



**EnergyAustralia**

LIGHT THE WAY

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

EnergyAustralia is one of Australia’s largest energy companies with around 2.4 million electricity and gas accounts in NSW, Victoria, Queensland, South Australia, and the Australian Capital Territory. EnergyAustralia owns, contracts, and operates a diversified energy generation portfolio that includes coal, gas, battery storage, demand response, solar, and wind assets. Combined, these assets comprise 4,500MW of generation capacity.

EnergyAustralia welcomes the opportunity to make this submission to the Consumer Data Right – Exposure Draft Legislation to Enable Action Initiation (Draft legislation).

The Draft legislation sets out a broad framework for Action Initiation and establishes Treasury’s powers to declare Actions for each sector and make the CDR rules for Action Initiation. The Draft legislation also sets out key obligations around Action Initiation.

We make two initial overarching comments to our submission.

Firstly, the CDR regime should be allowed more time to mature as a data sharing regime before making the major expansion in CDR functionality to Action Initiation. As the recent Statutory Review of the CDR (Statutory Review) stated “consideration should be given to finding a tempo that focuses on implementing what has been proposed to date, bedding down the core CDR framework/rules/standards and allowing time for the system to mature before progressing into further expansion”.<sup>1</sup> More time will allow the design of Action Initiation to benefit from the lessons learnt around the effectiveness of the CDR framework e.g. how effective are the Privacy Safeguards and other consumer protections; do authentication, consent and authorisation work as intended; is tiered accreditation working?<sup>2</sup> This is especially important where Action Initiation will itself involve data sharing to support the giving of the instruction to take an action.

Secondly, it is very difficult for stakeholders to assess whether the Draft legislation is workable as a framework for Action Initiation, even at a high level, without a stronger idea of the specific Action use cases for each sector beyond payment initiation. There is a risk that Treasury’s framework will be too theoretical with the result that the framework will not operate well, and it could create

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<sup>1</sup> [Statutory Review of the Consumer Data Right - Report \(treasury.gov.au\)](#), page 42

<sup>2</sup> [Statutory Review of the Consumer Data Right - Report \(treasury.gov.au\)](#), page 42

complications and unintended consequences for sectors beyond banking. We encourage Treasury to “sense check” the Draft legislation against the use cases that have been discussed for each sector, other than payment initiation. To support this, the first part of this submission discusses the issues around the switching use case which has been earmarked for the energy and potentially the telecommunications sector. This is intended to help inform the design of the Draft legislation. Our key conclusions are:

- The Minister should consider the existing sector’s regulatory framework before declaring Actions for a sector. This consideration will flag whether changes to the existing sector’s regulation are required to enable the Action use case e.g. removing regulatory barriers, and whether additional regulation/protections are required.
- The Minister should also consider the maturity of the sector in terms of customer identification and fraud mitigations<sup>3</sup> because Action Initiation (switching use case) will increase risks of fraud. Overall the reason to set up an Action to enable the switching use case remains unclear. Customer switching rates in the energy sector remain high compared to other sectors and internationally. Recent energy sector reform has also made customer engagement easier reducing the need for the switching use case.

The second part of this submission comments on the detail of the Draft legislation. Our main points are:

- The declaration process should be conducted across all sectors where there is a common use case like Streamlined or Automated switching, rather than taking a sector-by-sector approach.
- The Accredited Action Initiator (AAI) obligation to act efficiently, honestly and fairly should be revised to better address the risks of all Action use cases.
- We support the ability for Action Service Providers (ASPs) to charge fees for receiving and processing instructions received through the CDR, and support the Minister making CDR Rules to this effect.

If you have any questions in relation to this submission, please contact me ( [REDACTED] or [REDACTED] ).

