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### **Inquiry into Future Directions for the Consumer Data Right Discussion Papers**

The Australian Energy Council ('AEC') welcomes the opportunity to make a submission to Treasury's Discussion Papers on the Inquiry into Future Directions for the Consumer Data Right.

The AEC is the industry body representing 22 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 welcomes the opportunity to respond to the recommendations put forward in Treasury's Final Report of its Future Directions Inquiry, particularly as it relates to action initiation and tiered accreditation. We remain concerned that the expansion of the Consumer Data Right ('CDR') is progressing without sufficient regard to the interests of consumers and this jeopardises the likelihood of consumers developing trust and confidence in the CDR regime. The CDR is still in its infancy and consumers, as well as data holders, accredited data recipients ('ADRs') and regulators, are still in the process of becoming familiar with how the rules framework, customer protections and technical standards operate in practice. There is a real risk that introducing reforms like tiered accreditation, which creates various sub-sets of requirements, will make the CDR regime too confusing and complex for participants to sensibly navigate. For consumers, this will have the likely effect of reducing rather than improving the CDR's functionality, while some third parties might find themselves inadvertently not complying with their legislative obligations, exposing customers to risk.

For these reasons, the AEC remains opposed to the introduction of action initiation and tiered accreditation at such an early stage of the CDR's development. It does not represent good regulatory practice and, in the case of tiered accreditation, is responding to pressure to reduce costs for ADRs rather than being about delivering positive outcomes for consumers. There needs to be closer engagement with consumer bodies as well as independent customer research undertaken to determine what customers value before either of these recommendations are put into effect.

### **Consumer and industry comprehension of proposed expansions**

When the ACCC released consultation on its expansion amendments in September last year, the accompanying Privacy Impact Assessment ('PIA') raised considerable concern about the 'complexity of the proposed amendments' and the risks that it poses to a flourishing CDR ecosystem.<sup>1</sup> These amendments did not include action initiation though did include other reforms proposed here, such

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<sup>1</sup> Maddocks, 'Consumer Data Right Regime: Update 2 to Privacy Impact Assessment', 29 September 2020, p44.

as tiered accreditation and disclosure to parties outside the CDR regime. The addition of action initiation should only increase the level of complexity.

The risks that the PIA identified mainly revolved around the rollout of tiered accreditation and data holders and ADRs not understanding their legislative obligations, which increases the likelihood of mishandling customer data (as well as not having the awareness to identify when data has been mishandled); and customers not being properly informed about what they are consenting to and when a privacy breach has occurred or is at risk of occurring.<sup>2</sup> It further warned that tiered accreditation would mean customers could not assume that there are uniform rules for all CDR transactions and will need to understand the different rights, responsibilities and data access levels of the third party they are engaging with. The PIA cautioned this might result in customers experiencing ‘information overload’, which can impede their ability to provide properly informed consent.<sup>3</sup>

For the energy sector, the complexity of the proposed expansions is worsened by the fact that consideration of their operation has only occurred in the context of the banking sector. Given the ACCC’s consultation on the CDR energy rules framework is still ongoing and the draft rules are yet to be published, it is not even theoretically possible to consider how these changes will interact with energy’s sector-specific rules.

Noting this complexity, the AEC encourages Treasury to firstly pursue recommendation 7.8, which is to implement a timely consumer education program about the CDR. Concern has been raised previously to the Federal Government from consumer groups, data holders and ADRs that there is low customer awareness about the CDR and this is going to hinder the ability of the CDR to maximise its potential.<sup>4</sup> While industry will play its role in promoting customer awareness, the CDR is ultimately a government policy and therefore the primary responsibility to educate should rest on the shoulders of the Federal Government and government-funded institutions like the ACCC. The AEC remains concerned that the growing complexity of the CDR regime, combined with low customer awareness, could deter customers from participating or lead to a less than optimal customer experience for those that do participate.

### **Performing sectoral assessment**

The AEC strongly endorses recommendation 4.3 in the Future Directions Inquiry, which says ‘sectoral assessments should be required prior to the designation of action initiation in a sector’, but believes this should extend to tiered accreditation as well – especially given the recommendation (4.8) to include tiered accreditation for action initiation.

The energy sector represents an essential service and has special, sector-specific regulations in place to ensure energy is serviced safely and effectively to customers. For example, the energy sector has specific rules that regulate the servicing of a customer that uses life support equipment. How ideas like action initiation (which could enable, for example, the switching of a customer on life support)

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<sup>2</sup> Id at p44-45.

<sup>3</sup> Id at p47.

<sup>4</sup> The Senate, ‘Select Committee on Financial Technology and Regulatory Technology’, Commonwealth of Australia, Interim Report, September 2020, p219.

and tiered accreditation will interact with these regulations has not been properly tested nor have the interests of consumers been properly considered in an energy context.

The sectoral assessment should require a customer impact analysis to determine what benefits these changes will bring to customers in the sectoral context and whether the reduction in costs for ADRs outweighs the potential negative impacts (e.g. customer confusion, lower trust in the CDR regime). It should also assess whether customers agree or disagree with the implied assumption of the rule makers that energy data is less sensitive than banking data. The need for genuine customer research is particularly large in light of the observations from the Consumer Policy Research Centre ('CRPC') that it is mostly fintechs, not consumer groups, who are setting the parameters for what customers value.<sup>5</sup> The Future Directions Inquiry appeared to implicitly acknowledge this in its recommendation (7.10) to encourage greater consumer representation in developing the CDR; the inclusion of a customer impact analysis in the sectoral assessment is a good way to achieve this.

