKemp report, Open Consumer Energy Data – Applying a Consumer Data Right to the energy sector, June 2018



are also questions of AEMO scope and responsibility for data sets, which we would be happy to provide further comment on separately.

Finally, in relation to transparency we would like to raise concerns on the reliance by Treasury on the financial figures included in the HK report as a basis for assessment in the Exposure Draft. We do not believe that industry was properly consulted on this financial assessment, either by HK or Treasury, and note that the HK analysis is introduced with a disclaimer that the financials are a 'high-level assumption to estimate ball park figures'.⁶ Further is the fact that the HK assumptions were based only on subsection of data that AEMO already has responsibility for, and does not attempt to assess or consider potential costs of expanding to other data sets.

Should you have any questions or comments, please contact Kathryn Burela on 0498 001 328 or kburela@agl.com.au.

Yours sincerely

[Signed]

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⁶ See page 29 of HK report