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Australian Competition and Consumer Commission – Consumer Data Right Draft Rules (banking)

AGL Energy Limited (**AGL**) welcomes the opportunity to provide comment on the Australian Competition and Consumer Commission's (**ACCC's**) draft rules (banking) (draft Rules) in relation to the *Treasury Laws Amendment (Consumer Data Right) Bill 2019* (**CDR Bill**).

AGL continues to support the development of a Consumer Data Right (**CDR**) and believes that individual consumers should have access to, and control over data that directly relates to them.

However, as we have previously raised in submissions to the ACCC, Treasury, Data61 and the Senate Economics Legislation Committee, without proper care in drafting and decision-making, the introduction of a CDR may lead to unintended consequences. These unintended consequences include increased privacy and data security risks for consumers and higher costs for market participants, which may translate to higher barriers to entry in different markets, including the retail energy market. Appropriate time needs to be taken to ensure that drafting and consultation has occurred to properly analyse and mitigate against unintended consequences.

This submission highlights several areas where the ACCC should complete further analysis and engagement with all relevant stakeholders before progressing with the draft Rules. This will help ensure that unintended consequences have been properly identified and mitigated against so the CDR Framework can meet its stated objectives in an efficient and effective manner. In particular, this submission addresses matters we have identified in the Rules which are still in their infancy of development and further consideration and analysis is required to ensure we get it right:

1. ambiguity in the purpose of the consultation process; for example, it has not been made clear if the ACCC's draft Rules consultation is for both the general, industry-agnostic rules that will apply to all sectors, and the industry specific rules (contained within schedules);
2. uncertainty for stakeholders on the decision-making process by the ACCC, particularly where it differs from previous consultations (including the ACCC's CDR Framework);
3. departures from established privacy law requirements without any explanation or appropriate assessment of the need of such departures (such as a Privacy Impact Assessment or cost-benefit analysis); and
4. consumer rights and protection matters that remain under-considered and addressed in this version of the draft Rules.

Given the ambiguity on the purpose, it is important the ACCC separate the consultation process for the general Rules and the banking specific Rules. This will make it clear to all stakeholders what the ACCC intention is regarding general Rules to support interoperability of the system. This will also assist industry participants to consider how fit-for-purpose the general Rules will be for their designated sectors. This will in turn, provide the ACCC with valuable insights on establishing economy wide general

Rules that do not lead to unintended consequences. The current consultation process makes it difficult for participants in nonbanking sectors to determine if the proposed Rules are banking specific or general in nature.

AGL also recommends that the consultation document should be accompanied with a Privacy Impact Assessment (PIA) or explanatory statement to give transparency to stakeholders as to why the ACCC has made certain decisions, including departures from the existing privacy regime.

Other issues ACCC needs to consider

There are other matters that AGL considers may impact or influence the development of the ACCC Rules and roll out to different industries including energy. These include that:

1. the CDR Bill lapsed at dissolution and will need to be reintroduced to Parliament following the election on 18 May 2019;
2. the Labor Senators noted broad support of the policy intent of CDR but hold concerns about the current proposed framework. Depending on the outcome of the Federal election, and the fact the Bill has lapsed, there may be further amendments to the Bill before it is re-introduced which may influence the scope/content of the CDR Rules.
3. the purpose of a Privacy Impact Assessment (PIA) and the use of an independent and external body can help develop a robust assessment for stakeholders to understand the privacy protections and risks of the new regime; and
4. there are matters that relate to the energy sector that still need to be considered should the ACCC continue with the general draft Rules, such as whether the data is captured at a household level or an account holder level and how consumers can access this data.

We look forward to working with the ACCC further on the development of an efficient, fair and effective CDR regime for all sectors, including energy.

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

Yours sincerely,

[Signed]

Elizabeth Molyneux

General Manager Energy Market Regulation

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Our response

General comments

AGL has been at the forefront of the energy industry in our support for the development of a Consumer Data Right (**CDR**) and believe that consumers should have access to and control over data that directly relates to them. Our goal in providing these submissions to decision-makers is to ensure that the regime is well considered and fit for purpose for both consumers and businesses across different sectors. Given the focus on banking, we seek to provide decision-makers with insights into the energy sector experience to help influence requirements that encourage both interoperability as well as market efficiency for all participants.

We continue to be concerned with the current approach that has been adopted to roll out the CDR. These include the proposed implementation timeframe, the limited engagement with the energy sector, the exclusion of consumers and consumer viewpoints from many of the consultation papers, the deferral of responsibility for matters we consider should be captured in the CDR Bill and, in some cases, the Rules, and the operational impact and potential for harm to consumers.

Table of recommendations

Recommendation 1 - The ACCC should consult separately on the banking and general rules to improve transparency and engagement across all known relevant industry stakeholders.
Recommendation 2 – The ACCC should provide clear information to the energy and telecommunications sectors on the consultation plan for progressing the consumer data right in these sectors.
Recommendation 3 – The ACCC should make Rules and references to data standards and in line with the data standards body's role under the draft CDR Bill (e.g. focus on technical data sharing/processes).
Recommendation 4 – The ACCC should make Rules to apply to the data standards body requiring best practice consultation.
Recommendation 5 – The ACCC should provide transparency on the its objective of appending information to consumer records under a refusal to correct and provide information on the need for departures from existing privacy requirements, acknowledging operational complexity and impacts.
Recommendation 6 – The ACCC should align CDR Policy requirements with privacy policy requirements ensure that they can remain flexible, noting the constant change of business and the difficulty in maintaining a list of OSP and accreditation in a static document.
Recommendation 7 – The ACCC should provide further information and consult with stakeholders on the purpose and intention of the *options for redress* under the CDR policy.
Recommendation 8 – The Rules should align the exceptions for a refusal to disclose (including timing and process) to the current *Privacy Act 1988* (Cth) requirements or provide a proper assessment of the need for, and cost/benefit of, differences.
Recommendation 9 – The ACCC should use an external, independent body to conduct the Privacy Impact Assessment for the CDR Rules. This should be provided with a revised set of draft Rules for robust stakeholder assessment and comment.
Recommendation 10 – The ACCC and the OAIC should make the Memorandum of Understanding between their organisations publicly available on their websites.
Recommendation 11 – The ACCC should start considering and consulting early on more complex scenarios of shared CDR data including household electricity usage or where a person is an authorised person on an account.

