

EXPLANATORY STATEMENT

Issued by authority of the Treasurer

Competition and Consumer Act 2010

Consumer Data Right (Energy Sector) Designation 2020

Subsection 56AC(2) of the *Competition and Consumer Act 2010* (the Act) provides that the Minister may, by legislative instrument, designate a sector of the Australian economy to be subject to the consumer data right. The consumer data right is set out in Part IVD of the the Act.

The consumer data right provides individuals and businesses with a right to efficiently and conveniently access specified data that relates to them held by businesses, and to authorise secure access to this data by accredited third parties. The consumer data right also requires businesses to provide public access to information on specified products that they offer.

The consumer data right is designed to give customers more control over their information leading, for example to more choice in where they take their business, or more convenience in managing their energy usage and services.

Subsection 56AC(2) of the Act provides that the Treasurer may designate a sector of the Australian economy as being subject to the consumer data right by making a legislative instrument.

The sectors of the Australian economy that are covered by the consumer data right and the type of information consumers can request are limited to those specified in designations that will be made by the Treasurer.

Energy is the second sector of the Australian economy to which the consumer data right will be applied.

The Government consulted on the draft designation instrument from 6 May 2020 to 31 May 2020. 19 submissions were received during this time, and the stakeholder feedback was considered in the finalisation of the designation.

Subsection 56AD (1) of the Act obliges the Minister to consider a range of factors when exercising the power to make a designation instrument. These factors include the effect of the instrument on the interests of consumers, the efficiency of the energy markets, the privacy of consumer data, the promotion of competition, the public interest, and appropriate gateways for the data. The Treasurer has considered each of the factors required by the legislation when making the *Consumer Data Right (Energy Sector) Designation 2020* (the Designation).

Item 2 of Part 1 of the *Treasury Laws Amendment (Consumer Data Right) Act 2019* relieves the Minister, the Australian Competition and Consumer Commission (ACCC), and the Information Commissioner from associated consultation obligations in relation to the designation for the energy sector, provided that it is made prior 1 July 2020 or 3 months following the commencement of that Part, whichever is the later. Instead, the Treasurer has relied upon other consultations for the Designation

including: the Council of Australian Government's Energy Council's *Facilitating Access to Consumer Energy Data - Final Report*; the ACCC's *Consultation on energy data access models*, and the Department of the Treasury's *Consumer Data Right – Priority Energy Datasets* paper. Reliance is also being placed upon the *Consumer Data Right in the Energy Sector: Supplementary Privacy Impact Assessment for the Commonwealth Department of Treasury*, conducted independently by KPMG.

The purpose of the Designation is to designate specified National Electricity Market datasets as subject to the consumer data right. It also applies the consumer data right to generic product information in relation to generic gas offerings (but not customer and usage data for gas offerings which relates to specific customers, except to the extent that this information may be incidental to electricity offerings).

The Designation sets out the classes of information that are subject to the consumer data right regime, the persons who hold this information and will be required or authorised to transfer the information under the regime, the gateway for certain classes of the information, and the earliest date that the information being held is subject to the consumer data right.

Data holders may be required to disclose the data under this Designation in accordance with the consumer data rules. The rules may also authorise data holders to choose to share this data through the consumer data right.

The Designation does not specify any information as being subject to fees for access or use for the purposes of paragraph 56AC(2)(a) of the Act.

The Designation commenced on the day after it was registered.

Details of the Designation are set out in [Attachment A](#).

A statement of compatibility with human rights is set out in [Attachment B](#).

The Designation is a legislative instrument for the purposes of the *Legislation Act 2003*.

**Details of the Consumer Data Right (Energy Sector)
Designation 2020**

Section 1—Name

This section provides that the title of the Designation is the *Consumer Data Right (Energy Sector) Designation 2020* (the Designation).

Section 2—Commencement

This section provides that the Designation will commence on the day after it is registered.

Section 3—Authority

This section states that the Designation is made under subsection 56AC(2) of the Act.