Yours sincerely,

Selena Liu  
Regulatory Affairs Lead

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<sup>3</sup> See draft sections 56AD (heading), subsection 56AD(1), subparagraph 56AD(1)(a)(vi) and paragraph 56AD(1)(b)]

## EnergyAustralia submission

### 1. Action initiation and switching use case

The Final Report of the Inquiry into Future Directions for the Consumer Data Right (Future Directions Report) proposes that the main type of Action Initiation for the energy sector will be a type of switching use case. Box 4.4<sup>4</sup> proposes two types of switching use case, a simple and complex one:

- 1) A **Streamlined** switching use case where the Retailer assesses an energy bill to find a cheaper deal, and then applies to switch the consumer with a new Retailer on behalf of the consumer. The new Retailer receives the application and still needs to verify the consumer's identity and confirm the consumer's explicit informed consent (EIC) to sign up to the new energy contract. We see that an alternative model could involve the Accredited Action Initiator (AAI) obtaining EIC from the consumer for the Retailer.
- 2) An **Automated** switching use case, where the AAI charges a yearly fee to the consumer and assesses alternative energy plans. The AAI offers a legal arrangement where they can cancel and enter contracts on the consumer's behalf. As the AAI has an arrangement that allows them to enter new contracts on the consumer's behalf the incoming Retailer no longer approaches the consumer directly to sign them up. The Retailer sends applications via the CDR rather than via email to the Retailer.

#### 1.1 Switching use cases raises new issues around customer identification and fraud which will need to be considered in declaration process

Both switching use cases are fundamentally different to payment initiation, which is why we strongly suggest that Treasury actively considers use cases other than payment initiation when designing the legislation for Action Initiation.

The first key difference is that the switching use case involves a future Action Service Provider (ASP) (an incoming Retailer), while payment initiation does not. This means the incoming Retailer does not have a pre-existing relationship with the consumer and does not know who they are, therefore removing one of the key benefits of the CDR of customer ID verification (via authentication and the one-time password). i.e. an incoming Retailer cannot authenticate the consumer's ID without having records of that consumer and contact details to send the one-time password to.

This is an important difference which will raise the complexity of the CDR Rules design for Action Initiation as Treasury will need to consider what consumer identification requirements should replace authentication. Resorting to industry practice and what Energy Retailers have in place for customer ID verification and proof of address (to ensure the customer has authority to contract for supply to that address) is problematic as the energy sector has less mature processes for these matters. These processes should be improved as CDR and other digital initiatives are increasingly opening the possibility for fraud and inadvertent errors. Introducing new practices around proof of authority can be complex<sup>5</sup> and it adds friction to an otherwise very quick and streamlined process.

Although this is a problem today, Action Initiation potentially exacerbates the problem because it means the consumer (engaging through the AAI) will have no initial contact with the Retailer and less contact overall undermining the Retailer's ability to verify their identity. Allowing sufficient time for industry to improve their customer ID verification processes should be a pre-requisite to enabling the switching use case. **In line with this, we strongly suggest that one of the matters the Minister must consider when designating Actions for each sector is the maturity of the**

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<sup>4</sup> [Inquiry into Future Directions for the Consumer Data Right - Final Report \(treasury.gov.au\)](#), p 64

<sup>5</sup> e.g. where someone without power of attorney or access to records is attempting to set up an account for a family member or friend

**sector in terms of customer identification and fraud mitigations<sup>6</sup> because Action Initiation will increase risks of fraud.**

## **1.2 Switching use case faces regulatory barriers and creates risks that will require more regulation**

The Streamlined switching use case that involves the AAI obtaining EIC from the consumer for the Retailer and the Automated switching use case, will require a review of the Explicit Informed Consent requirements in the energy regulations.

We understand that in the banking sector Payment Initiation happens today and that the CDR will only be an additional channel that will instruct banks to action payments. The same cannot be said for the energy sector in relation to Automated Switching. Currently, Third Parties are largely seen by Energy Retailers as another channel to acquire customers. They are generally not seen as an agent that acts on behalf of consumers which the Automated switching use case assumes. In this way, the CDR is introducing a new business model at scale, rather than only providing a new channel of an existing business model.

**For this reason, there may be regulatory barriers to the switching Action use case which will need to be assessed and removed (or regulations otherwise modified) before the switching Action use case can proceed. We therefore recommend the Minister must consider the existing sector's regulatory framework before declaring Actions for a sector. This consideration will flag whether changes to the existing sector's regulation are required to enable the Action use case, and the sector's policy and reform agencies can consider whether those changes are appropriate.**

We discuss the EIC issues in detail below.

Retailers are required to obtain the EIC of a consumer before they enter a market retail contract for the buying of electricity. EIC is a salient consumer protection that ensures consumers make informed decisions about entering energy contracts.