### Action initiation

Most third-party providers in the energy sector are incentivised to switch customers through commission-based business models. This can create commercial incentives that are not aligned with the best interests of the customer. This problem is discussed in the Future Directions Inquiry and recommendations 7.5 and 7.6 were subsequently made to place obligations on accredited parties that want the power to execute action initiation.<sup>6</sup> In line with this intent to establish proper consumer protections, the AEC firmly considers that Treasury should firstly action recommendation 34 from the ACCC's *Retail Electricity Pricing Inquiry* report, which is to develop and enforce a mandatory code of conduct on third party intermediaries that includes an obligation to act in the best interests of the customer.<sup>7</sup> This should be treated as an absolute minimum requirement before action initiation is entertained. The problems identified with the current commission-based model of most third parties are ongoing and have not been addressed, as highlighted by the ACCC's recent enforcement activity.<sup>8</sup> If this is beyond scope then Treasury should consider developing a CDR general code of conduct that regulates any third-party entity seeking action initiation powers, including an obligation to act in the customer's best interests. This code of conduct should be designed to supplement, not substitute, existing sector-specific regulations.

The AEC supports recommendation 4.6, that accredited parties cannot perform actions above what a data holder can perform, as well as recommendation 4.7, which is to consult industry and consumer representatives on the potential privacy or security risks of certain actions. We agree this consultation should occur as part of the sectoral assessment and wish to participate if or when the time comes.

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<sup>5</sup> Consumer Policy Research Centre, 'Stepping towards trust: Consumer experience, Consumer Data Standards, and the Consumer Data Right', September 2020, p4, 7.

<sup>6</sup> Australian Government, 'Inquiry into Future Directions for the Consumer Data Right', Commonwealth of Australia, October 2020, p160-163.

<sup>7</sup> ACCC, 'Retail Electricity Pricing Inquiry – Final Report', Commonwealth of Australia, June 2018, Chapter 14.

<sup>8</sup> ACCC, 'iSelect to pay \$8.5 million for misleading consumers comparing energy plans', 8 October 2020, <https://www.accc.gov.au/media-release/iselect-to-pay-85-million-for-misleading-consumers-comparing-energy-plans>.

## Tiered accreditation

The AEC has particularly strong concerns about tiered accreditation given the speed in which it is progressing. The motivation behind the push for tiered accreditation appears to be to reduce costs for prospective ADRs.<sup>9</sup> This is important but must be balanced against the other considerations that go with good regulatory practice, namely ensuring the security of customer data, building and maintaining confidence in the CDR regime, and avoiding making the CDR too complex for participants to navigate. These other considerations are not, in the AEC's view, receiving proper attention.

With respect to data security, the PIA that assessed the ACCC's proposal for tiered accreditation raised multiple warnings about potential data breaches resulting from 'less sophisticated entities' handling personal information without fully understanding the privacy obligations they hold.<sup>10</sup> This, combined with the overall complexity of tiered accreditation, is likely to hinder rather than enhance the customer experience as customers become unsure of what they are consenting to. The Office of the Australian Information Commissioner ('OAIC') has also cautioned that data, which might be classified as low risk, being accumulated to become a high-risk data set: 'as CDR is rolled out across the economy and data sets can be combined, richer and more granular insights may be derived about individual consumers, meaning the overall privacy risks for consumers may increase'.<sup>11</sup>

There are other gaps that require addressing if tiered accreditation is to deliver positive outcomes for customers. One such area is ensuring customers have recourse to dispute resolution processes if they are dissatisfied with how a restricted accredited party has handled their data. The CPRC has said that access to dispute resolution is contained in the United Nations Guidelines for Consumer Protection and 'the consumer experience of dispute and redress processes must be recognised as an integral part of the consumer experience for CDR'.<sup>12</sup> It is critical these systems are in place before tiered accreditation is implemented.

If tiered accreditation is pursued in the manner suggested, there should be industry consultation to help determine what datasets (in the energy sector) are classified as low risk, medium risk, or high risk. The basis for such consultation is similar to recommendation 4.7: to understand the potential risks there may be to a customer's security or privacy.

Alternatively, the AEC would welcome Treasury exploring more in-depth the viability of a sponsorship model that would see a fully accredited party "sponsor" an unaccredited third party so they can access CDR data. The advantage of this model is that it makes the sponsor responsible for the management of risk (i.e. the sponsor must ensure the third party complies with their obligations so they remain accredited), whereas the proposed tiered accreditation model places responsibility in the hands of the customer (i.e. the customer must ensure the third party they select is trustworthy). The sponsorship model therefore creates incentives for third parties to have proper procedures and protocols in place because this will improve their ability to obtain a sponsor. For the sponsor, there will be financial incentives to contract with a third party and reputational incentives to ensure the

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<sup>9</sup> ACCC, 'CDR Rules Expansion Amendments Consultation Paper', Australian Government, September 2020, p4.

<sup>10</sup> Maddocks, 'Consumer Data Right Regime: Update 2 to Privacy Impact Assessment', 29 September 2020, p45, 69.

<sup>11</sup> Office of the Australian Information Commissioner, 'OAIC Submission to the CDR Energy Rules Framework', Australian Government, August 2020, p11-12.

<sup>12</sup> Consumer Policy Research Centre, 'Stepping towards trust: Consumer experience, Consumer Data Standards, and the Consumer Data Right', September 2020, p10.

third party is trustworthy. There are, of course, some potential limitations with the sponsorship model, namely that any breach will only be known after the fact (and, subsequently, after the customer has been harmed), and this will need to be worked through.

Noting Treasury's intent to conduct additional consultation, the AEC would be happy to further explore the suitability of the sponsorship model or other alternative solutions with Treasury if desired.

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

Yours sincerely,



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