Section 4 —Definitions

The Designation includes a number of definitions. These include:

Act means the *Competition and Consumer Act 2010*.

Associate has the same meaning as it has in section 318 of the *Income Tax Assessment Act 1936*. This includes a person's relatives such as spouse, children or siblings. Including an associate in the Designation reflects that there can be more than one account holder on an electricity account, or that the primary account holder may grant access to the account to a relative or spouse.

National Energy Retail Law means the National Energy Retail Law that is set out in the Schedule to the South Australian legislation the *National Energy Retail Law (South Australia) Act 2011*.

National Electricity Rules refers to the rules, as in force from time to time, made under the National Electricity Retail Law and as they apply in the Commonwealth or the States and Territories.

Together the National Energy Retail Law and the National Electricity Rules establish and regulate the National Energy Market, which is the wholesale electricity market that operates in New South Wales, the Australian Capital Territory, Queensland, South Australia, Tasmania, and Victoria.

A number of terms mean the same in the Designation as in the National Electricity Rules:

- *DER register information*
- *Metering data*
- *NMI Standing Data*
- *Type 7 metering installation*

Retailer means a person that is authorised as a retailer under the National Energy Retail Law or the *Electricity Industry Act 2000* (Vic). This is intended to capture all electricity retailers in the National Energy Market, including in Victoria.

Section 5 — definitions relating to arrangements

This section sets out definitions of *arrangement*, *customer*, and *associate* that apply in the Designation (except for section 10, which relates to natural gas).

- **Arrangement** means an arrangement where a retailer sells or supplies electricity to a person for a premises, and does not apply to an arrangement solely for the supply of electricity by a customer into the grid. For example, a contract between a customer and a retailer will not be captured if it relates only to the electricity generated by the customer's solar panels and supplied to the grid.
- **Customer** means a person who purchases electricity, or to whom electricity is supplied, under an arrangement.
- **Associate** means an associate (within the meaning of section 318 of the *Income Tax Assessment Act 1936*) of a customer, to whom electricity is supplied under an arrangement. This definition captures persons such as the customer's close relatives including a spouse, children or siblings.

The terms *customer* and *associate* are used in the Designation so that where electricity is supplied to multiple persons under an arrangement there is scope for the CDR rules to require the relevant data holder to disclose CDR data to each of those persons. For example, the Designation enables the CDR rules to provide that a *customer* includes both an account holder, and a person that the account holder has authorised to operate, or disclose data from, the account.

The note to section 5 clarifies that an arrangement for the sale or supply of electricity will always involve electricity, but may also include retail goods or services (for example, discounts on movie tickets or airline loyalty points).

Section 6 — designation of sector subject to the consumer data right

This section sets out:

- the classes of information that are prescribed and therefore subject to the consumer data right (information set out in sections 7 to 10);
- the data holders for the classes of information that are prescribed (the persons set out in section 12);
- that the earliest date that the classes of information that are held by a data holder under the Designation can become subject to the consumer data right is 1 July 2018; and
- that the Australian Energy Market Operator (AEMO) is the designated gateway for information covered by the Designation that is held by retailers (see section 12).

A note to subsection 6(3) also confirms that no fees can be charged for information accessed under this Designation.

Specified classes of information

Section 7 – information about a customer or associate

Information about a customer or an associate of a customer that is subject to the consumer data right is information provided by the customer or associate or obtained by the data holder in connection with the arrangement.

The information may include identifying information about the customer or associate, information that goes to the customer’s eligibility for an arrangement, the contact details of the customer or associate, or information about whether an associate is authorised to access the account.

This also includes information used to authenticate the identity of the customer or an associate (or where the retailer has sought to authenticate such a person, the outcomes of an authentication process). This will, for example, enable the rules to enable AEMO to use such information to ensure that data it releases (as a gateway or as a data holder) have been authorised by an appropriate customer or associate.