Recommendation 12 – The Rules should not allow for ADRs to request information be shared outside of the CDR ecosystem (for example, to non-ADRs such as a consumer's lawyers or accountants). This should only be done by the consumer, as the consumer can request their own data under this regime and will therefore have full control of how it is managed.
Recommendation 13 – The Rules should allow for revocation of consent by phone to align with consumer preferences and different consumer needs.
Recommendation 14 – The Rules should use AS10002:2014 instead of a banking specific dispute resolution (Regulatory Guide 165) under the Rules or move this specific requirement to Schedule 2 (banking schedule).
Recommendation 15 – The ACCC should consider the questions raised by AGL under Part 4 of this submissions to provide further guidance and support to CDR participants in compliance related matters.
Recommendation 16 – The ACCC should consider providing a performance reporting template (such as provided by the Australian Energy Regulator for retailer performance reporting).
Recommendation 17 – The ACCC should review definitions within the draft Rule to ensure consistency with the CDR Bill and data standards.
Recommendation 18 – The ACCC should ensure that definitions used in the Rules are clear and easy to access for compliance purposes.

Part 1 - Consultation and governance

Consultation

To date, the ACCC has released three papers regarding the ACCC CDR Rules:

- **The CDR Rules Framework**[1] – 12 September 2018 – the ACCC consulted on the draft framework which was intended to operate across all designated sectors to inform of the principles and objectives that the CDR Rules would follow.
  The CDR Framework was heavily focused on banking needs and experience and therefore failed to meet the need of other sectors to be designated, including energy. No final Framework was released by the ACCC.
- **The CDR Rules Outline**[2] – 21 December 2018 – the intention of this paper was in response to the banking sector need for CDR banking rules to facilitate implementation by 1 July 2019.
  The ACCC did not invite submissions or seek broader stakeholder feedback on this paper. This paper was released in late December 2018 as an alternative to the Banking Rules that the banking industry had requested to facilitate implementation by 1 July 2019.
  This was before the amendment to delivery requirements and dates in the banking sector. The Rules Outline was developed in close consultation with Data61 who have been focused on the development of data standards for the banking sector. This paper would only reasonably consider relevant for banking implementation, rather than as an informative tool for all sectors including energy.
- **The CDR Draft Rules (banking)**[3] – 29 March 2019 – the ACCC have stated that these draft Rules are for the CDR in the banking sector.[4] The ACCC website states "The CDR draft rules cover issues central to the implementation of CDR in banking".[5]

[1] ACCC Rules Framework consultation paper, September 2018
[2] ACCC Rules Outline paper, 25 January 2019
[3] ACCC CDR draft rules (banking), 29 March 2019
[4] ACCC Consultation Hub – CDR draft rules overview
[5] ACCC CDR draft rules (banking), 29 March 2019

As we noted in the cover letter, this focus by the ACCC suggests a single purpose of the draft Rules – to inform the roll out of CDR in banking. However, our reading of the draft Rules, as well as email correspondence received from the ACCC in April 2019, show that the ACCC intend this document to serve two purposes:

1. General rules – intended to be industry agnostic and applied to each designated sector; and
2. Schedules (banking rules - schedule 2) – intended to represent the elements that the ACCC will consult on sector by sector, starting with the banking sector.

It is not apparent to stakeholders that this dual purpose is intended and whether or not the CDR Rules in their entirety will be consulted on sector by sector. As we do not know what data sharing model will be used by the ACCC for energy, it is difficult to fully understand the appropriateness of the general draft rules for energy as they have been designed. For example, the ACCC is currently considering using a gateway model for the energy sector but the Rules do not address how a gateway would affect the obligations of CDR participants (such as whether the gateway would be responsible for the dashboard and monitoring changes to consumer consent).

Given the energy sector is undergoing significant and intense regulatory change, including the introduction of a Victorian Default Offer (**VDO**) and Default Market Offer (**DMO**) by 1 July 2019, resources for engagement are stretched. We would urge the ACCC to be transparent for the intent of the consultation paper, so that effected stakeholders can engage and have an opportunity to provide feedback. If our understanding is correct, and that the general rules are intended to apply across all sectors then we strongly encourage the ACCC consult on the general Rules independently to the banking specific rules listed in Schedule 2 to ensure that all known relevant and potentially impacted stakeholders (such as energy and telecommunications).

Requirements for consultation

We recognise that the structure of the current CDR Bill would allow the ACCC to create Rules without meeting the consultation requirements outlined in the CDR Bill including:

- the ACCC may make Rules (consumer data rules) for designated sectors in accordance with Division 2 – which lists the matters that the consumer data rules may detail (56BA);
- before making consumer data rules the ACCC must consult the public for at least 28 days inviting public comment and wait at least 60 days before making the Rules (56BQ); and
- before making the consumer data rules the ACCC must consider the kinds of matters referred to in paragraphs 56AD(1)(a) which include – interest of consumers, efficiency of relevant markets, promoting competition and the likely regulatory impact of the Rules (56BP).

Section 56BQ(2) of the CDR Bill and Explanatory Memorandum also notes that "a failure to consult will not invalidate the consumer data rules".[6] This drafting flaw was addressed by the Standing Committee for the Scrutiny of Bills (Scrutiny Committee) in March 2019. The Scrutiny Committee's view is that the instrument being disallowable is not a sufficient justification that a failure to comply with consultation requirements should not lead to invalidity.[7] The ACCC could therefore leave consultation as is, and still have valid Rules.

However, despite the legislative loophole to consultation, there is opportunity for the ACCC to ensure that appropriate, transparent and best practice consultation occurs, particularly as there is likely to be additional time for consideration with the CDR Bill lapsing. Thorough and transparent consultation will lead to better CDR Rules that will foster consumer trust and engagement with the CDR framework.

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[6] Treasury law Amendment (Consumer Data Right) Bill 2019, explanatory memorandum pp. 39, 40.
[7] The Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 2 of 2019, pp 64-72

Given the lack of a privacy impact assessment (or explanatory statement for the ACCC decisions that depart from existing privacy obligations) and the areas for further ACCC consideration highlighted in the draft Rules (such as civil penalty provisions at Rule 9.4 and CDR data directed outside the regime at Rule 7.2.3), we encourage the ACCC to undertake further consultation on the draft Rules.

Governance

We recognise the importance of building a flexible over-arching CDR regulatory regime that can be adapted to the unique characteristics of different industries that adopt the CDR regime applies to. Treasury drafted the CDR Bill in a way that conferred substantial powers on the ACCC to allow for this flexibility, but qualified that:

> *While it might appear that the ACCC is provided with significant powers to create consumer data rules …. the Government considers it important to provide direction to the ACCC on the types of consumer data rules that can be made, balanced with the flexibility to make rules that are appropriate and adapted to any industry that might become designated into the future.*[8]

The ACCC is provided with the power to make CDR Rules, in consultation with the Office of Australian Information Commissioner (**OAIC**), that will determine how CDR functions in each sector.[9]

The CDR Bill further acknowledges that there would be specific technical elements that would need to be addressed by a Data Standards Body. The data standards are drafted in the CDR Bill to apply to data subject to the CDR and will prescribe the format of data, method of transmission and security requirements for data to be provided by a data holder and or an accredited data recipient (ADR) to a consumer or to one another.[10] The role of the data standards body is further defined as explaining the format and process by which the data needs to be provided by CDR participants.[11] We therefore have concerns about the role the draft Rules is giving to the data standards body in some instances.

