



AUSTRALIAN  
SENATE

Senate Standing Committee for the  
Scrutiny of Delegated Legislation  
Parliament House, Canberra ACT 2600  
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14 April 2021

The Hon Josh Frydenberg MP  
Treasurer  
Parliament House  
CANBERRA ACT 2600

Via email: [tsrdlos@treasury.gov.au](mailto:tsrdlos@treasury.gov.au)

CC: [committeescrutiny@treasury.gov.au](mailto:committeescrutiny@treasury.gov.au); [chris.reside@treasury.gov.au](mailto:chris.reside@treasury.gov.au)

Dear Treasurer,

### **Competition and Consumer Amendment (AER Functions) Regulations 2020 [F2020L01606]**

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to these matters.

#### ***Conferral of discretionary powers***

Senate standing order 23(3)(c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers. This includes where discretionary powers and functions are delegated under the instrument.

The instrument broadens the functions of the Australian Energy Regulator (AER) as a designated data holder under the Consumer Data Right regime to include "such functions as are necessary to enable the AER to operate as a data holder of CDR data in accordance with the CDR provisions (as those provisions apply as described in subsection 56AR(4) of the *Competition and Consumer Act 2010*)".

The explanatory statement states that the instrument makes a minor, technical amendment to the *Competition and Consumer Regulations 2010* to give effect to the AER's role as a data holder by virtue of the Energy Designation, however, it does not specify what functions or powers are conferred, including whether any rights and obligations may be affected by conferring additional functions or powers on the AER.

The committee considers that explanatory statements to instruments that confer discretionary powers should address the purpose and scope of the discretion, why it is necessary, and explain how those powers and functions will be exercised. Further, the explanatory statement should set out the factors which must be considered in exercising those powers and functions. The committee also expects the explanatory statement to explain the nature and source of any relevant limitations and safeguards, including whether they are contained in law or policy.

In light of the above, the committee requests your advice as to:

- the specific rights and obligations that are affected by the designation of the Australian Energy Regulator to operate as a data holder of CDR data in accordance with the CDR provisions; and
- whether any safeguards or limitations apply to the exercise of these powers or functions, and whether these safeguards are contained in law or policy.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. Noting that the 15th sitting day after the instrument was tabled in the Senate is 11 May 2021, the committee has resolved to give a notice of a motion to disallow the instrument on that day as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **28 April 2021**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your assistance with this matter.

Yours sincerely,

**Senator the Hon Concetta Fierravanti-Wells**  
**Chair**  
**Senate Standing Committee for the Scrutiny of Delegated Legislation**



**THE HON JOSH FRYDENBERG MP**  
**TREASURER**

Ref: MS21-000895

Senator the Hon Concetta Fierravanti-Wells  
Chair  
Senate Standing Committee for the Scrutiny of Delegated Legislation  
Parliament House  
CANBERRA ACT 2600

Dear Senator Fierravanti-Wells

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation regarding the *Competition and Consumer Amendment (AER Functions) Regulations 2020* (amending Regulations).

In that letter, the Committee sought my advice as to:

- The specific rights and obligations that are affected by the designation of the Australian Energy Regulator (AER) to operate as a data holder of CDR data in accordance with the CDR provisions; and
- Whether any safeguards or limitations apply to the exercise of these powers or functions, and whether these safeguards are contained in law or policy.

*Rights and obligations of the AER as a data holder*

Under the *Competition and Consumer Act 2010* (Act), the provisions of Part IVD of the Act and the consumer data rules and regulations (CDR provisions) apply to Commonwealth entities that hold information covered by a designation made under the Act (ss. 56AJ and 56AR). The *Consumer Data Right (Energy Sector) Designation 2020* (Energy Designation) designated the AER as a data holder for information it collects about retail products offered by energy retailers. This means that the rights, functions and obligations applicable to data holders under the CDR provisions apply to the AER by virtue of it being specified in the Energy Designation.

The detailed functions of the AER under the CDR regime will be set out in the consumer data rules, however, there was a delay between the AER being designated as a data holder and the start of the consumer data rules applying to it. There was a concern that this delay might mean that the AER would not be able to undertake any actions relevant to its role as a data holder until after the rules had started to apply.

The amendment ensures there is no doubt about the AER's ability to undertake all functions necessitated by its role as a data holder under the CDR regime. This includes any preparatory work (for example, developing Application Program Interfaces (APIs) to enable access to the CDR data it



holds) it would need to undertake in the lead up to the start of the detailed obligations under the consumer data rules applying to it.

The effect of the amending Regulations is not to extend the AER's functions as a data holder under the CDR regime, as those functions were applied broadly to the AER when it was designated as a data holder.

*Safeguards and limitations on AER's functions*

The CDR provisions apply in full to the AER, subject to any modification in the regulations. As a result, all of the safeguards and limitations that apply to data holders under the CDR provisions apply to the AER.

Thank you for bringing the Committee's concerns to my attention.

Yours sincerely

THE HON JOSH FRYDENBERG MP

28 / 4 /2021



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13 May 2021

The Hon Josh Frydenberg MP  
Treasurer  
Parliament House  
CANBERRA ACT 2600

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CC: [committeescrutiny@treasury.gov.au](mailto:committeescrutiny@treasury.gov.au); [Chris.Reside@treasury.gov.au](mailto:Chris.Reside@treasury.gov.au)

Dear Treasurer,

**Competition and Consumer Amendment (AER Functions) Regulations 2020 [F2020L01606]**

Thank you for your response of 28 April 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 12 May 2021. On the basis of your advice that Part IVD of the *Competition and Consumer Act 2010* includes obligations that will apply to the Australian Energy Regulator, and the more detailed rules that will apply to the Australian Energy Regulator have not yet been made, the committee has concluded its examination of the instrument.

In light of this, the committee has resolved to withdraw the disallowance notice in place on the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

**Senator the Hon Concetta Fierravanti-Wells**  
**Chair**  
**Senate Standing Committee for the Scrutiny of Delegated Legislation**