



PO Box 4136
East Richmond VIC 3121
T 131 806
F 1300 661 086
W redenergy.com.au

PO Box 4136
East Richmond VIC 3121
T 1300 115 866
F 1300 136 891
W lumoenergy.com.au



27 November 2020

Dr Kerry Schott
Independent Chair
Energy Security Board

Submitted electronically: info@esb.org.au

Dear Dr Schott,

Re: Consultation paper - Energy Security Board data strategy

Red Energy and Lumo Energy (Red and Lumo) welcome the opportunity to make this submission to the Energy Security Board's (ESB's) consultation paper on a data strategy for the Australian energy sector.

We see considerable benefits in reassessing the regulatory framework for energy and support the intent of the data strategy, in addition to some of the specific recommendations. For example, data access can lead to improved policy outcomes if implemented effectively and efficiently. It allows for more targeted and proportionate responses based on the nature and extent of problems, rather than assertions or anecdotal evidence.

Similarly, more efficient processes by regulators and policymakers to collect, use and share data can reduce costs borne by consumers through lower regulatory compliance costs. Recommendation 2, for example, provides an opportunity for Energy Ministers to agree on a single and simplified mechanism for collecting retail market data - through the ACCC, AER or AEMC, for example - and reduce the need for state based regulators to duplicate their analysis. We welcome the ESB's recognition of the administrative burden associated with data collection and recommend that it remains mindful of its importance as it refines the strategy.

However, we see some potential risks in a 'paradigm shift' in energy policy that moves from "one which prohibits disclosure by default, to one which authorises controlled disclosure for approved purposes where safeguards are in place".¹ The majority of the current restrictions on the use and sharing of data reflect previous decisions and the precise roles and responsibilities of the respective regulatory agencies. The ESB must proceed carefully if it chooses to unwind these controls. The consultation paper refers to digitalisation as a driver of the reassessment of the current framework. While we agree that technological change is increasing the volume of energy data, it does not change the fundamental need to ensure that private, commercially sensitive and proprietary information is not misused.

¹ Energy Security Board (2020), *Data Strategy Consultation Paper*, page 44

Our views on the importance of appropriate controls on energy data reflect our position as a commercial business in a competitive environment who is subject to various reporting and other obligations and whose operations are influenced by policy decisions. However, we are also guided by our customers' expectations of how potentially sensitive data is collected and used, including by regulators and policymakers. We are very mindful of community expectations and our regulatory responsibilities with respect to personal information and usage data.

The Galexia and King & Wood Mallesons report for the ESB describes the current public interest for the sharing of data as 'unworkable' and considers the broader framework to be overly conservative with respect to the collection and sharing of data.² While there may be scope for reform, we think there is a case for maintaining a strict and risk averse approach that reflects consumer preferences and protects commercially sensitive information.

Specific risks

Consumer preferences

One of the main issues the ESB will need to consider is how data access and usage will impact on the privacy and safety of energy consumers, and their perceptions of whether controls are adequate. This is in the context of the paper suggesting that data access should extend beyond energy regulatory entities to 'prescribed agencies' and 'trusted bodies'.

The consultation paper discusses numerous use cases for energy data and makes specific recommendations about access to datasets. For example, figure 3 identifies consumer ID, individual tariff, billing history, hardship history, subsidies and health impacts as 'priority gaps and/or access constraints'. Furthermore, recommendation 6 refers to high level analysis of 'protected meter data', recommendation 8 relates to consumer surveys and Bill Benchmarking, and recommendation 9 seeks 'improved data and metrics on vulnerable consumers'.

The ESB will be aware the ACCC is considering the sensitivity of different energy datasets - including those mentioned above - as it develops energy-specific Rules under the Consumer Data Right. It also suggested that some particularly sensitive datasets that relate to vulnerability, such as concession or life support status, could be subject to additional controls.

In our view, the sensitivity of many energy datasets - and how those sensitivities differ across different consumer segments - remains a live issue, irrespective of whether data is used for commercial or policy reasons. Even meter data is sensitive for many energy consumers. It provides information about usage at a particular location which allows third parties to understand behavioural patterns, appliance use, and extended absences from the premises. This could lead to a range of outcomes, such as risks to personal safety or to property (including in the case of a consumer who is experiencing family violence), or to less significant issues such as unsolicited marketing and other communications to the household. Consumers will want to

² King & Wood Mallesons and Galexia (2020), *ESB Data Strategy, Preliminary legal report*

be reassured that sensitive information is protected in some way (e.g. through aggregation and/or anonymisation).

Furthermore, there is the issue of informed consent, which is a fundamental concept in energy regulation and also under the Consumer Data Right, and integral to consumer trust. Consumers should understand the potential uses of the data they create and provide to retailers, including where that data is available to non-regulatory agencies and used for policy and research purposes. This is also important for retailers who are often the custodians of sensitive data and bear reputational risk if it is used inappropriately or for reasons that a consumer does not understand or was not aware.