The CDR Bill is explicit in the role that the data standards body is expected to play in the CDR regime, and this focuses on the technical requirements for facilitating data sharing between data participants.[12] Our reading of this role does not extend to the manner in which information regarding the regime must be conveyed to the consumer.

We have concerns about instances where the Rules require compliance with the data standards that do not meet this role of format or process of CDR data transfer – for example:

Gaining consumer consent

The ACCC Framework included a specific list of information that must be provided to a consumer when seeking their consent to disclose consumer data right data. This list was over half a page of information regarding the purpose of the collection of data, the use of that data and information regarding the receiver of the data.

In our submission to the Framework we encouraged the ACCC to undertake consumer testing to ensure that the required information was concise, clear and provided in an easy-to-understand format.[13]

[8] See section 1.27 of Version 1 explanatory memorandum (draft) 2018
[9] See section 1.17 of Version 1 explanatory memorandum (draft) 2018
[10] See part 1.270 of Treasury law Amendment (Consumer Data Right) Bill 2019, explanatory memorandum
[11] See page 47 of Treasury law Amendment (Consumer Data Right) Bill 2019, explanatory memorandum
[12] See 56FB of the draft CDR Bill
[13] AGL submission to ACCC Rules Framework September 2018

Instead, the draft Rules remove the specific consent requirements that were detailed in the CDR Framework and instead refers CDR participants to gain consent in line with the data standards.[14]

We consider this is beyond the purpose and scope of the data standards body and creates questions and concerns around the governance of these decisions. We encourage the ACCC to ensure that references to data standards are in line with the legislative intent of such references (and the role the data standards body is intended to play).

Another governance concern we have is regarding the obligations placed on the data standards body to ensure clear, transparent and effective consultation with stakeholders. The ACCC has the power to make Rules about consultation requirements for the data standards body[15] and we encourage the ACCC to use this power to create transparency on the role and obligations of the data standards body. These obligations should include ensuring the data standards body undertakes best practice consultation in line with the Office of Best Practice Regulation guidance note[16] as well as a cost-benefit assessment to ensure that the standards set are the most appropriate for all impacted sectors.

Key recommendations of consultation and governance

Consultation

- Recommendation 1 – The ACCC should consult separately on the banking and general rules to improve transparency and engagement across all known relevant industry stakeholders.
- Recommendation 2 – The ACCC should provide clear information to the energy and telecommunications sectors on the consultation plan for progressing the consumer data right in these sectors.

Governance

- Recommendation 3 – The ACCC should make Rules and references to data standards in line with the intention of the CDR Bill (that is, the focus on technical data sharing and processes).
- Recommendation 4 – The ACCC should make Rules to apply to the data standards body requiring best practice consultation.

Part 2 - Privacy law differences

The feedback that we provide in this section is to ensure there is alignment with the Australian Privacy Principles (APPs) under the *Privacy Act 1988* (Cth) (Privacy Act) and the Privacy Safeguards under the draft Rules to the extent that this is possible under the CDR framework. This will help ensure that consumers are not confused on their rights or business obligations and to help reduce the cost of implementation and management of the CDR regime down.

The CDR regime introduces privacy safeguards which are intended to be comparable with the APPs[17] but to allow for flexibility through the ACCC Rules where the APPs may not be fit for purpose.[18] We

[14] For example, draft Rule 4.10 (2)(d) ‘’must do so in accordance with the data standards’.
[15] See page 48 of Treasury law Amendment (Consumer Data Right) Bill 2019, explanatory memorandum
[16] Office of Best Practice Regulation, Best practice consultation guidance note, 2016
[17] See section 1.22 of Treasury law Amendment (Consumer Data Right) Bill 2019, explanatory memorandum
[18] See page 9 of Treasury law Amendment (Consumer Data Right) Bill 2019, explanatory memorandum

expect that any such departures would be accompanied by an explanatory statement or impact assessment setting out:

(i) the need for such departures of established business processes and consumer protections; and
(ii) the cost / benefit of any such departures.

In the Senate Committee Hearing the Privacy Commissioner[19] stated that in making rules to ensure an effective privacy protection framework the "ACCC will need to fully consider the privacy impacts of the rules it intends to make." We agree with this and further suggest that any Rules that depart from existing privacy law practice be appropriately consulted on with explanations as to the need for specific departures. Such an approach improves the ability of stakeholders to engage with consultation processes and provides insights into decision-making processes.

This section of our submission provides information to help inform a Privacy Information Assessment (PIA) and focuses on departures in the draft Rules from established privacy requirements, as well as other concerns associated to those specific draft Rules, including:

1. management of correction requests by consumers;
2. refusal to disclose CDR data after a consumer request;
3. dispute resolution requirements; and
4. CDR policy structure and obligations.

We encourage the ACCC to have further consultation on the draft Rules that is accompanied by a detailed PIA to help ensure transparency for stakeholders.

Corrections

Under the APPs a body must take reasonable steps in the circumstance to correct information if an individual requests, but such a request can be refused in certain circumstances. A refusal to correct information can occur so long as the individual is notified in writing of the reasons of refusal, the mechanisms available to complain and any other prescribed regulations (including the customer's right to associate a statement). The individual consumer can request that the entity/business append or associate a statement to the individuals' personal information that they consider to be inaccurate, out-of-date, incomplete, irrelevant or misleading.[20]

Under the CDR regime, the privacy safeguards reflect the APPs for a consumer right to request corrections be made to their CDR information. However, the operation of this requirement under the draft Rules will be different to the APPs (as we detail below) which raises questions such as:

- What is the purpose the ACCC is trying to achieve with requiring the statement to be appended to customer records?
- What is the need for the reduced, 10-day time frame?
- What will the ACCC do on matters that require interpretation, such as determining what an appropriate length of a statement is?

Purpose of the requirement

Under the draft Rules consultation paper, it is not clear what the ACCC's intended objective or purpose is in requiring information to be appended to a refusal to correct records.

[19] Official Committee Hansard, Treasury Law Amendment (Consumer Data Right) Bill 2019, 6 March 2019, p.47
[20] Australian Privacy Principles Guideline Chapter 13, p.14

In our previous submission to the ACCC's Framework consultation, we outlined AGL's appending process as most often occurring in a free-text field that alerts call agents to the fact that a customer has previously requested a correction in case this is raised in future calls or contacts, whether this request was accepted or refused.

