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### **Consumer Data Right – Exposure Draft Legislation to Enable Action Initiation**

The Australian Energy Council ('AEC') welcomes the opportunity to make a submission to Treasury's consultation on its *Exposure Draft Legislation to Enable Action Initiation* ('Exposure Draft').

The Australian Energy Council is the peak industry body for electricity and downstream natural gas businesses operating in the competitive wholesale and retail energy markets. AEC members generate and sell energy to over 10 million homes and businesses and are major investors in renewable energy generation. The AEC supports reaching net-zero by 2050 as well as a 55 per cent emissions reduction target by 2035 and is committed to delivering the energy transition for the benefit of consumers.

Expanding the Consumer Data Right ('CDR') to incorporate action initiation has been flagged since its inception. It is seen as an important part of the CDR's overall functionality and various use cases, from opening and closing accounts to automated life admin, have been presented as possible through action initiation. These possibilities are exciting but are also not without risk. Giving third parties the power to make decisions on behalf of customers requires two core protections:

1. Protections to ensure a customer and their data is secure and privacy maintained.
2. Protections to ensure third parties act in the best interests of the customer.

There has been cautious messaging in the past, via the Future Directions Inquiry, and in the present, via the CDR Statutory Review, that CDR must reach a certain level of maturity before action initiation commences. The Exposure Draft's proposal to unroll action initiation via ministerial designation does, in theory, create a workable process for action designation based on each designated sector's maturity and readiness for an action type.

In practice, however, the AEC considers it likely that there will be significant stakeholder pressure placed on Treasury to begin designating actions immediately regardless of system maturity. This is not ideal and the AEC is of the view that the CDR framework, especially in non-banking sectors, is still too nascent to evaluate whether action types can occur safely and securely. The energy sector is yet to commence and even then, it will take several months, if not years, to see any meaningful uptake and interaction from customers.

The ability to evaluate is exacerbated by the short consultation turnaround to this major policy expansion. Energy stakeholders are particularly impacted as resources are constrained by preparation for the CDR's commencement into their sector on 15 November.

### **Timing of consultation and maximizing stakeholder input**

Previous consultations on economy-wide legislation have faced challenges in getting participation from non-banking stakeholders. These challenges are partly self-caused, with stakeholders prioritizing other policy developments, but also attributable to the inaccessibility of the consultation. It is hard for non-banking stakeholders to consider how these changes affect their businesses when the rationale and examples tend to be banking focused.

For energy, the timing of this consultation period is particularly challenging. While the AEC understands that no consultation period will be ideal for all stakeholders, the ability of energy stakeholders to respond meaningfully to this consultation is heavily restricted by their preparation for the CDR's commencement in the energy sector on 15 November. Not only is this preparation resource intensive, it also means the sector is unable to assess how the rules and standards work in practice, and how they might interact with action initiation.

With Treasury stating their intent to have the final bill introduced into Parliament by the end of the year,<sup>1</sup> this does not leave any opportunity for stakeholders to contribute beyond this consultation phase. It is helpful that there will be targeted consultation phases for when an action is designated, though this should not be used to defer consideration of the concerns raised to the Exposure Draft.

### **Maturity of Consumer Data Right framework**

The Future Directions Inquiry that recommended action initiation was qualified by reference to first building customer trust. The Final Report stated that 'the success of any potential action initiation regime is heavily linked to customer trust' and that 'consumer trust in the CDR will be closely linked to the successful commencement and operation of data sharing'. It suggests a staggered approach to action initiation commencement to allow consumer trust to develop, which has been adopted here.

The AEC would support a staggered approach if the staggering is based on evidence of customer trust. However, we are concerned that there will be stakeholder pressure to accelerate action designation prior to clear evidence of consumer trust in the CDR. The rollout of the initial legislation before the CDR starting in energy is arguably evidence of this stakeholder pressure.

Concerns about the maturity of the CDR framework were reiterated in the recent CDR Statutory Review. Like the Future Directions Inquiry, the Statutory Review saw action initiation as integral to the longevity of the CDR, but equally cautioned that the CDR's rapid sectoral expansion 'has not allowed enough time for the system to mature and capitalise on the lessons learnt' and there needs to be 'greater visibility of success measures and system objectives [to] provide increased confidence and assurance to participants'.

The AEC would support then the establishment of some success measures to be satisfied before a new action type can be declared. This could include, for example, a threshold for customer uptake in each sector. Such a threshold would arguably incentivise CDR participants, including government, to promote and encourage customers to use it.

### **Sectoral assessment process**

The ability of the minister to declare which data holders an action type applies to recognises that each sector is at different stages of their CDR journey and has different sector-specific regulatory requirements.

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<sup>1</sup> This intent was said at the Consumer Data Right Framework Design and Strategy Forum on 11 October.

It will be important that these factors are accounted for, though it might also create some challenges along the way with respect to Treasury's economy-wide intent.

For energy, the matter of customer consent is a particular sticking point that is likely to emerge in the sectoral assessment consultation process. Explicit Informed Consent (EIC) is a substantive and onerous requirement in the energy sector that fundamentally guides customer interaction. Third parties are not allowed to give EIC on behalf of customers; the customer must communicate EIC directly to the retailer. The Future Directions Inquiry noted this obstacle and said 'core changes to the EIC requirements are needed to enable streamlined switching through the CDR channel'.

These core changes are presumably allowing third parties to provide a consumer's EIC. Such changes are going to become highly problematic in the context of third parties also pushing for the streamlining of consent processes (which in the AEC's view, should be described as lowering customer protections, not minimising friction).

The AEC considers then, at minimum, that the minister must be required to consider how an action type under the CDR aligns with sector-specific regulation. In the event of conflict, the higher level of customer protection should prevail.

### **Best interests of customers**

The AEC has regularly repeated the view of the ACCC and AEMC that the actions of third parties should be regulated through a best interest clause, specifically that they must act in the best interests of the customer.<sup>2</sup> The Future Directions Inquiry heard this view and opted instead for a softer obligation to act "efficiently, honestly and fairly", which Treasury has incorporated in section 56BZA of the Exposure Draft. The Final Report's recommendation 7.6 then stated that 'in some sectors it may be appropriate that a higher standard (or additional obligations) apply, either generally or in relation to particular actions. This should be considered during sectoral assessment...'

It was not explained why the Final Report opted for a softer conduct obligation to best interest. While it leaves room for a higher standard to be enforced via sectoral assessment, this seems to indicate there are some current or prospective CDR sectors where a best interest clause is seen as excessive or unnecessary. Given the currently designated sectors – banking, energy and telecommunications – are classed as essential services, a best interest clause appears the appropriate default. The AEC considers then that a best interest clause should be the default conduct obligation and, if there are future designated sectors where this is too burdensome, then an alternative obligation can be considered through the sectoral assessment consultation process.

Any questions about this submission should be addressed to Rhys Thomas, by email [rhys.thomas@energycouncil.com.au](mailto:rhys.thomas@energycouncil.com.au) or mobile on [0800123456](tel:0800123456).

Yours sincerely,

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<sup>2</sup> The AEC put forward this argument in its submissions to the [CDR Energy Rules Framework Consultation Paper](#) and [CDR Rules Expansion Amendments Consultation Paper](#).