The ESB is clearly aware of these sensitivities but it is important context as the ESB further develops the data strategy. It must account for consumers' preferences and ensure they trust the framework and understand the rationale for any changes to current arrangements.

Controls over data access and use

A related point is the nature of the legislative controls that apply when energy data is accessed and/or shared. Access to consumer data and to commercially sensitive or proprietary information should only be necessary to assist with the exercise of legislative functions, reflecting prescribed roles and responsibilities. Therefore, we see some potential risks in expanding the type of information collected but also in the type of entities that the ESB suggests should have access to it. This includes non-regulatory bodies such as the CSIRO, ARENA, Australian Bureau of Statistics, Energy Consumers Australia, 'research facilities' and 'approved external analysts'.³ It is entirely appropriate that these entities' access to energy data is restricted in some ways because they do not have the same clearly defined and specific functions in the energy sector, or the same governance arrangements or accountabilities as bodies such as the AER, ACCC, AEMC, and AEMO. These limitations are clearly articulated in national energy laws.

Relaxation of existing controls potentially increases the risk of data breaches but also of the inappropriate data use. This could range from relatively trivial matters such as unsolicited contact by researchers. More significantly, it could lead to the release of commercially sensitive information to competitors or the broader market, or in more extreme instances, to market interventions that could undermine innovation or crowd out commercial solutions to emerging challenges that competitive businesses could otherwise deliver more efficiently. This could arise under recommendations 3 and 10 (collection, sharing and analysis of commercial contracts), recommendation 6 (meter data), and recommendations 31 and 32 (data access for 'defined purposes, and specifically public-good research').

This illustrates the importance of recommendations 18 and 19, which relate to the overarching governance arrangements for data access and sharing.

³ Energy Security Board (2020), op. cit., page 58

Impact of regulation

A further risk of the strategy is the potential increase in compliance and administrative costs for energy market participants and the subsequent impact on the prices that end consumers face. Additional reporting creates additional regulatory compliance costs for businesses and it may not always be the case that the benefits outweigh those costs. As mentioned above, the ESB should consider these costs relative to the expected benefits as it progresses specific recommendations and also ensure that the future regulatory framework requires the cost-benefit analysis of any proposals to collect additional data. This would also capture other impacts and unintended consequences of additional reporting.

This is particularly relevant for some of the ESB's recommendations about greater transparency of the wholesale and retail market (including information about retail margins, contracts with commercial and industrial customers, and OTC contracts). While the ACCC has made previous observations on these matters, subsequently they have been the focus of numerous recent regulatory initiatives so it is worth reassessing whether the need for these measures still exists.

For example, it is difficult for regulators to collect and then compare margins across retailers in the absence of a consistent approach to their calculation. However, it is not reasonable to create regulatory accounts—similar to those that apply to regulated monopolies—or require the reporting of specific metrics by competitive market participants who differ significantly in the business structure and models. The consultation paper refers to Energy Consumers Australia's suggestion to create standardised regular retail cost and revenue reporting, including reporting of EBITDA and for this information to be widely shared and published. This would generate additional costs for retailers but with little benefit for consumers.

In addition to being commercially sensitive, retail margins are a second order issue in a well functioning competitive market. High margins would only persist if there are obstacles to competition and new entry—through regulation, for example—and this should be the focus of policy responses. Regulatory actions focused on margins, rather than on factors that inhibit competition, could distort the competitive market to the long term detriment of consumers.

Therefore, regulators should focus on encouraging competition and innovation, and encourage consumers to compare offers and then switch between providers. This has been the objective of numerous regulatory initiatives in recent years, such as requiring retailers to use the Default Market Offer (DMO) as a reference in their advertising and customer communications, and the use of Basic Plan Information Documents under the AER's Retail Pricing Information Guidelines.

Another example is the ESB's suggestion to create a system for all small consumers that allows for "statistically robust average prices and bills, distributional impacts and many other aggregate statistics that could be reported in an automated fashion on a near-live dashboard".⁴ This would require careful consideration of implementation and compliance costs, and of data security. It

⁴ Ibid., page 84

should also avoid any measures that are inconsistent with what industry is implementing under the Consumer Data Right.

Recommendations for next stage

In line with these concerns, we recommend the ESB keep the following factors in mind as it finalises its data strategy.

The data strategy must incorporate genuine consumer engagement so that energy consumers understand what data is being collected, how it is being used and by whom. This will maintain trust in the integrity of the regulatory framework and in retailers. We note the recommendations of the Consumer Policy Research Centre in its submission to the ACCC's consultation on energy rules for the CDR that the framework should reflect "consumer research and user testing regarding consumer attitudes to sensitive data sets".⁵ We think this equally applicable for consumer data that is collected for regulatory and policy reasons and then available to non-regulatory agencies. There is also an important role for governments and policymakers to clearly articulate the case for any changes to current arrangements.

Secondly, access to data—either when it is collected directly and obtained from another regulatory or policy agency—should link directly to legislative functions and responsibilities. For example, any new information that the AER might collect should be treated consistently with its existing legislative powers. It should only use information obtained in relation to its retail and wholesale market monitoring functions for the specific purposes of this function rather than to redistribute this information to the AEMC, AEMO or to consumer groups. Furthermore, the AER's power to compel people to give evidence should be limited to enforcement of a specific National Electricity Rule and should not be used for any other purpose.