The purpose is not to inform external businesses of the fact of such a refusal, but to ensure that a customer's objection is recognised by the agent when engaging with the customer, and for the purposes of internal dispute resolution. This information may also be referred to or viewed by ombudsman schemes or other external bodies if there is a dispute and is required to resolve the dispute.

For example, if such a note was used for a disputed energy usage amount, is the purpose of this note to inform the ADR that a better offer should be sought for against the appended claimed usage amount, or the amount recorded by the retailer through the meter? In Victoria, new regulations will require retailers and third parties to inform a customer of the best offer available to them.[21] If the usage is disputed, which amount should an offer calculation be based on?

This is further complicated by the definition of *CDR contract* (draft Rule 1.8). As drafted, the term links the CDR contract with the goods and services contract (e.g. electricity market contract, solar contract). This is not commercially feasible for energy. It is likely to be the case that the CDR data is required to provide a quote. Linking the CDR contract with the goods and services contract could mean a customer could revoke their CDR data consent which allows the customer to terminate their goods/services contract. The concern is for products where customers may have been offered an upfront benefit (for example, a battery), and then the customer has the ability to withdraw and terminate contracts soon after a benefit is paid (regardless of whether the benefit may have been based on the customer staying for a certain period to cover the cost of the upfront benefit).

We would therefore encourage the ACCC to provide context and clarity on how the corrections element is intended to work and what it is meant to achieve (e.g. from an internal or external data management perspective) and to consider how refused correction requests may impact the CDR contract.

Operational matters

Under the existing APP 13.5 organisations must respond to correction requests within a reasonable period after the request is made and that this should not exceed 30 days.[22] If such a request is refused and the individual requests a record or appended statement to be attached to their information, this must be done within 30 calendar days.[23] However, under the draft Rules, data holders will have 10 days after a request to add, delete, alter, destroy or deidentify data, or include a statement to ensure the data is accurate. It is unclear why the ACCC has determined that a 10-day period is required instead of the period not exceeding 30 days under the privacy regime.

We also have concerns on how a business will operationalise notes/links to large data sets (for example, if a customer requests a 3-page letter to be attached stating why they disagree with our usage records for the household).

We would also then encourage the ACCC to consider the other guidance around reasonable statement association in line with the OAIC guidelines which states that the content and length of any statement will depend on the circumstances but is not intended that the statement be unreasonably

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[21] See Essential Services Commission Victoria final decision (part 1) *Building Trust Through New Customer Entitlements in the Retail Energy Market: Final Decision, 30 October 2018, Division 2 Customers entitled to clear advice (70F-70H)*

[22] Explanatory Memorandum, *Privacy Amendment (Enhancing Privacy) Bill 2012*, p 88 on APP 13.5

[23] Australian Privacy Principles Guideline Chapter 13, p.15

lengthy.[24] This would be related to, and influenced by, the ACCC's stated purpose of the corrections requirement.

Finally, on a drafting matter, we note that draft Rule 7.6, which requires corrections to be noted on a consumer dashboard, is not one of the matters that is listed under draft Rules 1.13 and 1.14 which lists the requirements for consumer dashboards for data holders and ADRs. We would encourage the ACCC to appropriately cross-reference to help ensure compliance.

CDR Policy

Outsource service providers

In our previous submission to the ACCC Rules Framework we noted general support for CDR data to be provided to outsourced service providers (**OSP**). Under APP1 businesses must have a Privacy Policy which is published on their website. This policy must address a number of matters as outlined in the privacy legislation. In relation to outsourcing, the requirements are to state that:

> *the purposes for which [AGL] collects, holds, uses and discloses personal information… … [and] whether [AGL] is likely to disclose personal information to overseas recipients, and [if so] the countries in which such recipients are likely to be located if it is practicable to specify those countries in the policy*

In practice, this means that privacy policies should have a section which speaks to the categories of service providers that businesses outsource to and who help provide services to customers, as well as a list of countries that they are located in.

In contrast to APP1, the draft Rules go significantly further and would require an ADRs to list all OSPs, whether they are accredited or not, the nature of the services they provide and what classes of CDR data they are exposed to. The broadening scope is not based on any evidence by the ACCC that the current APP1 requirements have failed to protect consumers data or that consumers have raised concerns that the current level of disclosure required on OSPs is insufficient for the consumer to transact with confidence with the business.

Further, as a result of draft Rule 7.2, businesses will face practical limitations in having to develop overly prescriptive policies and will need to keep an up-to-date list of OSPs with the required information. It will be incredibly difficult for businesses to manage such a list and ensure it is accurate at all times. This may also pose a security risk where OSPs may be targeted to access AGL customer or commercially sensitive data, where those OSPs have not previously been known to the public.

A dynamic list of OSPs could mean an almost weekly update of the CDR policy which would take significant resources to maintain. For AGL, our current Privacy Policy is approved by our Board of Directors to ensure proper governance and oversight as well as to meet business expectations. This practice would be difficult to continue under draft Rule 7.2. Further, if frequent OSP updates are provided to consumers, this could lead to consumer confusion or create a white-noise effect where consumers tune out policy update notifications. This could have the unintended consequence of reducing transparency with consumers.

The extensive requirements the ACCC have included in the draft Rules regarding the CDR policy requirements for OSPs lacks sufficient detail and is substantially more burdensome on businesses than current Privacy Law requirements. We would strongly encourage the ACCC to further assess whether this is necessary under the CDR regime and provide information to stakeholders on the decision or outline what the ACCC is trying to achieve. Specifically, and as previously stated, this

[24] Ibid.

should be subject to a fact-based cost-benefit analysis as part of a proper PIA to ensure the consumer benefits outweigh the industry costs.

Dispute resolution

Under 7.2(3) of the draft Rules, the ACCC has required that a CDR participant's CDR Policy must including certain information about the internal dispute resolution process, including options for redress. This is not a requirement under Privacy Law, and as such there is no guidance or information about what is envisioned by the ACCC in terms of redress.

We note that this concept has not been considered or explained through CDR Bill or supporting documents (such as the Privacy Impact Assessment). Given this is a new concept we would encourage the ACCC to provide greater transparency and information to stakeholders on the expectations regarding consumer redress.

There are also energy specific Rules that exist that require retailers to operate internal dispute resolution programs for energy retailers.[25] Alignment with the existing energy requirements for internal dispute resolution is something that should be addressed as part of the energy specific rules to avoid duplication and overreach.

