

Australian Third Party Access Regime and Consumer data Right

IPAG

26 June 2019

Third Party Infrastructure Access Regime

Establishes a legal regime to facilitate third party access to certain services provided by significant infrastructure facilities.

Aims to promote *the economically efficient operation of, use of and investment in* infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets.

Economy wide, established under the Competition and Consumer Act 2010.

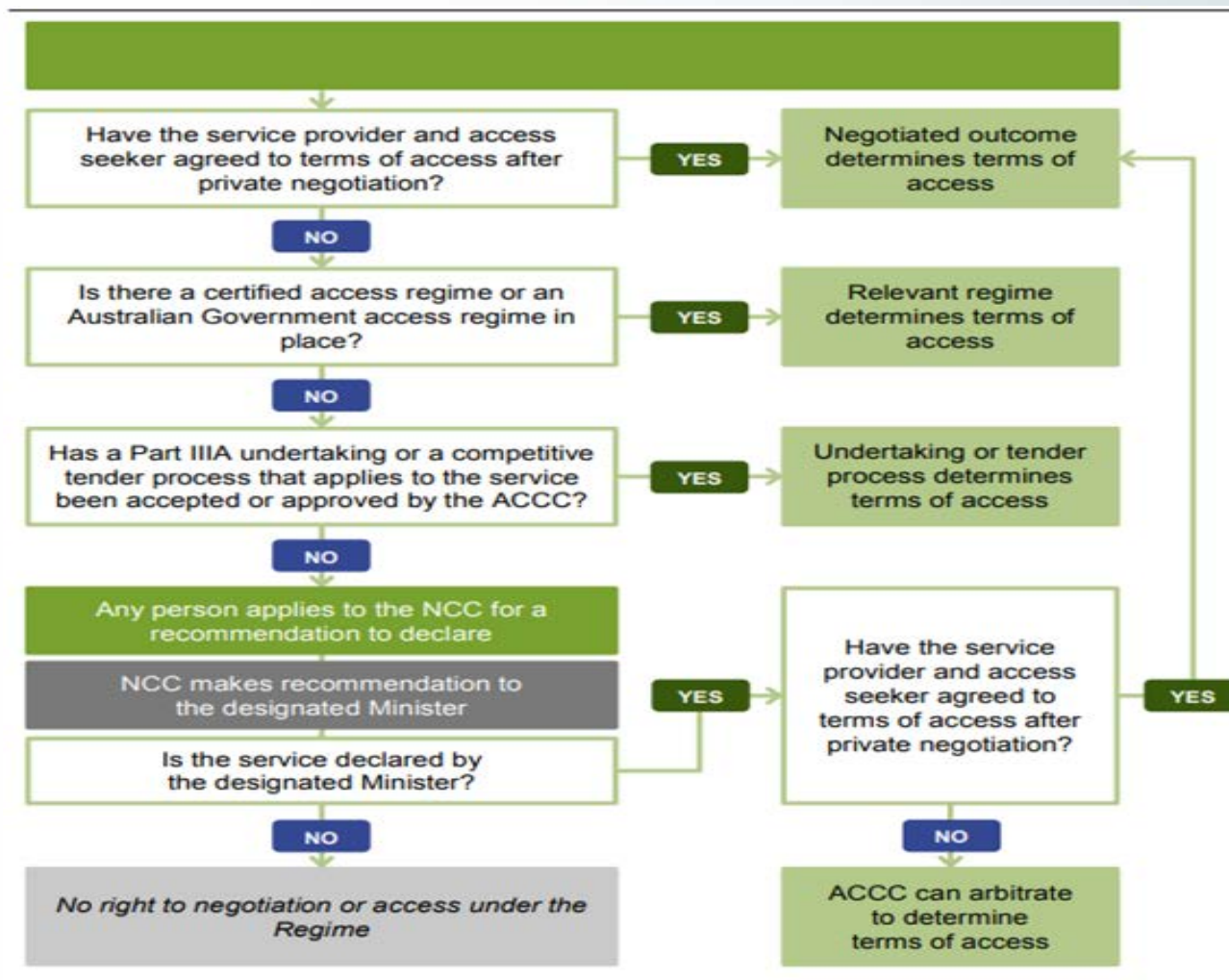
Multiple mechanisms through which access can be sought to infrastructure services:

- declaration and arbitration
- access undertakings
- certification of state access regimes.