The ESB should exercise caution in extending data access, particularly to 'prescribed agencies' through recommendations 20 and 32. It should only occur when it is necessary for those agencies to perform legislative functions, where appropriate controls exist, and where the proposal to extend access has been comprehensively assessed.

Any data sharing should be supported by clear statements, such as a Memorandum of Understanding, that provide certainty and clarity to stakeholders about why and how private and commercially sensitive information is being collected, used and protected, and what recourse exists in the event of a data breach. The forthcoming Data Availability and Transparency Bill provides a framework for this as it will create a "rigorously safe, streamlined, transparent and accountable" framework for data sharing between government agencies.⁶

⁵ Consumer Policy Research Centre (2020), *Submission to Consumer Data Right Energy Rules Framework Consultation Paper*

⁶ Commonwealth of Australia, Department of the Prime Minister and Cabinet (2020), *Consultation Paper, Data Availability and Transparency Bill 2020 Exposure Draft*

The ESB should rely on established governance frameworks for considering legislative and rule changes that relate to data. This will ensure appropriate public consultation and cost-benefit analysis of viable options to address specific problems, rather than simply to facilitate data access. We would be greatly concerned if some of the ESB's recommendations, such as the creation of a Data Leadership and Coordination group and Data Users Group bypassed these established mechanisms (e.g. by acting as an alternative to public consultation and options analysis by the AEMC).

Finally, regulators should explicitly consider the commercial and market implications of sharing information with non-regulatory agencies as part of any impact assessment. They should avoid sharing commercially sensitive or proprietary information as this could undermine incentives for commercial entities to offer innovative and efficient solutions to emerging challenges that also reflect consumer preferences. This is one of the risks associated with recommendations 6 and 32, for example, particularly if there is a broad view of the meaning of public good research.

Alignment with current regulatory initiatives

We welcome the ESB's recognition of the numerous initiatives that are already underway and which are directly relevant to its data strategy. As the ESB will be aware, it is possible—and in some instances, highly likely—that many of these existing work streams will achieve the same objectives that some of the specific recommendations seek to achieve in the consultation paper.

This also illustrates the current framework does not require significant change as it already caters for emerging issues and challenges to be identified and then resolved through established processes. This includes regular reviews of market outcomes by the AEMC, AER and other entities, and the ability for any interested party to propose a rule change.

Therefore, we support recommendation 22—to align the strategy with the CDR—but also recommend that the ESB align any future recommendations to Energy Ministers with these current work streams. This will ensure they are implemented in an efficient and effective manner and avoid duplication or inconsistency.

The most relevant work streams include:

- *Implementation of the CDR* - this includes its expansion as the Treasury designates additional energy data sets but also through amendments to the overarching legislation and rules, through the *Inquiry into Future Directions for the Consumer Data Right*, led by Mr Scott Farrell.
- *Forthcoming Data Availability and Transparency Bill 2020* - this will establish consistent accountabilities and safeguards so public sector data is only shared with accredited users when it is appropriate and safe to do so.

- *Review of the Privacy Act* - ESB should take account of and align with any changes resulting from the Attorney-General's Department's current review of the Privacy Act.
- *Reviews of network planning* - AEMC's review of three rule change requests to better facilitate the efficient integration of distributed energy resources (DER) to the electricity distribution network, and the AER's review of how networks should account for DER in their planning. We expect to see numerous measures out of these work streams that place obligations on networks to be more transparent in how they assess and procure services to support network operations and recover those costs.

This could directly address many of the ESB's recommendations about the visibility of the low voltage network and DER. For example, the AER would have a role to assess whether networks have assessed all feasible options for alleviating constraints, including through contracts with owners of DER through open and competitive market arrangements.

- *AER's Hardship Guideline* - this includes oversight and reporting obligations. This provides a source of information about 'vulnerable' consumers and a mechanism for change if the current arrangements are considered to be inadequate.
- *Regulated pricing* - AER's ongoing analysis of the impact of the DMO on competitive market outcomes and the forthcoming review of the DMO Code.
- *AEMC's review of competitive metering* - as noted in recommendation 15.

About Red and Lumo

We are 100% Australian owned subsidiaries of Snowy Hydro Limited. Collectively, we retail gas and electricity in Victoria, South Australia, New South Wales, Queensland and the ACT to over 1.1 million customers.

Red and Lumo thank the ESB for the opportunity to comment on the consultation paper and we would welcome the ability to discuss the submission. Please call Geoff Hargreaves, Regulatory Manager on 0438 671 750 to organise this discussion or to discuss aspects of this submission.

Yours sincerely

A handwritten signature in black ink, appearing to read "Ramy Soussou".

Ramy Soussou
General Manager, Regulatory Affairs & Stakeholder Relations
Red Energy Pty Ltd
Lumo Energy (Australia) Pty Ltd