In the Streamlined switching use case, the EIC could be left with the Retailer to obtain, or the AAI could obtain the EIC from the consumer for the Retailer. Both approaches happen in the third-party comparator market today, but the latter raises issues around third party EIC compliance which continues to be challenging so the energy regulations may need to be reviewed to directly impose EIC requirements on third parties and not just Retailers.

Under Automated Switching, the third-party AAI would enter the energy contract on the consumer's behalf, which assumes that they would be providing the EIC to the Retailer on the consumer's behalf.

There is uncertainty over whether a third party can provide EIC on the consumer's behalf under the current regulation i.e. without the consumer even knowing that the energy contract is being entered. Both the Australian Competition Consumer Commission (ACCC) and the Australian Energy Market Commission (AEMC) have expressed views that there is no ability under the current regulations for Third Parties to do so, and that the relevant regulations would need to be changed to allow Third Parties to give EIC on behalf of customers.

The Future Directions Report also made the same observations and found that core changes to the EIC requirements are necessary to enable Automated Switching through the CDR.

In addition to considering regulatory barriers, **Treasury should also consider whether additional regulation is required where Action Initiation is introducing new business**

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<sup>6</sup> See draft sections 56AD (heading), subsection 56AD(1), subparagraph 56AD(1)(a)(vi) and paragraph 56AD(1)(b)]

**models which increase risk for consumers. This should be another matter which must be considered before declaring Actions for each sector.** This would act as a prompt for Treasury to engage with the relevant sector's reform agencies to implement any new regulations before implementing Action Initiation for a sector.

We caution that before Automated Switching is adopted for the energy sector, a mandatory code of conduct for third parties (AAIs) should be made (as recommended by the ACCC) to address issues with the third-party sector that will only be exacerbated with Automated Switching. These issues are:

- **Actions unaligned with best interests of consumers.** As noted by the ACCC, Third Parties do not always make energy plan recommendations that are in the best interests of consumers (e.g. due to payment of commissions); and inadequate disclosure to consumers around the number of Retailers compared (where only part of the market is compared) (Chapter 14, REPI report).<sup>7</sup>
- **Possible incentives to increase switching against consumer interest:** The typical Third-Party model is usually paid per customer sale and so they are often incentivised to increase customer switching to generate revenue when it may not deliver economic or other value to customers. Enabling Automated switching will worsen these concerns. It would mean the customer is not providing EIC for each switch will mean there will be no "check point" for the customer to confirm or reject the Third Party's decision to switch. Newer business models are emerging in which Third Parties are remunerated on some other basis than by a commission per sale, for example the Third Party could charge the Retailer a fixed monthly amount for the period the customer stays with a Retailer, or the customer could pay the Third Party instead (as per the Automated switching use case described above). However these will not always provide an incentive for these organisations to act in customers' interests (e.g. where different Retailers pay different levels of commission).

We also understand that these issues with our Third-Party sector may extend to other sectors, in which case the regulation of Third Parties for all sectors with a switching use case should be reviewed and improved.

In addition, the conduct obligation in the Draft Legislation should be improved to better target the concerns that Action Initiation will raise i.e. better target the issues around the agent/principal relationship. See section 2.2 below. Other protections under the CDR could be designed in the consent/authorisation process. i.e. if an ADR is providing EIC on behalf of customers for each individual switch, each individual switch could be communicated to the customer via the CDR dashboard (like notifications about data disclosures).

### **1.3 Switching use case is more complex than payment initiation, and blurs lines between the instruction vs action layer**

In our view the switching use case is far more complex than payment initiation. Again, it involves signing up the customer to a new energy contract with a new Retailer. If some functions such as obtaining EIC are delivered by the AAI, then this will potentially blur the lines between what is the instruction layer versus action layer. I.e. on one view, obtaining EIC is *part of the switching process* undertaken by the Retailer i.e. it is part of the action layer and not the instruction layer.