Refusal to disclose data

The draft Rules would allow data holders to refuse a request to disclose CDR data where there is a risk of serious harm or abuse to an individual or an adverse impact to security, integrity or stability of the system.[26]

We request greater clarity on the application of the second limb - *adversely impact the security, integrity or stability of the information and communication technology systems the data holders use to receive requests, and to disclose CDR data*. Currently, APP 12.3 lists the grounds when an organisation may refuse to give access under APP 12. We would encourage the ACCC to align with these exceptions. We would encourage the ACCC to provide further information as to what is considered an adverse impact to the security, integrity or stability of the system. For example:

(i) would this would permit denial of vexatious requests that could place unnecessary loads on an organisation's systems; and

(ii) what extent of instability risk would justify refusal (e.g. does it need to risk the system crashing or could it occur where response times have slowed)?

Further, under the draft Rules a notification of a refusal to disclose must be made to the ACCC within 24 hours. While we recognise the intention for the ACCC to monitor non-compliance with the regime, it is unclear why the ACCC would require notification within 24 hours and it has not been assessed whether this is practicable from a business perspective. There are also practical business limitations of this requirement, such as public holidays or weekends. We do not believe that a refusal to disclose warrants an immediate and emergency notification to the ACCC.

Civil penalties for privacy breaches

We understand that the ACCC is still considering which provisions will be subject to civil penalties. If the ACCC is considering applying these to any of the Rules in respect of the privacy safeguards, the penalties should align with the Privacy Act. If the ACCC consider that it necessary for more serious penalties to apply, it should provide an explanatory statement setting out:

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[25] See for example section 50 of the National Energy Retail Rules or section 50 of the Energy Retail Code Victoria

[26] See Rule 3.5 of ACCC CDR Rules, exposure draft 29 March 2019

(i) why larger penalties would be required for breaches than currently exist under the Privacy Act; and

(ii) if applicable, why it is necessary to forego the "serious or repeated" breach requirement under the Privacy Act.

We note that the application of civil penalties is also currently present in the CDR Bill. There is a risk that more significant fines could have the unintended consequence of organisations putting their CDR obligations ahead of their general privacy obligations and creating a larger, unnecessary regulatory burden for parties entering into the energy market.

Privacy Impact Assessment

The ACCC Consultation Hub for stakeholders to upload their submissions to the draft Rules states that feedback on privacy aspects of the draft rules provided during this consultation will inform a future PIA of the CDR rules. We have several comments regarding the Treasury PIA process[27] which we would encourage the ACCC to consider prior to commencing the PIA:

1. **The purpose of the PIA needs to be considered** – the ACCC has drafted rules that impact the way consumers privacy is protected. A PIA should be completed at the start of a project and at key points along the way. Given our comments above about the lack of assessment or information on why the ACCC considered such departures from the existing privacy regime necessary, we strongly believe that a PIA should have been completed prior to the release of the draft Rules and provided along with the draft Rules for comment and assessment by stakeholders.

2. **Utilising independent PIA experts** – We have concerns about organisations conducting their own PIA where part of the role of the PIA is to bring an objective review of the impact on privacy generally. We would therefore encourage the ACCC to utilise an external, independent body to conduct the PIA. While there is currently no information publicly available on who will be completing the CDR draft Rules PIA, we wish to point out the serious concerns there have been by several stakeholders regarding the in-house approach that Treasury took, including the OAIC Commissioner.[28]

3. **Highlighting economic benefits to justify CDR regime** – the Treasury PIA speaks to expected improvements that the CDR regime will bring to the economy.[29] The associated commentary provides examples of new service and offerings for customers, such as comparison, budgeting and analysis tools. All these tools currently exist, though arguably their utilisation and depth are limited due to the access of data. Despite this, we would expect to see some economic and data modelling to assess these impacts.

4. **Impact assessment** – further to the above, we strongly consider that appropriate, detailed assessments of the privacy impacts need to be undertaken in a PIA. The OAIC have released guidance on PIA's which states that a

   > *PIA is a systematic assessment of a project that identifies the impact that the project might have on the privacy of individuals, and sets out recommendations for managing, minimising or eliminating that impact*.

   The guidance goes on to say that a PIA should

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[27] See Treasury Privacy Impact Assessment – Consumer Data Right (version 2) 1 March 2019,
[28] See for example Official Committee Hansard, Treasury Law Amendment (Consumer Data Right) Bill 2019, Australian Privacy Foundation, Australian Banking Association, Law Council of Australia,
[29] See Treasury Privacy Impact Assessment – Consumer Data Right (version 2) 1 March 2019, p.31-32

analyse the possible impacts on individuals' privacy, identify and recommend options for avoiding, minimising or mitigating negative privacy impacts and build privacy considerations into the design of a project.

The Treasury PIA has not done this, instead utilising subjective language and focusing on high-level principled comments such as "Treasury consider that the CDR has a significant privacy impact". This is assessed only with high-level subjective statements such as "the CDR will encourage development of new data technologies and systems that are likely to increase the safety of data flows and holdings".[30] As we have said above, there is no modelling or detailed analysis of how this will occur, which is the responsibility of decision-makers when undertaking a PIA. We would encourage the PIA to focus on tangible facts and assessments of the likely take up of the CDR regime by consumers and the possible impacts.

5. **Memorandum of Understanding** (MOU) – the CDR regime is built on dual roles being performed by the ACCC and the OAIC. The Treasury PIA speaks to the administrative arrangements between the OAIC and ACCC, and that an MOU has been prepared regarding the enforcement and educational roles of each under the CDR regime. This MOU should be made publicly available on both the ACCC and OAIC website, particularly where such an MOU is used in a PIA to explain the strength of privacy protections under the regime.

We believe that any additional obligations to existing privacy requirements should be fully scoped and consulted on with all appropriate stakeholders to determine if they are necessary – particularly for data holders who may wish to also become ADR. We strongly encourage the ACCC to review comments from stakeholders regarding the Treasury PIA process and ensure that these concerns are addressed to deliver a transparent and effective PIA.

[30] Ibid, p.31

Key recommendations of Privacy section

Corrections

- Recommendation 5 – The ACCC should provide transparency on its objective of appending information to customer records under a refusal to correct and the reason for such departures from existing privacy requirements, acknowledging operational impacts.

CDR Policy

- Recommendation 6 – The ACCC should align CDR Policy requirements with privacy policy requirements ensure that they can remain flexible, noting the constant change of business and the difficulty in maintaining a list of OSP and accreditation in a static document.

Dispute Resolution

- Recommendation 7 – The ACCC should provide further information and consult with stakeholders on the purpose and intention of the options for redress under the CDR policy.

