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Joint submission on exposure draft legislation to enable action initiation

Tiger & Bear Partners is a multidisciplinary advisory firm with a significant practice in the retail energy sector. Our long-standing client, Accurassi, is a leader in digitised customer acquisition for the energy market. Accurassi's technology helps businesses acquire new customers and scale adoption of products with tools that enable a faster digital acquisition of "net-zero" solutions (e.g. solar panels and VPPs).

We appreciate the opportunity to make this joint submission on the proposed "action initiation" reforms through the *Treasury Laws Amendment (Measures for Consultation) Bill 2022: Consumer Data Right – Implementing Action Initiation* ("**Bill**").

Overall, we support the Bill. We consider that action initiation is a key element of the CDR ecosystem without which consumers are unlikely to be able to truly unlock the value of their data. That said, we think there are a number of areas in which the Bill could be revised or improved, and have drawn in particular on our experience in the energy retail sector, to illustrate some of these points. Our comments are suggestions are set out below:

- **Entities acting as CDR representatives of, or under a sponsored accreditation arrangement with, Accredited Data Recipients and trusted advisers must be able to initiate actions**

The Bill requires that Accredited Action Initiators must also be "accredited persons", in the sense that they have been accredited to receive CDR data, even if they have not yet in fact received any. However, the Bill does not appear to extend the ability to initiate actions to CDR representatives, persons operating under a sponsored accreditation arrangement or trusted advisers ("**Other Participants**").

This is a material issue. In both open banking, and based on our discussions with industry participants, in open energy, the number of unrestricted Accredited Data Recipients is likely to be relatively few, given the cost, time and complexity involved in obtaining and maintaining accreditation. In our view, each of the Other Participants should each be able to participate in the action layer, subject to similar safeguards, rules and arrangements that exist in the instruction layer. Without this change, we believe that action initiation is likely to have a muted impact.

- **The Bill should not seek to re-regulate the action layer, but should dovetail with existing regulations within the action layer (for example, explicit informed consent requirements imposed on energy retailers)**

The Bill does not seek to regulate the action layer.¹ We think that is a sensible approach and will limit the risk of double regulation. That said, we suggest that Treasury should consider whether any

¹ Page 10, Summary of proposed changes.



existing regulations which apply to the action layer ought to be amended in order to dovetail with the action initiation reforms.

A clear example is the requirement for energy retailers to obtain a customer's "explicit informed consent" ("EIC") before transferring the customer from another retailer or entering a customer into a new market retail contract.² The requirements are prescriptive and the consequences of failing to obtain EIC are material.

There is an obvious role for action initiation for consumers wishing to switch between energy retailers, as suggested in the Explanatory Memorandum. Quickly switching energy retailers has long been a challenge faced by many energy customers. We think that the Bill could introduce amendments to the National Energy Retail Law to make it clear that EIC can be obtained via action initiation processes. By contrast, if an energy retailer (i.e. the Action Service Provider) cannot explicitly rely on the consent given to the Accredited Action Initiator in order to satisfy its EIC obligations, then we query how effective the CDR and action initiation will be in the retail energy sector in helping customers compare electricity tariffs and then switch retailers.

Similarly, we suggest consideration of digital identity portability when considering the role of action initiation. Currently, when a consumer signs up with an energy retailer or telecommunications provider, the consumer needs to re-identify themselves (i.e. pass a KYC check) and sometimes go through a credit check. We are conscious that the Australian Government is separately considering reforms which would create a trusted digital identity, but consider that Treasury should give further consideration to whether Bill could also play a role in streamlining digital identity verification for customers who seek to switch through the action layer.

- **We query the rationale for allowing Action Service Providers to be able to charge fees for performing actions**

The Bill permits Action Service Providers to charge fees for performing the action, subject to the non-discrimination principle. The general non-discrimination principle, namely that Action Service Providers must not discriminate against an instruction merely because it arrives via the CDR, is sound. However, we are concerned that Action Service Providers can impose charges for performing CDR actions provided that the charges do not "exceed the fees that the person would ordinarily charge for performing actions of that type in the course of the person's business".³

The challenge is that Action Service Providers do not today charge for performing actions in an action initiation setting. Today, they rely extensively on manual data entry and human decision making. In other words, until the Bill is passed and implemented, Action Service Providers will not have customarily performed those actions in a CDR/action initiation environment. The example set out in the Explanatory Memorandum, namely that Action Service Providers could pass on existing charges like home loan application fees without breaching the non-discrimination principle, exemplifies this issue. Once action initiation is live, Action Service Providers should receive most, if not all, of the information required to perform the action. As a result, reliance on manual-decision making and manual data processing should be significantly reduced, meaning that the costs of performing the action should similarly be reduced, certainly not increased. If that is not the case, then there is a risk that action initiation does not assist in achieving the overarching policy objective of making switching service providers easier. As drafted, the Bill may have the perverse consequence of disincentivising Action Service Providers to make their processes more efficient.

- **Action initiation has a significant role to play in the transition to "net-zero", but this may in time require a re-think of designated data holders for the energy sector**

For households and businesses, energy consumption is the largest contribution to carbon emissions. The average Australian household emits 11 carbon tonnes per year from energy, with 31% of these emissions coming from gas/electricity usage and 69% through vehicle fuels.⁴ We believe that CDR, and action initiation in particular, can assist in reducing these carbon emissions as well as reducing energy costs for households and small businesses.

² Sections 38 to 42 and 273 of the National Energy Retail Law.

³ Section 56BZD(3) of the Bill.

⁴ Page 10, Castles and Cars Rewiring Australia Discussion Paper, Saul Griffiths.



To demonstrate how action initiation and CDR (with non-designated data) could support the net zero energy transition, we have highlighted several scenarios where consumers may benefit:

- Retailer emissions – where an energy retailer’s emission intensity exceeds a certain threshold, the customer could initiate an action to switch to a lower carbon retailer at a similar price point
- Battery optimisation – periodically check for the most efficient battery optimisation service to maximise the return on investment of the consumer’s home battery and, where applicable, initiate an action to switch optimisation services
- Solar performance – intermittently check the performance of the consumer’s solar system. If the consumer is “wasting” solar (exporting to grid) then find a peer-to-peer buyer for the excess

None of the data required to trigger the above actions is currently CDR designated data. That said, energy retailers are designated data holders (and by extension, will become Action Service Providers), and the Bill is clear that the action initiation regime can be accessed independently of a request to share designated data. This means that the affected retailers could be required to undertake an action even though the data point which triggered the action did not originate from the CDR ecosystem.

However, the second two examples are problematic. As we transition to “net-zero”, and in particular with energy bills expected to rise by 35% in 2023, distributed energy resources (e.g. rooftop solar and batteries) are expected to increase exponentially and quickly.⁵ Consumers and SMEs will rely on third-party battery optimisation services to optimise battery usage, and facilitated peer-to-peer energy trading will naturally increase too. To put it simply, the relevance of traditional energy retailers as accredited data holders (and Action Service Providers) will diminish as we move towards behind-the-meter generation and storage. We think that Treasury should earmark service providers in these areas for future designation as accredited data holders (and, as a consequence, Action Service Providers) to ensure the regulation keeps up with evolving industry dynamics.

We would be happy to meet with Treasury to discussion this submission.

Yours sincerely

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<https://www.abc.net.au/news/2022-10-11/energy-suppliers-say-costs-to-rise-another-35/14081156>.