Commercial negotiation is the preferred means to determine the prices and other terms and conditions of access to services provided by infrastructure facilities.

Does not include the supply of goods, the use of intellectual property or the use of a production process.

Pathways to access under the regime



Declaration Criteria

and

ACCC considerations

- (a) that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service (**criterion (a)**)
- (b) that it would be uneconomical for anyone to develop another facility to provide the service (**criterion (b)**)
- (c) that the facility is of national significance, having regard to:
 - (i) the size of the facility; or
 - (ii) the importance of the facility to constitutional trade or commerce; or
 - (iii) the importance of the facility to the national economy (**criterion (c)**)
- (d) [repealed]
- (e) that access to the service:
 - (i) is not already the subject of regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB)
 - (ii) is the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB), but the Council believes that since the Commonwealth Minister's decision was published, there have been substantial modifications of the access regime or of the relevant principles set out in the Competition Principles Agreement (**criterion (e)**)
- (f) that access (or increased access) to the service would not be contrary to the public interest (**criterion (f)**)

- (aa) the objects of Part IIIA (which include the efficient use of and investment in infrastructure and promoting effective competition in dependent markets)
- (a) the legitimate business interests of the provider, and the provider's investment in the facility
- (b) the public interest, including the public interest in having competition in markets
- (c) the interest of all persons who have rights to use the service
- (d) the direct costs of providing access to the service
- (e) the value to the provider of extensions (to a facility) whose cost is borne by someone else
- (ea) the value to the provider of interconnections to the facility whose cost is borne by someone else
- (f) the operational and technical requirements necessary for the safe and reliable operation of the facility
- (g) the economically efficient operation of the facility
- (h) the pricing principles specified in s 44ZZCA.

Has it worked?

The Productivity Commission found there has been limited use of the pathways.

Six declaration decisions have been made in favour of the applicant. Of these, three declaration decisions have now expired and one has been revoked.

The access undertakings that have been accepted by the ACCC were required by legislation (for example, bulk wheat exporters) or government agreement.

Nineteen state and territory access regimes have been certified since the regime was introduced. Some state and territory regimes remain uncertified, including most electricity regimes and all gas regimes.

There have been no applications for ACCC approval of a competitive tender process since the competitive tender provisions took effect in 2010.

The Australian Consumer Data Right

The Consumer Data Right (CDR) provides individuals and businesses with a right to efficiently and conveniently access specified data in relation to them held by businesses. The CDR authorises secure access to this data by trusted and accredited third parties. The CDR requires businesses to provide public access to information on specified products they have on offer. CDR is designed to give customers more control over their information

The Minister will designate each sector to which the CDR will apply, and the relevant data holders and data sets, in a "designation instrument".

ACCC will have the power to make rules to determine how the CDR functions. It published the draft rules for consultation (March 2019).

A **Data Standards Body** will develop technical standards on matters such as data format, transfer and security.

The ACCC's Rules

The ACCC's rules will establish the following:

- which consumers can take advantage of the CDR
- the data sets that are within scope
- the criteria an entity must satisfy to be an 'accredited data recipient'
- requirements for consumer consent
- requirements for authorisation and authentication
- the limits a consumer can place around the use of their data

Consent, Authorisation and Authentication

Three key concepts in the rules framework are 'consent', 'authorisation' and 'authentication':

'Consent' refers to the consumer consenting to the data recipient collecting and using the consumer's data. The consumer's express and informed consent will be required for each of the accredited data recipient collecting the data, and using the data.

'Authorisation' is used to refer to the consumer permitting the data holder to share data with the accredited data recipient.

'Authentication' is the process by which the data holder verifies the identity of the consumer directing the sharing of their data, and the identity of the accredited data recipient seeking to collect the consumer's data.

Who's who in the CDR

There will be three key players in the CDR for any given piece of data:

The **consumer**: this is the person or entity that has the right to request that their information is transferred from the data holder to the accredited data recipient.

The **data holder**: this is the original holder of the data that is to be transferred - e.g. the consumer's retailer.

The **accredited person / accredited data recipient**: an "accredited person" is a person who is licensed to receive data through the CDR system. Once they have received such data, they are an "accredited data recipient" and must follow strict privacy safeguards regarding the data.