Refusal to disclose

- Recommendation 8 – The Rules should align the exceptions, timing and process to the current Privacy Act requirements or provide a proper assessment of the need for, and cost/benefit of, differences.

Privacy Impact Assessment

- Recommendation 9 – The ACCC should use an external, independent body to conduct the Privacy Impact Assessment for the CDR Rules, which includes robust assessment and modelling of potential impacts, benefits and risk mitigations. This PIA should be provided with a revised set of draft Rules for robust stakeholder assessment and comment.
- Recommendation 10 – The ACCC and the OAIC should make the Memorandum of Understanding between their organisations publicly available on their websites.

Part 3 - Consumer protections

The following section focuses on elements of the Rules that we consider may impact consumer protections and rights. This includes:

- access to CDR data by an authorised person on an account;
- allowing third parties to direct CDR data outside of the CDR regime "ecosystem"; and
- rights of customers to access CDR regime through non-digital means.

CDR data access by authorised persons

Both the Rules and the Privacy Impact Assessment (**PIA**) discuss the concept of joint accounts, particularly in relation to banking. However, in energy there is also the matter of authorised representatives on an individual's energy account.

An authorised representative can access and act on the energy account in another's name and tend to fall in to three key categories:

1. legal guardian or power of attorney;
2. spouse/partner – the energy account is in one name, but the spouse/partner is authorised to access and interact on the account; and

3. financial counsellor / consumer representative – the energy account is in the consumer's name, but the consumer has authorised a financial counsellor or consumer representative to access and interact with the account or part of the account on their behalf. This is common amongst vulnerable consumers who need assistance.

Authorised representatives create greater complexities then joint accounts and require consideration by decision-makers.

Further, the energy sector billing arrangements are fundamentally based on the electricity or gas meter rather than the customer. That is, energy usage data is shared by market participants through the Australian Energy Market Operator (AEMO's) B2B Procedures and Market Settlement and Transfer Solution (MSATS) system to allow for market settlement and customer billing is underpinned by the meter at the supply address.

It remains unclear at this stage whether CDR in energy will pertain to the household (e.g. the national meter identifier (NMI)/meter installation registration number (MIRN)/supply address) or to the person with the account in their name. This is an important distinction as energy users in a household can be a range of different scenarios including spouse, adult children living with their parents, share house arrangements and so forth.

We also note that the complexities around joint account holders and authorisations also raises concerns as to how the definition of "prohibited use or disclosure" will apply to households in the energy sector. It is possible that individuals who are not joint account holders could be a subject of CDR data in energy (e.g. shared homes). Therefore, insights or a profile may be compiled in relation to a person who cannot be identified and therefore could not consent to such a request. It is possible this issue could be resolved through clarifications in the energy CDR rules.

Directing data outside the CDR ecosystem

We have previously raised concerns with the ACCC about the potential of allowing an accredited person to disclose a consumer's data received under the CDR regime to another person (for example a consumer's accountant, lawyer or financial counsellor) under Privacy Safeguard 6.[31]

We use the term CDR 'ecosystem' in reference to scenarios where the CDR framework and relevant protections continue to apply to consumer data subject to the CDR (i.e. safeguards and the right to correct, deletion etc). We supported scenarios of providing CDR data to an outsourced service provider or an intermediary simply due to the nature of businesses and how we operate. We continue to have concerns about the practical impacts of CDR data leaving the ecosystem and the risk to consumers – particularly vulnerable consumers who may not understand the purpose of such a direction through an accredited third party. Consumers may not understand that the same protections under the CDR framework do not apply when data is directed outside the CDR ecosystem which can cause mistrust and confusion in the overall CDR regime.

We continue to believe that the best approach for an arrangement of data leaving the ecosystem is to set a principle with the consumer data requests by a consumer to allow them to direct this information to an external body. This would need to be addressed under the data standards to ensure that it cannot be prompted or part of an ADR's consumer data request. Data being contained within the CDR regime is a key point of concern for stakeholders, including the Australian Privacy Foundation, who have stated that the CDR regime should be a closed system where participants do not deal with somebody unless they are accredited and in dispute resolution.[32]

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[31] AGL submission to ACCC Rules Framework September 2018
[32] Official Committee Hansard, Treasury Law Amendment (Consumer Data Right) Bill 2019, 6 March 2019, p.7

Additional information provision requirements could be imposed to inform the consumer that if they choose to share the information with others, they may not have the same CDR Framework protections. This could be provided for in the Rules by outlining the specific rights and obligations that should be imposed to give effect to the right of consumers being able to directly access their data and therefore understanding the implications of sharing outside the ecosystem.

Non-digital access rights

The draft Rules allow consumers to withdraw consent in writing or by using the consumer dashboard.[33] We acknowledge that the ACCC may consider non-digital rights for consumers in future iterations of the CDR Rules, but we wish to take the opportunity to state our support on this matter to ensure all consumers can be properly engaged and protected.

The recent consumer experience report released by Data61 (CX Report),[34] highlighted the need for multi-channel revocation for consumers and be available through the ADR and the data holder. Consumer testing found that most participants would use a non-digital means of revocation first (especially by phone and in person).

Key recommendations of consumer protections section

Consumers sharing CDR data

- Recommendation 11 – The ACCC should start considering and consulting early on more complex scenarios of shared CDR data including household electricity usage or where a person is an authorised person on an account or share the data (e.g. shared rental property).

Data outside the CDR ecosystem

- Recommendation 12 – The Rules should not allow for ADRs to request information be shared outside of the CDR ecosystem (for example, to non-ADRs such as a consumer's lawyers or accountants). This should only be done by the consumer, as the consumer can request their own data under this regime and will therefore have full control of how it is managed.

Non-digital engagement of CDR regime

- Recommendation 13 – The Rules should allow for revocation of consent by phone to align with consumer preferences and different consumer needs.

Part 4 - Other matters

In this section we highlight other matters or concerns raised by the draft Rules for the ACCC's consideration.

Complaints (Regulatory Guide 165)

Under the CDR Bill, the ACCC is able to make CDR Rules requiring CDR participants to have dispute resolution processes that relate to rules or meet certain criteria.[35]

[33] See draft Rule 4.11 p.33
[34] Data61, Consumer Data Standards – Phase 1: CX Report (February 2019)
[35] See 1.290 of Treasury law Amendment (Consumer Data Right) Bill 2019, explanatory memorandum *CDR rules may require dispute resolution processes that relate to rules or meet criteria.*

The draft Rules reference the need for compliance with Regulatory Guide 165,[36] which is an internal and external dispute resolution schemes regulatory guide developed by the Australian Securities and Investment Commission. This is likely an appropriate guide for disputes resolutions in the banking sector but appears in what we consider are the 'general rules' as opposed to the banking specific rules (schedule 2).