After entering the energy contract, the customer needs to be onboarded with the Retailer to set up their account and put in place arrangements for any specific customer needs. For example:

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<sup>7</sup> [https://www.accc.gov.au/system/files/Retail%20Electricity%20Pricing%20Inquiry%E2%80%94Final%20Report%20June%202018\\_0.pdf](https://www.accc.gov.au/system/files/Retail%20Electricity%20Pricing%20Inquiry%E2%80%94Final%20Report%20June%202018_0.pdf)

- Do they have life support equipment that cannot be disconnected from electricity supply?
- Are they in financial hardship and require special payment arrangements?
- Are they entitled to government assistance for their bills, including rebates credited to the customer's bill?
- Are they moving in and is the house disconnected from power?<sup>8</sup>
- Is the plan suitable for the consumer and is the consumer eligible for the plan?

We question whether the AAI will be involved in this onboarding process on behalf of the consumer. Given the complexity and high level of information required (some of which can be sensitive), we expect a Retailer will ultimately need to engage with the consumer to complete the onboarding process. It simply will not be possible for the AAI to provide a complete set of information (without excessive back and forth with the consumer) and for the AAI to make decisions in the onboarding process on behalf of the consumer. This means the benefits of the switching use case are somewhat reduced in terms of greater convenience to the consumer, because the consumer will still need to engage with their Retailer and so some level of friction will still exist for consumers.

It will need to be very clear whether the AAI is assisting with the onboarding process on behalf of the consumer or not. We can see a scenario where a consumer is serviced by one ADR which switches the consumer and ports the consumer's life support registration requirement to the new Retailer. If a consumer then engages with a different ADR, who only provides the service of switching energy plans but does not port onboarding details such as life support; the consumer may assume their life support registration has been updated with their new Retailer and that they do not need to contact the new Retailer to advise of their life support requirement. This could have very serious safety consequences.

#### 1.4 The case for the switching use case is unclear

We reserve our detailed consideration of the benefits of Automated switching to Treasury's declaration process for the energy sector. However, at a high level, we question the merit of both switching use cases and emphasise there would be little value in progressing Action Initiation on the basis of a switching use case for the energy sector alone.

##### 1.4.1 Customer switching is already at very high levels

In terms of levels of engagement or level of customer switching, economists have observed that there is no evidence that customers are less engaged in the energy sector than in other sectors, and to the contrary, switching is higher for energy than for most consumer products in Australia.<sup>9</sup> Customer switching levels in the NEM<sup>10</sup> are already very high compared to international markets.<sup>11</sup> This strongly indicates that customers do not face barriers to switching nor that they face difficulty.

For the very small proportion of customers that have never engaged in the market to switch, it is important to understand the reasons for that behaviour. As economists have noted,

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<sup>8</sup> In this case, there is usually more information that needs to be provided by the customer and communicated back by the Retailer regarding timeframes and charges for the power being turned on that often depends on the customer's location, meter type and possibly local issues to do with field workload for the distributor or meter service provider.

<sup>9</sup> Paul L Joskow, Michael G Pollitt, *Handbook on electricity markets*, chapter 5 (written by Stephen Littlechild), 2021, Edward Elgar publishing, page 138

<sup>10</sup> The CDR will only apply to customers in the National Electricity Market (NEM) in phases 1-4. This excludes customers in Western Australia, Northern Territory and large parts of South Australia and Queensland. EnergyAustralia supplies electricity to mass-market customers across the NEM except for Tasmania.

<sup>11</sup> Australian annualised electricity switching rates for residential and small business customers from 2016-17 to 2020-2021 are: Queensland 13-21%, NSW 18-21%, ACT 6-12%, South Australia 15-21%, Victoria 23-30% (source: charts and figures from the AER Annual Retail Markets Report 2020-21). Comparable data from other countries shows that the highest switching rates have occurred in: Portugal 26%, New Zealand 22%, Netherlands 18%, Texas 16% and Norway 14%. [https://www.energy.vic.gov.au/\\_\\_data/assets/pdf\\_file/0024/79161/KPMG-Energy-Retail-Markets-analysis-final-7-April.pdf](https://www.energy.vic.gov.au/__data/assets/pdf_file/0024/79161/KPMG-Energy-Retail-Markets-analysis-final-7-April.pdf) The UK has recently has a 23% switching rate that grew to 31% due to the impact of a high number of retailer failures: <https://www.statista.com/statistics/713751/energy-consumers-switching-suppliers-uk-gb/>

