



public interest
ADVOCACY CENTRE

**Submission to Commonwealth Treasury CDR
rules and standards design paper**

26 May 2021

About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in Sydney.

Established in 1982, PIAC tackles barriers to justice and fairness experienced by people who are vulnerable or facing disadvantage. We ensure basic rights are enjoyed across the community through legal assistance and strategic litigation, public policy development, communication and training.

Energy and Water Consumers' Advocacy Program

The Energy and Water Consumers' Advocacy Program (EWCAP) represents the interests of low-income and other residential consumers of electricity, gas and water in New South Wales. The program develops policy and advocates in the interests of low-income and other residential consumers in the NSW energy and water markets. PIAC receives input from a community-based reference group whose members include:

- Affiliated Residential Park Residents Association NSW;
- Anglicare;
- Combined Pensioners and Superannuants Association of NSW;
- Energy and Water Ombudsman NSW;
- Ethnic Communities Council NSW;
- Financial Counsellors Association of NSW;
- NSW Council of Social Service;
- Physical Disability Council of NSW;
- St Vincent de Paul Society of NSW;
- Salvation Army;
- Tenants Union NSW; and
- The Sydney Alliance.

Contact

Thea Bray
Public Interest Advocacy Centre
Level 5, 175 Liverpool St
Sydney NSW 2000

T: (02) 8898 6500

E: tbray@piac.asn.au

Website: www.piac.asn.au



Public Interest Advocacy Centre



@PIACnews

The Public Interest Advocacy Centre office is located on the land of the Gadigal of the Eora Nation.

Contents

- Introduction..... 1**
- Peer-to-peer data access model in the energy sector..... 1**
 - Insufficient assessment and evidence in support of change..... 1
 - Issues with a P2P approach to data access..... 2
- Opt-out joint account data sharing 4**
- Continued engagement..... 5**

Introduction

PIAC welcomes the opportunity to respond to the Commonwealth Treasury's (the Treasury) Consumer Data Right (CDR) rules and standards design paper (the Paper).

PIAC does not support the Paper's proposed approaches to the data access model and sharing of joint account data. PIAC has been involved in the process of developing and applying the CDR in the energy sector since it commenced. PIAC supports the intent of the CDR to allow consumers the right to access their data and authorise its wider use for their benefit. However, the proposals outlined in the Paper do not adequately reflect this principle, making them unlikely to deliver the intended benefits to consumers while increasing the risk of consumer detriment and harm.

The approaches proposed in the Paper diverge substantially from those previously established and supported by industry and energy sector consumer stakeholders. At this stage of the process PIAC does not consider the case for such substantive changes has been made. The changes, which impact consumer utility and benefit, consumer protection, risk management, and the underlying purpose of CDR reforms, are presented with little supporting argument or evidence and no detailed analysis. As such the Paper presents insufficient justification to support the substance of the changes proposed, and does not address a number of serious gaps and unresolved issues of utility and risk.

PIAC strongly disagrees with the proposed approach in both parts of the Paper. This submission outlines our concerns with each proposed change, and presents our responses to aspects of the design paper.

Peer-to-peer data access model in the energy sector

PIAC rejects the proposal to switch to a peer-to-peer (P2P) model for data access in the energy sector as it will greatly diminish the effectiveness of CDR. The Paper provides little evidence or reasoning to support such a radical shift in direction and approach, and PIAC is deeply concerned at the Treasury's apparent intention to force through such a change at this very stage of the process with only scant analysis and poor engagement.

Insufficient assessment and evidence in support of change

The Paper characterises the change in approach – from gateway model to P2P – as supported by stakeholder feedback. However, it does not present which stakeholders supported this change (or their basis for supporting it) or that other stakeholders have raised major concerns with Treasury about the proposal. This is poor engagement and misleading behaviour.

The Paper presents the change to a P2P approach as a given, with insufficient explanation or evidence of reasoning behind this change, or how the decision was arrived at. The Paper only states the gateway model 'may not be able to leverage NEM systems as intended' without any explanation why. A relatively lesser benefit from leveraging existing systems does not constitute a sufficient reason for change in itself, particularly as no supporting details or analysis are presented. The extent of expected benefits of the P2P approach have not been detailed and the

Paper does not assess them against the benefits, costs and weaknesses of leveraging existing system architecture.

