AUSTRALIAN ENERGY COUNCIL

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Submitted via email: data@treasury.gov.au

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Consumer Data Right Rules Amendments (Version 3)

The Australian Energy Council ('AEC') welcomes the opportunity to make a submission to Treasury's consultation on the *Consumer Data Right Rules Amendments (Version 3).*

The Energy Council is the industry body representing 20 electricity and downstream natural gas businesses operating in the competitive wholesale and retail energy markets. These businesses collectively generate the overwhelming majority of electricity in Australia, sell gas and electricity to over ten million homes and businesses, and are major investors in renewable energy generation.

The AEC has been an active stakeholder in the development of the Consumer Data Right since its inception as an idea back in November 2017. Since then, and especially over the past year, the CDR has progressed at a rapid rate. Multiple and disperse workstreams have emerged to progress: the CDR's gradual rollout across sectors (first banking, then energy, and now telecommunications); the expansion of the CDR's functionality; and the behind-the-scenes technical standards that enable the CDR to work smoothly.

The Version 3 amendments fall within the second workstream, being how to expand the CDR's functionality. For sectors like energy, which are still preparing for the CDR's commencement, questions of expansion can appear premature, given the sector-specific rules, technical standards and infrastructure that will enable these added functionalities are not yet known. This limitation is presumably why questions of expansion are usually considered within a banking context, where there is greater familiarity with the CDR's capabilities.

For these reasons, this submission mainly puts forward some questions for Treasury to contemplate with respect to how these expansions might work.

Sponsorship Model

Earlier this year, the AEC submitted to Treasury's Future Directions Inquiry that a sponsorship model is preferable to tiered accreditation.[1] This assertion was based on the premise that the sponsor would be responsible for the management of risk (i.e. ensuring the third party/affiliate complies with obligations to remain accredited). By placing responsibility on the sponsor, it should incentivise the affiliate to develop proper procedures and protocols to improve their ability to obtain a sponsor.

Bearing this in mind, the AEC supports in principle Treasury's proposed sponsorship model, which appears to appropriately place responsibility on the sponsor to perform due diligence when selecting an affiliate and provide that affiliate with necessary training about their obligations. There are nonetheless certain areas that Treasury should make clearer:

[1] Australian Energy Council, Submission to 'Inquiry into Future Directions for the Consumer Data Right Discussion Papers', 9 March 2021, https://www.energycouncil.com.au/media/ffjeahxq/20210309-aec-submission-to-treasury-future-directions-discussion-paper.pdf.

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- What the chain of accountability will be and who is liable if the regulations are breached. If the sponsor is not responsible for the affiliate's use of CDR data, this presumably means the sponsor is not responsible for breaches either. This appears to create a contradiction given the sponsor is initially responsible for ensuring the affiliate is CDR compliant during the onboarding process and therefore should have some accountability if the affiliate becomes non-CDR compliant. The AEC retains the view that making the sponsor responsible for the reasonable or prudent management of risk should produce better customer outcomes.
- The processes that will be in place if a customer wishes to make a complaint. Will they complain to the affiliate or sponsor and, if their complaint is unanswered, who is the appropriate authority to escalate it to? Are sponsored parties required to have some form of external dispute mechanism in place either of their own or via referral?
- The identity of the sponsor. Any customer using a third-party service should be able to easily determine the identity of the sponsor of that third-party. Ideally this information should be accessible on the dashboard.
- What measures Treasury will put in place to ensure customers clearly understand what they are consenting to. The constitution of the sponsorship model, and its related elements (CDR representatives and OSPs), is complex and technical, so there will need to be explanatory material written in plain English to improve the ability of customers to understand what their data can be used for, liability arrangements, and the complaints process.

Trusted Advisors

The AEC acknowledges the impetus behind enabling customers to provide their data to trusted advisors. In previous consultations, the AEC has supported this proposal on the proviso that the ADR does not have a commercial incentive to encourage the customer to nominate a trusted advisor, and that the trusted advisor is bound by the CDR rules.

The AEC supports what appears to be partial protections against commercial incentives, not allowing ADRs to make the nomination of a trusted advisor a condition of entry for a customer. However, we remain concerned about the proposal to allow trusted advisors to be subject to their existing fiduciary obligations rather than the CDR regime. Treasury should explore further:

- How an ADR will determine if the nominated trusted advisor is authorised. What 'reasonable steps' must an ADR take to confirm the data recipient is authorised?
- The chain of accountability/liability if there is either a data breach or the customer has a complaint (do they complain to the ADR or the trusted advisor?)
- Whether relying on fiduciary obligations is sufficient, especially in light of some of the findings at the recent Financial Services Royal Commission. There may be benefit in Treasury engaging a consultant to compare the similarities and differences between the CDR regime and fiduciary obligations to identify gaps and assess how significant these gaps are in terms of customer protection.

Joint Accounts

The AEC's submission to Treasury's Design Papers raised concern about the possibility of the current rules for joint accounts, as used in banking, applying on a cross-sectoral basis. To highlight the reasons behind this concern, the AEC surveyed its members, which cumulatively serve the majority of customers. The survey found that energy data holders do not use joint account holder arrangements and imposing the banking rules onto the energy sector would result in sub-optimal outcomes.

We are pleased to see that Treasury has taken this feedback on board in its acknowledgement that joint accounts are not used across all sectors. More importantly, the Explanatory Statement appears to provide an assurance that alternative arrangements will be used for sectors without joint accounts:

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'where the concept of a joint account is not relevant to a sector, the joint account rules would accordingly not be relevant'.[2] The AEC looks forward to working with Treasury to develop these alternative arrangements for the energy sector, which as alluded to in the Explanatory Statement, will likely be the existing secondary user rules.

Notwithstanding the above, the AEC remains principally opposed to an opt-out data sharing model, or "pre-approval" option as it is now called, for joint accounts. This fundamentally goes against the principle of customer consent that underpins the CDR. It is concerning that some of the terminology used to justify this option, such as reducing "friction" or minimising "inconvenience", appears to imply that obtaining customer consent is a burden rather than an important customer protection.

While the requirements for notifying customers about the pre-approval setting are welcome, it is doubtful how much attention customers will give to these and, in any event, it cannot justify why pre-approval should be the automatic default setting. It would appear to make more sense to have the co-approval option as the default setting – this enshrines customer consent as a fundamental principle and better enables customer choice. Pre-approval appears to be based on the view that customers will not choose, so someone else needs to choose for them.

Any questions about this submission should be addressed to Rhys Thomas, by email to Rhys.Thomas@energycouncil.com.au or by telephone on (03) 9205 3111.

Yours sincerely,

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[2] Treasury, 'Consumer Data Right Rules Amendments (Version 3): Exposure Draft Explanatory Materials', page 18, https://treasury.gov.au/sites/default/files/2021-06/187223-cdr_rules_amendments_em.pdf.

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