Section 8 – information about sale or supply of electricity

Information about the sale or supply of electricity includes information about the physical electricity connection points or other information about the supply of the electricity to the customer.

This includes, but is not limited to, information relating to the arrangement that is NMI Standing Data, metering data, or DER register information. It also includes information about the sale or supply of related goods or services under the arrangement, for example discounts on other services and details of non-electricity supplies that are bundled as part of the arrangement. This information may also include:

- a bill;
- payment information, including the payment method;
- information about the customer’s account with the retailer;
- authorisations for access to the customer’s account;
- information about whether the customer is experiencing hardship;
- any discounts applicable, including concessional arrangements;
- a breakdown of the charges under the arrangements; and
- information used to calculate a bill

Any information that is “materially enhanced” within the meaning of section 11 is not covered by this section and is therefore not subject to the consumer data right. However, information that would otherwise be “materially enhanced” but that falls within the specific inclusions in subsections 8(2) and (3) will still be subject to the consumer data right (see section 11 below).

Section 9 – information about retail arrangements

This section applies to information about an arrangement for the supply of electricity, including:

- the name or other identifying information relating to the arrangement;
- costs and charges associated with the arrangement;
- discounts or non-monetary benefits under the arrangement;
- terms and conditions associated with the arrangement; and
- eligibility criteria for the arrangement.

This information applies to a new or current arrangement or arrangements that are still in use but no longer available to new customers. It also applies to arrangements that relate to both electricity and natural gas.

An arrangement can be offered to a group of people or tailored to a particular person.

Section 10 – information about retail arrangements (natural gas)

The Designation also applies to certain arrangements that only relate to the supply of natural gas. These arrangements are only those that apply to new customers, and not arrangements that are tailored to an individual customer.

The information related to a supply of natural gas that is subject to the consumer data right is:

- information identifying the arrangement;
- all costs associated with the arrangement;
- a discount or non-monetary benefit under the arrangement;
- terms and conditions associated with the arrangement; and
- eligibility criteria for the arrangement.

Section 11 – Exclusion – materially enhanced information

Information about the sale or supply of electricity in section 8 can also be *materially enhanced*. This will be the case when the information is improved through the application of insight or analysis by the data holder (or on their behalf), and the improved data is significantly more valuable than the original information. If information that would otherwise be captured by section 8 is materially enhanced then it is not subject to the consumer data right. However, information of the kind listed in subsections 8(2) and (3) cannot be materially enhanced and will be subject to the consumer data right. This is because information listed in subsections 8(2) and (3) is generally factual, observed or collected, mandated to be created, or required to be provided via other channels. However, if this data is improved through the application

of insight or analysis that renders it significantly more valuable than the original data then it will be caught by the materially enhanced carve out.

Further, there are circumstances where information captured by section 8 that is materially enhanced will still be subject to the consumer data right. This is where:

- the information is publicly available; or
- the information is required to be disclosed under an Australian law.

Subject to these qualifiers regarding public availability and required disclosure, examples of materially enhanced data include:

- any material analysis of a customer’s energy usage;
- any material analysis of a customer’s credit worthiness;
- any material analysis of a customer’s preferences or propensity to take up a product; or
- any material analysis of customer’s energy usage to inform retailer pricing models.

Examples of non-materially enhanced data include:

- monthly or quarterly totals for energy usage;
- a calculated account balance;
- a calculated fee to be charged;
- unique identifiers, such as account numbers; or
- outcomes of authentication assessments.

The materially enhanced exception is not applied to section 7 of the Designation because that class of data is limited to data that is provided or obtained by the retailer from external sources. It will therefore never apply to internally created data, let alone materially enhanced data.

Section 12 – Specified data holders

This section sets out who is the data holder for the information set out in the Designation.