Similarly, the lack of assessment of costs of various models prevents any meaningful comparison of approaches. The Paper cites 'increased costs' for the Australian Energy Market Operator (AEMO) without detail as to what these costs are and there is no detailed or reliable assessment of the costs of the P2P arrangements.

Interoperability and extensibility of the CDR across sectors is cited as a key priority. There is no explanation as to whether the focus of this priority is consistency of outcomes for consumers and data recipients or consistency of the access model by which data is provided. There is no evidence that a gateway model is unable to delivery interoperability and consistent outcomes for consumers. In any case PIAC does not consider consistency of access model across different sectors to be a priority over an effective CDR for energy.

PIAC does not consider there to be a demonstrated case for interoperability of data authorisation between sectors. The key objectives and principles of the CDR reforms are not considered against the stated priority for interoperability, and there is no assessment of how a choice predicated on interoperability impacts the fundamental objectives of the CDR. How use of a consistent mechanism rather than the gateway model impacts consumer utility, protection and transparency do not appear to have been addressed. This assessment is crucial in considering the changes proposed in this paper.

The Paper explicitly recognises accounts in the energy sector are different from those in banking, but does not fully reflect these differences in considering how the CDR should be applied, the selected access model, or what the optimal CDR model is for energy in light of what is known about costs and complications. There is recognition that sector-specific rules should be developed only where necessary, but the Paper provides no details as to how these will be considered. Any such consideration should preclude the P2P model being proposed at this stage.

The CDR approach does not properly consider established structures and experiences within the energy sector. The relationship between consumers and retailers is characterised by power and information imbalances and has required increasing regulatory interventions to ensure greater systemic transparency, efficiency and consumer protection as a result. The approach to CDR should recognise this historic relationship and how it will impact consumers under different proposed models.

The Paper presents none of the required evidence and analysis to support the proposed approach and address the issues raised above. PIAC does not consider it appropriate to continue with a P2P approach without addressing these and the serious concerns PIAC and other stakeholders have.

Issues with a P2P approach to data access

PIAC has consulted with consumer and community stakeholders on the Paper and highlights a number of major, unaddressed issues raised in relations to a P2P approach to data access. Specifically, PIAC highlights the following:

- The P2P architecture creates a structural conflict of interest for retailers and compounds existing power and information imbalances in consumers' relationship with their retailers. Retailers already have access to an individual customer's data, and the ability to use this data to shape retail offers and tariffs for this customer. They have a direct financial relationship with this customer and an interest in retaining them to maximise revenue. P2P architecture gives this retailer responsibility for managing the authorisation and sharing of this customer's data, for purposes that are likely to directly impact their revenue. This conflict of interest is unlikely to be overcome by any protections. In any case, it is highly unlikely that any specific protections put in place to address the conflict would offer systemic protections superior to arms-length arrangements enabled by a gateway model.
- The costs involved in a P2P model of data access are not transparent, predictable or likely to be efficient. The gateway model of data access involves costs related to building a central access point for data authorisation and sharing, with smaller changes to retail systems to interact with this architecture. A P2P model will require all retailers to create consumer dashboards and systems capable of individually undertaking the authorisation and sharing process, and will involve increased costs to facilitate AEMO engagement with this system. These systems are unlikely to be consistent, introducing further complications for consumers and intermediaries and undermining their ability to understand and engage with their data.

There are significant risks duplication will multiply the costs involved in data access, and consumers will face additional costs that will not be transparent or subject to efficiency drivers. PIAC highlights the experience of retail-lead smart meter rollout as an example of the likely result of retail responsibility for data access. Retail rollout of smart metering has failed to meet expectations of scope, utility or cost efficiency, leading to a major review by the Australian Energy Market Commission (AEMC) after less than 5 years.

Information is already a significant barrier to consumers getting fair outcomes in the energy market, as evidenced through more than a decade of reviews demonstrating that consumers are paying more than they should and do not understand or trust information provided by retailers.