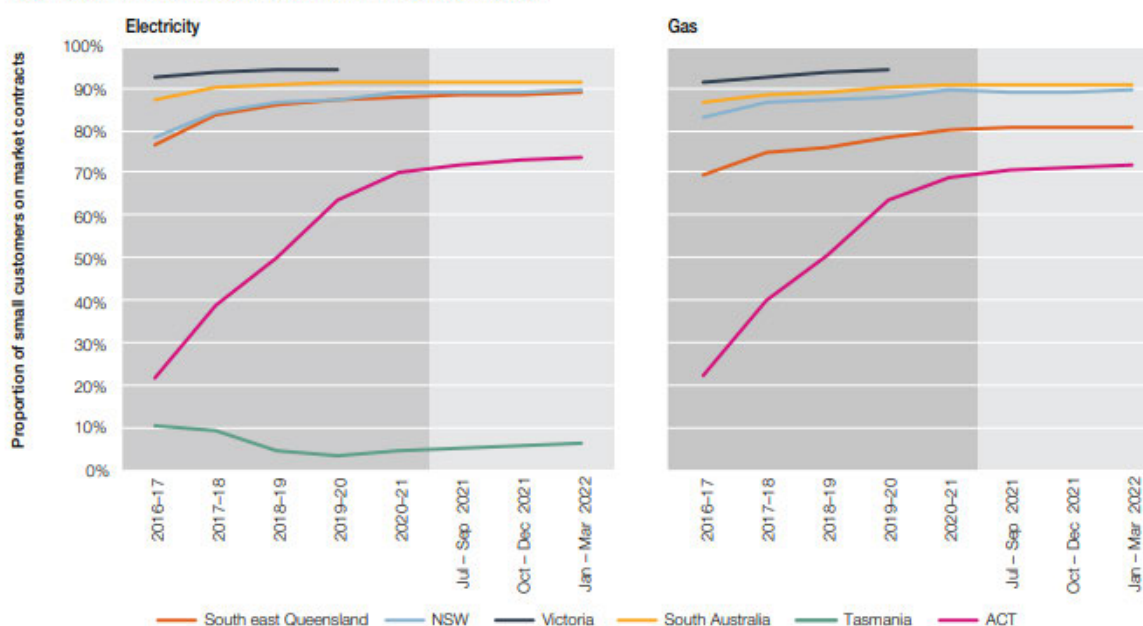
“The explicit or implicit assumption was that customers have not switched supplier or are not “engaged” in the market are dissatisfied and/or not well served, while in reality many customers may not search around for another supplier because they are satisfied with their present one.”<sup>12</sup>

Another possibility is that it reflects that customers have different values of time spent engaging in the market i.e. the benefit is not worth their time.<sup>13</sup>

It is difficult to estimate the number of customers that have never switched to a Market Offer, and remain on default Standing Offers because customers on Standing Offers also include customers that have switched but then default onto Standing Offers because of current circumstances. E.g. Their last contract came to an end. However the number of total Standing Offer customers has steadily declined or remained very low over recent years showing high engagement/switching of customers. Only around 7–11% of residential customers are on standing offers<sup>14</sup> (and again, this overstates how many customers have never engaged in the market).

This is reflected in the reverse in the graph below, by the increasing numbers of customers on Market Offers, except in regional jurisdictions which are essentially non-contestable (and where the government owned (or partially government owned) retailers<sup>15</sup> maintain strong market positions). Other than these regional exceptions, we believe the level of customer engagement is already very high and unlikely to materially increase from current levels.

**Figure 6.20 Small customers on market contracts**



Note: Standing and market offer shares are based on the number of small customers at 31 March 2022 except Victoria (June 2020). Queensland electricity numbers exclude customers in regional Queensland, who largely remain on standing offers.

Source: AER, Retail markets quarterly, Q3 2021–22, June 2022; ESC, Victorian energy market report 2019–20, December 2020.

Source: AER<sup>16</sup>

<sup>12</sup> Paul L Joskow, Michael G Pollitt, *Handbook on electricity markets*, chapter 5 (written by Stephen Littlechild), 2021, Edward Elgar publishing, page 139

<sup>13</sup> Paul L Joskow, Michael G Pollitt, *Handbook on electricity markets*, chapter 5 (written by Stephen Littlechild), page 139

<sup>14</sup> [State of the energy market 2022 - Full report.pdf \(aer.gov.au\)](#), p 184

<sup>15</sup> Ergon Energy (Queensland), Aurora Energy (Tasmania) and ActewAGL (ACT)

<sup>16</sup> [State of the energy market 2022 - Full report.pdf \(aer.gov.au\)](#), p 206



The material increases in and high levels of customer switching, combined with the introduction of regulated prices for default Standing offers and increased competition (driven by high switching) has delivered better customer outcomes (including putting downward pressure on electricity bills).