Accreditation is key

To grant accreditation the Data Recipient Accreditor must be satisfied that the applicant:

- Is a fit and proper person to manage CDR data.
- Has taken the steps outlined in rules to protecting the CDR data from: misuse, interference and loss; and unauthorized access, modification and disclosure.
- Has internal dispute resolution procedures that meet the requirements in the Rules.
- Is a member of an External Dispute Resolution scheme recognised for the CDR.
- Has adequate insurance, or a comparable guarantee, in light of the risk of CDR consumers not being properly compensated for any loss that might reasonably be expected to arise from a breach of obligations.

Banking first, energy second

The CDR is to apply to the banking sector first and is more developed than other industries. Its timeframes are:

2019: big four banks required to make product data for credit and debit cards, deposit accounts and transaction accounts available.

pilot programme with the big four banks to test the performance, reliability and security of the Open Banking system.

applications for accreditation open.

2020: big four banks required to make product data, consumer data, account data and transaction data for mortgage accounts available.

other banks: make available product data, account data and transaction data for credit and debit cards, deposit accounts and transaction accounts

2021: other banks: make available product data, account data and transaction data for mortgage products, personal loan and other accounts

The energy sector is next

Consumers in the National Electricity Market currently have a right to authorise a third-party representative to access their electricity metering data,

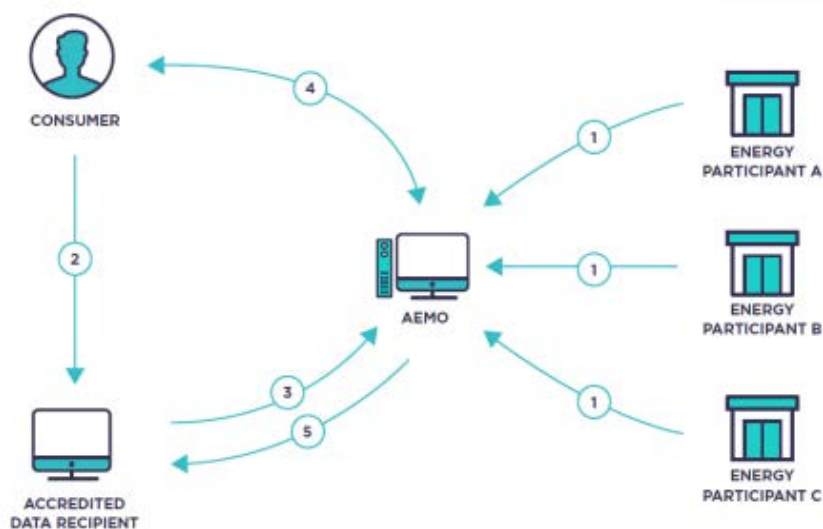
A HoustonKemp report for the Council of Australian Governments' Energy Council identified impediments:

- complex arrangements put in place by distributors and retailers for authorising third parties to access data, to manage privacy obligations;
- lack of uniformity about data access arrangements, including processes for fulfilling privacy obligations, data formats, and data provision arrangements; and
- the length of time from which a data request is made, and the data provided.

The CDR will commence in the energy sector in the first half of 2020. With the ACCC taking up the reins.