- The Paper recognises the P2P model currently cannot provide utility for consumers and data recipients on par with a gateway model. Energy retail arrangements reward consumers who regularly refresh or switch their retail provider, making it likely many consumers will have more than one retailer with data relevant to their current NMI within a 12 month period. However, access to data held by a previous retailer is not possible or easily enabled in a P2P model. The future energy market may involve multiple providers relating to a single connection (through retail relationships, demand response relationships with aggregators and other new service providers related to distributed energy resources), the P2P model makes accessing data relating to multiple services more complicated and the Paper recognises there is not currently a consistent and efficient solution for this. A gateway model can potentially accommodate accessing data relating to multiple services.
- The P2P model's concentration of roles in a single entity is inappropriate and undermines systemic protections and transparency in a way that creates material consumer and competition risks. Section 14 of the design paper indicates under the proposed P2P model

the retailer will be responsible for collecting the data (as the primary data holder), authorising and facilitating the sharing of the data, collecting other relevant data and handling complaints regarding those processes. This concentration of roles could be appropriate under a gateway model, where responsibility is undertaken transparently, at arm's length, by the system operator. However, having these roles concentrated in a commercial entity with a financial incentive potentially counter to the interests of the consumer, is unacceptable. It is also inappropriate for retailers, as a single entity in the energy supply chain, to have a role of responsibility over aspects of the entire supply chain.

Opt-out joint account data sharing

PIAC strongly recommends against an opt-out approach to joint account data sharing and recommends Treasury continue with the established opt-in approach. PIAC notes the submission from the Financial Rights Legal Centre (FRLC) in response to the design paper and supports their critique of the opt-out approach.

The Paper recognises the rules for joint account data sharing are well-established and settled, citing input from data recipients that the established opt-in approach 'will lead to poor consumer outcomes'. The only explanation in support of this position is that opt-in arrangements introduce 'friction' to data sharing authorisation, and that this friction will discourage businesses from offering CDR-based services to consumers. PIAC regards this as faulty reasoning and an irrelevant consideration in the implementation of a CDR.

The intent of the CDR is not to create a market for the use of consumer data, it is to create a mechanism for consumers to access and utilise their data, and allow authorised third parties to do the same on their behalf, as and when they choose, for their benefit. In this regard, the utility of the CDR arrangements and the outcomes for consumers must be viewed from the perspective of the consumer, not potential recipients of their data. The relative 'friction' in arrangements to share data is relevant only if it impacts consumers' ability to access and use their data for their benefit. If a consumer benefits from time to consider the implications of a data sharing authorisation and exercise their consent, this is the appropriate amount of systemic 'friction'. Friction in this case – where consent is required from multiple parties – is entirely appropriate and preferable to maintain natural protection for consumers and enable informed decision making.

An opt-out model contradicts fundamental principles of consent central to the CDR reforms. Specifically, consent must be voluntary, express and informed. The opt-out model pre-empts and assumes consent if and until it is withdrawn. This is not voluntary or express exercise of consent, and it places the burden on the joint account holder to be able to understand and be informed regarding what has been authorised and how to opt-out of this. This also places the risk of unintended consent on the joint account holder, in the event that the notice of authorisation is not received or understood.

The proposed opt-out changes would undermine a joint account holder's requirement to exercise consent with a clear, freely given affirmative act. This is counter to established principles of privacy protection and would effectively establish a default for consent or an assumption of silence or inaction as active agreement. This is unacceptable and a violation of fundamental consumer rights and protections.

The proposed opt-out model for joint account data sharing is a backwards step that substantially increases risks for people subject to forms of financial and domestic abuse. The energy sector and the community more broadly increasingly recognise the role essential service providers can play in enabling (and therefore mitigating) financial abuse, elder abuse and domestic and family abuse. Energy services are often used by perpetrators of abuse to curtail victims' financial independence and agency. They can also be used as vehicles for surveillance and the deprivation of victims' freedom and ability to escape abuse and re-establish themselves. The energy sector are re-evaluating systems and practices at all levels to identify processes that can enable abuse, and seeking to address them.

PIAC supports the FRLC submission to this process, in particularly the analysis of the increased risks an opt-out model introduces for victims of financial and domestic abuse. We note extensive work done by the Consumer Policy Research Centre (CPRC) throughout this process and their strong recommendations for the retention of opt-in models for data sharing throughout the CDR architecture. PIAC strongly recommends against any implementation of an opt-out model for joint account data sharing.

Continued engagement

PIAC would welcome the opportunity to meet with Treasury and other stakeholders to discuss these issues in more depth.