The definition of "complaint" in the draft Rules is an altered version of the definition of complaint in AS1002:2004 that states that a complaint is *"an expression of dissatisfaction made to an organisation, related to its products or services, or the complaints handling process itself, where a response or resolution is explicitly or implicitly expected"*. We do not consider this definition is sufficiently clear to ensure compliance and reporting for a business.

AGL is compliant with the Australian Standard 10002:2014, which includes a revised definition of the above which defines a complaint as an *"expression of dissatisfaction made to or about an organisation, related to its products, services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required".* We consider this definition is clearer for participants.

Further, the energy industry is not required to be compliant with Regulatory Guide 165. We therefore consider that the Rules should reference AS 10002:2014 rather than Regulatory Guide 165 for complaints management. This definition is clearer, and the standard is likely to be more appropriate for adoption in the broader economy.

The National Energy Consumer Framework (NECF) has an established process for complaints management which the ACCC needs to consider specifically for the energy sector. Energy also has a regulatory structure around the ombudsman schemes which will be impacted/complicated by the ACCC's decision on how retailers must manage complaints obligations for CDR Rules.

Energy ombudsman schemes are not structured to accommodate for external participants, such as ADR's and would therefore need to change their Constitutions and procedures to capture CDR complaints as part of their jurisdiction. This is an issue that is already emerging in relation to solar and battery consumer complaints where the energy ombudsman schemes do not currently have jurisdictions. We note that both Victoria and New South Wales Ombudsman have gone through lengthy processes to broaden jurisdiction, members and fee structures to provide external low-cost dispute resolution services. We have previously suggested that a national energy ombudsman scheme should be established with a revised consolidated constitution that can adapt to disruptions in traditional energy services.[37]

Compliance reporting

Under the draft Rules, Division 8.4 notes that the data standards must make data standards (amongst other things) for the requirements to be met by CDR participants in relation to public reporting of information relating to compliance with performance and availability of systems to respond to CDR requests.

Part 9 deals with rules relating to reporting, record-keeping and audit matters. It is unclear whether the ACCC will be releasing a compliance and enforcement guide for participants to understand the form and content required for this reporting. For example, under the ADR specific reporting

[36] See Rule 6.2 of ACCC CDR Rules, exposure draft 29 March 2019, p52.
[37] AGL submission to CDR Treasury Bill further amendments consultation, 7 September 2018, p. 13

obligations there is a requirement to report on consents to collect and use CDR data provided by CDR consumers. This raises questions such as:

- Is this intended to be reporting on each consumer request under each category of data?
- How are these categories going to be defined? Uses will vary across accredited recipients but without a consistent naming convention the reporting of this on a granular level would be pointless.
- We also note under Rule 9.5 CDR consumers can request a copy of their records from data holders and accredited data recipients in the form approved from the Commission. What is the form that is appropriate?
- Are these matters not addressed under the need to send notification to the CDR consumer of consents. Would regenerating this notification be sufficient under Rule 9.5?

We also note that both the ACCC and OAIC are able to bring audits in respect of the privacy safeguards to the extent that they relate to the Rules. We recommend the ACCC consider how the ACCC and OAIC will communicate and work together on audits of privacy safeguards, or address this in the MOU and make this publicly available. This could help avoid any unnecessary overlap or duplication of audits.

Revocation, suspension, or surrender of accreditation

The ACCC has included several grounds for revoking or suspending accreditations. As with the proposed penalties for breaching the privacy safeguards under the CDR Bill, there is a risk that these could be triggered by minor or accidental breaches, including those caused by human error. We would encourage the ACCC to consider the use of penalties for a serious or repeated breach, particularly as there is already the potential for significant financial penalties under the Act and Rules.

Structural

Definitions

There is a serious concern on the way the different documents developed by Treasury, ACCC and the data standards body defines and uses different terms relating to the CDR regime. These inconsistencies and overlaps will make it difficult for CDR participants to actively engage and be compliant with the regime.

For example, the CDR Bill uses the term CDR Participant to refer to a data holder or an ADR. The Treasury PIA however, uses the term CDR participant to describe anyone taking part in the CDR regime.[38] While this may seem minor, the impact of this type of inconsistency is that later in the PIA, Treasury states that "CDR participants will be required to confirm that entities are accredited and listed on the register before transferring data".[39] The changed definition of CDR participant in this case would mean that a consumer is required to check accreditation.

This type of definitional issue occurs throughout the draft Rules. The ACCC introduce new terms or use terms in a way that is either inconsistent with the CDR Bill or difficult for readers to follow. For example, terms such as *consumer consumer data request* may appear as a logical way to describe the flow of information but only adds to confusion under the regime. We are also concerned about how a CDR participant is meant to determine primary data and the definition of product for the purposes of the CDR regime.

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[38] See Treasury Privacy Impact Assessment – Consumer Data Right (version 2) 1 March 2019, p.11, footnote 2,
[39] Ibid, p.101, A17

In our opinion, this is an overcomplication of the scheme makes it difficult to understand and therefore to comply with. To help explain our concerns have prepared a flow map on CDR data in Appendix 1.

Use of notes in the draft Rules

Throughout the general draft Rules section of the exposure draft the ACCC has used notes to explain or clarify the requirements of sections. However, these notes are also used for the purposes of clarifying the purpose of a Rule under the banking sector. For example, Rule 1.14(2) Consumer dashboard – data holder, includes a note for the banking sector and refers to clause 3.4 of the banking specific rules under Schedule 2. Such notes will create complexity as additional sectors are designated and will make the document unnecessarily burdensome. We recommend the ACCC reconsider such an approach.

Data portability research

A recent paper issued by the Competition and Consumer Commission of Singapore[40] provides some valuable insights on data portability on the development of the Australian CDR framework. While brief, this paper offers a number of interesting insights into the various data portability regimes being prepared across the world which may help improve the CDR development and application in Australia. Some points relevant for the ACCC's consideration are:

- Noting that compliance requirements (including the data standards) should be set at a minimum to ensure that they are relatively easy to achieve. This acknowledges that the more complex the compliance requirements, the more difficult it will be for smaller organisations to compete.[41]
- The need to have a minimum threshold for data volume, and a cap on the number of requests that a consumer can make within a *to-be-defined* period (acknowledging compliance costs and the overall reasonableness of the regime.[42] We have commented on vexatious requests above in this submission.
- Acknowledging the implementation costs – specifically for banking in the UK, with an ongoing compliance cost of around £400,000 per year, with those costs split between internal staffing costs and external costs (including software and technology).[43]

Costing

AGL have previously stated concern in various CDR submissions[44] about the costing assessments for CDR implementation. The financial and compliance cost impacts provided by Treasury in the Explanatory Memorandum 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 Data 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 ballpark figures of what each option would cost". Specifically, the HK report focused on interval meter data rather than expected CDR data sets.