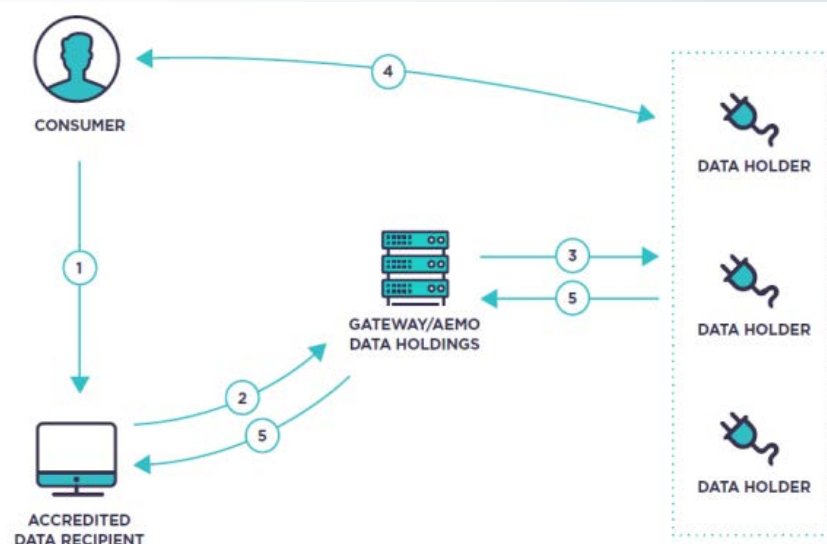
ACCC consulted on three models

The AEMO centralised model



1. All CDR data is provided to the Australian Energy Market Operator (AEMO) by energy participants. These transfers would occur under national energy legislation and not under the CDR regime
2. The consumer consents to an Accredited Data Recipient (ADR) obtaining their energy data
3. The ADR contacts AEMO seeking to access the consumer's data
4. The process of authentication and authorisation occurs in accordance with any requirements in the CDR energy rules
5. AEMO shares the consumer's data with the ADR

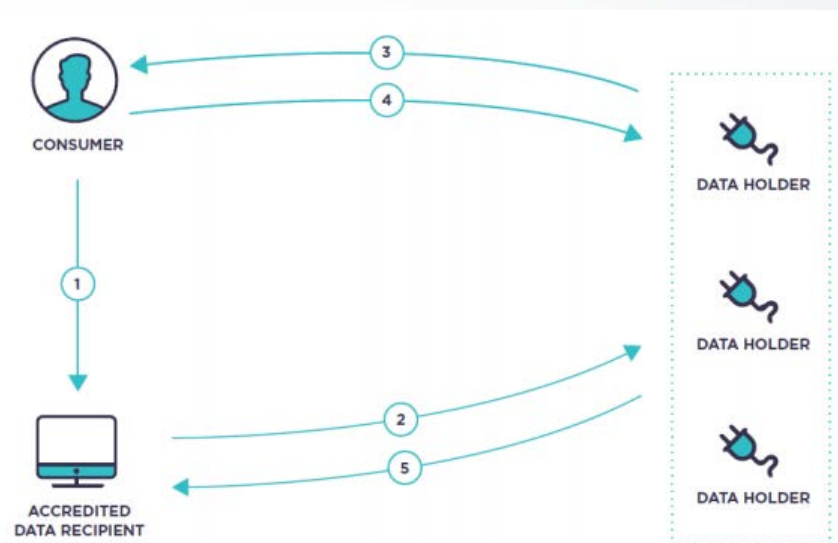
The Gateway model



1. The consumer consents to an Accredited Data Recipient (ADR) obtaining their data
2. The ADR contacts the Gateway, seeking to access the consumer's data
3. The Gateway identifies which data holder(s) holds the consumer's data and provides the transaction details to them
4. The process of authentication and authorisation occurs in accordance with any requirements in the CDR energy rules
5. The consumer's data is shared with the ADR via the Gateway

ACCC consulted on three models

The economy-wide CDR model



1. The consumer consents to an Accredited Data Recipient (ADR) obtaining their energy data
2. The ADR contacts the data holder(s), seeking to access the consumer's data
3. The data holder contacts the consumer to authenticate the consumer's identity in accordance with any requirements in the CDR energy rules
4. The consumer authorises the data holder to disclose their data, in accordance with any requirements in the CDR energy rules
5. The data holder(s) shares the consumer's data with the ADR

The energy sector preferred the Gateway model

The Gateway model 2 was the preferred option for most submitters; participants considered that it represented a 'mid-way' between the centralised and decentralised models.

Model 3 was supported by a few participants, this was in the context of an economy-wide CDR where participants were concerned that implementing a specific energy CDR would lessen consistency across sectors.

Model	Submission in favour
1	5
2	12
2 or 3	4
3	8
Alternate	1

What NZ firms had to say

Vector

Vector does not support the Australian Energy Market Operator (AEMO) centralised model (Model 1), which we believe will impose significant IT development and maintenance costs, and heavier regulatory burden on CDR participants (accredited data recipients (ADRs) and data holders) and consumers.

Importantly, a highly centralised approach will limit innovation that benefits consumers.

We support the 'decentralised' AEMO gateway model (Model 2) or the economy-wide model (Model 3), or variants of these models. These models will better enable innovation, facilitate the development of energy markets, and encourage greater consumer participation in these markets.

Meridian/Powershop

We consider option 1 untenable because it involves storing personal information out of the control of the entrusted holder and is likely to have significantly higher cost and complexity without any countervailing benefits. Of the remaining options our strong preference is for option 2.