Information	Data holder
Information about a user of electricity	Retailers
NMI Standing Data, metering data, and DER register information	AEMO

Other information about the supply of electricity (other than NMI Standing Data, metering data, and DER register information)	Retailers
Information about retail arrangements (other than tailored arrangements)	The Australian Energy Regulator and Victorian Energy Compare
Tailored retail arrangements	Retailers
Retail arrangements relating to natural gas	The Australian Energy Regulator and Victorian Energy Compare

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Consumer Data Right (Energy Sector) Designation 2020

The *Consumer Data Right (Energy Sector) Designation 2020* (the Designation) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Treasury Laws Amendment (Consumer Data Right) Act 2019* amended the *Competition and Consumer Act 2010* to establish a consumer data right.

The consumer data right provides individuals and businesses with a right to efficiently and conveniently access specified data that relates to them held by businesses, and to authorise secure access to this data by accredited third parties. The consumer data right also requires businesses to provide public access to information on specified products that they offer.

The consumer data right is designed to give customers more control over their information leading, for example to more choice in where they take their business, or more convenience in managing their energy usage and services.

Subsection 56AC(2) of the Act provides that the Treasurer may designate a sector of the Australian economy as being subject to the consumer data right by making a legislative instrument.

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Human rights implications

The Designation engages the right to protection from arbitrary or unlawful interference with privacy under Article 17 of the International Covenant on Civil and Political Rights (ICCPR) because it enables, in the context of the energy sector, a

person to directly access or to direct another person or entity to transfer personal information about themselves to another person or entity.

In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the particular circumstances. The UN Human Rights Committee has interpreted the requirement of ‘reasonableness’ to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

The consumer data right is a right for consumers to authorise data sharing and use. The consumer data right will provide individuals and businesses with a right to access data relating to them; and to authorise secure access to their data by persons who have been approved to receive the data, known as ‘accredited data recipients’.

Underpinning the consumer data right is a requirement that the disclosure between entities of personal information is generally only permitted with the express consent of the individual to whom the information relates. The consumer data right does not generally allow businesses who hold or receive data relating to a customer to transfer or use the data without the customer’s consent.

It is intended that the consumer data right in the energy sector, by giving consumers improved access to data, will support better comparison services by taking into account Australians’ actual circumstances and promoting more convenient switching between energy providers and products.

The *Competition and Consumer Act 2010* protects against arbitrary interference with privacy by establishing a set of consumer data right specific privacy safeguards, modelled off the existing Australian Privacy Principles (APPs) but with additional obligations. The privacy safeguards included in the consumer data right are:

- restrictions on the use, collection and disclosure of information received through the consumer data rules, including information derived from this information, generally in circumstances where the consumer has given express consent;
- requirements to have privacy policies in place which are easily accessible and clearly explain the complaints handling process;
- obligations on data holders and accredited data recipients to correct information;
- obligations on data holders and accredited data recipients to notify the consumer when information is disclosed;
- requirements to destroy information that is purported to have been shared under the consumer data rules but has been disclosed in error;
- strong powers for regulators, including the Office of the Australian Information Commissioner (OAIC);
- restrictions on direct marketing; and

- remedies for breaches, including through external dispute resolution arrangements.

The OAIC will advise on and enforce privacy protections, and provide complaint handling for breaches of the privacy safeguards. Consumers will have a range of avenues to seek remedies for breaches of their privacy or confidentiality including access to internal and external dispute resolution and direct rights of action.

The *Competition and Consumer Act 2010* also established an accreditation process that provides protection against arbitrary or unlawful interference with privacy. Only trusted and accredited third parties will be able to access data from data holders at the customer's direction. The ACCC will initially be responsible for accrediting entities. The requirements that need to be met will be set out in the consumer data rules, and will address matters such as:

- having systems, resources and procedures in place which enable the entity to comply with their consumer data right obligations including the security of information; and
- having internal dispute resolution procedures in place and being a member of a recognised external dispute resolution body.

These limitations are consistent with the prohibition on arbitrary interference with privacy as they are directed at legitimate objectives and are reasonable and proportionate to those objectives.

Conclusion

This Legislative Instrument is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.