We do not consider these cost assessments as being appropriate cost-benefit or regulatory assessments for the purposes of applying CDR in the energy sector. We strongly encourage a proper

[40] Discussion paper on Data Portability, Personal Data Protection Commission Singapore
[41] Ibid. paragraph 4.11
[42] Ibid, para 4.3
[43] Ibid, para 4.9
[44] See AGL submission to ACCC Energy Data Models consultation, p5-6 and AGL submission to Inquiry into Treasury Law Amendment (Consumer Data Right) Bill 2019, p.3

regulation impact statement or cost-benefit analysis be completed for the CDR and its application in the energy sector.

Key recommendations for other matters

Complaints

- Recommendation 14 – The Rules should use AS 10002:2014 instead of a banking specific dispute resolution (Regulatory Guide 165) under the Rules, or move this specific requirement to Schedule 2 (banking schedule).

Compliance reporting

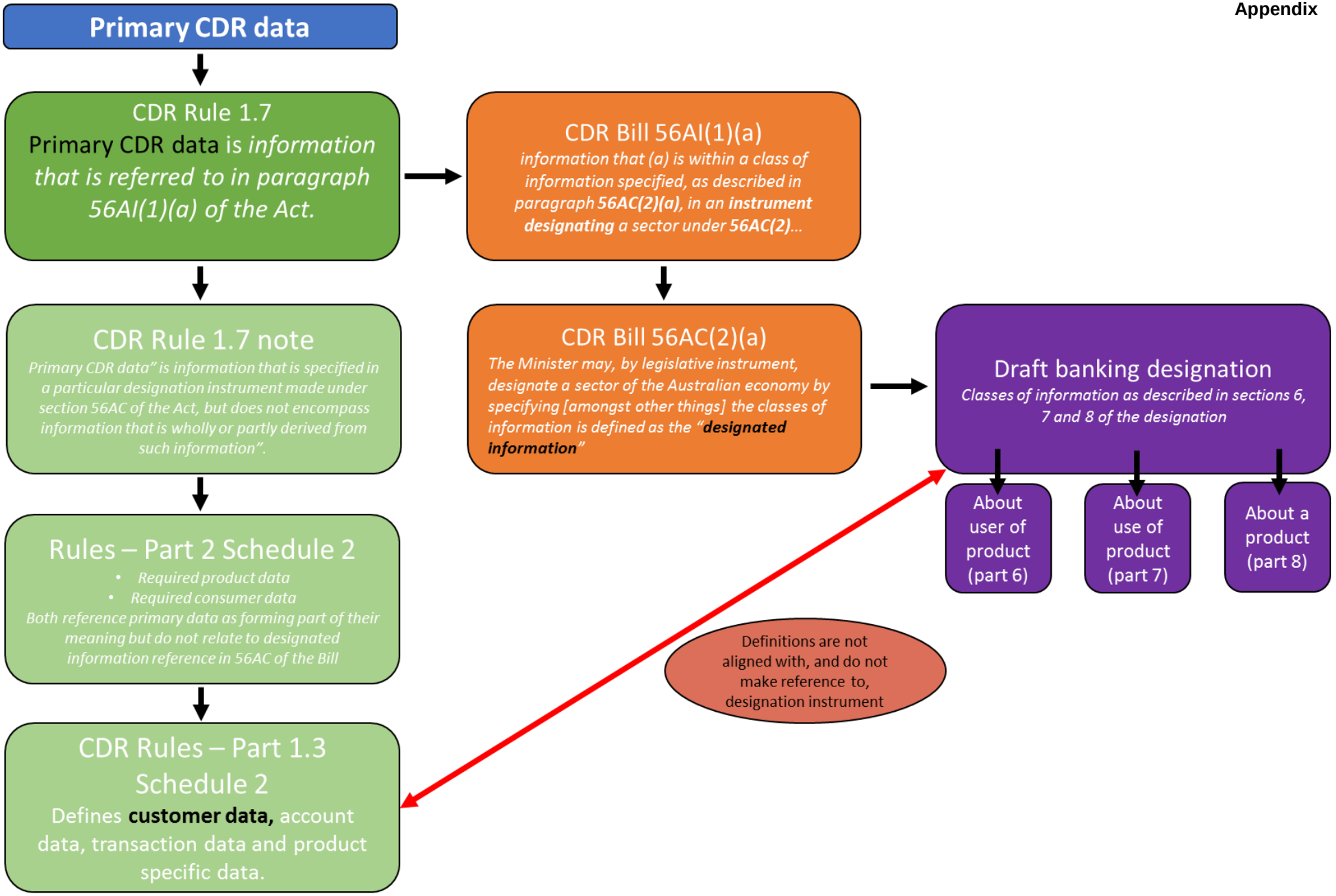
- Recommendation 15 – The ACCC should consider the questions raised by AGL under this Part 4 to provide further guidance and support to CDR participants in compliance related matters.

- Recommendation 16 – The ACCC should consider providing a performance reporting template (such as provided by the Australian Energy Regulator for retailer performance reporting).

Structural matters:

- Recommendation 17 – The ACCC should review definitions within the draft Rule to ensure consistency with the CDR Bill and data standards.

- Recommendation 18 – The ACCC should ensure that definitions used in the Rules are clear and easy to access for compliance purposes.


Primary CDR data
CDR Rule 1.7
Primary CDR data is information that is referred to in paragraph 56AI(1)(a) of the Act.
CDR Bill 56AI(1)(a)
information that (a) is within a class of information specified, as described in paragraph 56AC(2)(a), in an instrument designating a sector under 56AC(2)...
CDR Rule 1.7 note
Primary CDR data" is information that is specified in a particular designation instrument made under section 56AC of the Act, but does not encompass information that is wholly or partly derived from such information".
CDR Bill 56AC(2)(a)
The Minister may, by legislative instrument, designate a sector of the Australian economy by specifying [amongst other things] the classes of information is defined as the "designated information"
Draft banking designation
Classes of information as described in sections 6, 7 and 8 of the designation
About user of product (part 6)
About use of product (part 7)
About a product (part 8)
Rules – Part 2 Schedule 2
Required product data
Required consumer data
Both reference primary data as forming part of their meaning but do not relate to designated information reference in 56AC of the Bill
Definitions are not aligned with, and do not make reference to, designation instrument
CDR Rules – Part 1.3 Schedule 2
Defines customer data, account data, transaction data and product specific data.