#### 1.1.1 Energy sector reform has reduced the need for switching use case

Further, there have been many market reforms adopted from recommendations by two major reviews in 2017 (the ACCC Retail Electricity Pricing inquiry (2017) and Victorian's Independent Review into the Retail Electricity & Gas Retail Markets in Victoria). These significant reforms aimed to promote customer engagement and make it easier, including:

- Measures to improve price transparency – all offers are compared against a standard benchmark (the price for a default Standing offer) allowing customers to make like for like comparisons of all offers in the market.
- Customer notification of changes to their energy pricing and their discounts; and
- New bill messages which indicate whether the customer is on their best offer with their Retailer and what their potential savings would be if they switched to their best offer.

In summary, high levels of customer switching, intense competition and extensive reform to facilitate switching, mean the case for Streamlined or Automated switching is somewhat redundant in furthering competition and is likely to be inefficient. We expect that the Minister will actively consider the state of competition including the effect of previous regulatory reform in the sector, when considering the matter of competition in the declaration process.

#### 1.1.2 Impacts on energy market if Automated switching results in very frequent switching (less than 12 months)

##### Impacts on Retail energy pricing

From a broader energy market perspective, very frequent switching (less than 12 months) could create serious challenges to how Energy Retailers price energy and recover their costs today. For example, energy products are generally sold with "flat" pricing that is set for 12 months. This price is one single unit price for the year that smooths out seasonality, which means the price may result in an under-recovery in peak price periods such as in summer and winter, but is balanced by an over-recovery in the other seasons. Over a 12-month customer tenure, this under- and over-recovery is offset. If customers move to frequent switching after periods less than 12 months there is the potential for customers or AAIs to game the energy pricing and would lead to energy retailers setting more cost reflective (but more complex prices).

There are also other issues around frequent switching by ADRs and different types of Retailers/tariffs. For example, if an ADR were switching customers between Retailers with fixed pricing and Retailers with some level of wholesale electricity cost pass through; it might drive behaviours where ADRs switch customers to the second type of Retailer (pass through Retailer) when wholesale prices are low and falling, but then switch customers to fixed prices when wholesale prices are increasing. This could cause supply issues for the fixed pricing Retailer where they are offering fixed prices based on established wholesale (hedging) arrangements and their previous customer load (and would then potentially face higher wholesale costs for the load they had not planned for).



## 2. Comments on Draft legislation

### 2.1 Declaration process should be conducted across sectors where there is a common use case

The Draft legislation proposes that the Minister will declare which Data Holders an action type applies to, as Data Holders have been designated per sector this seems to imply a sector-by-sector rollout of Action Initiation.

As the switching use case potentially applies across sectors, to both the energy and telecommunication sectors, we contend that the switching use case should be assessed across all the relevant sectors. This will assist in establishing a truly sector agnostic approach to the CDR Rules and avoid the pitfalls of the CDR data sharing experience, where the CDR Rules and standards were initially designed for the banking sector, and it has been difficult to retrofit them to subsequent sectors. This approach would also align with recommendations from the recent Statutory review which noted the lack of flexibility of a sectoral approach and promoted the benefits of a cross-sectoral approach.

### 2.2 AAI Obligation to act efficiently, honestly, and fairly

There is one main protection in the Draft legislation which goes to addressing the risks of Action Initiation - an obligation on AAIs to act efficiently, honestly, and fairly when initiating CDR actions.

We agree that there should be a new protection in the Draft legislation to solve for new risks that Action Initiation will introduce. However, Treasury should design any new protections taking into account the common risks across all the different use cases. The obligation to act efficiently, honestly, and fairly might make sense in a financial context and payment initiation, but it lacks meaning in the context of the switching use cases for energy:

- Acting “efficiently” when deciding to switch to a new energy plan has an ambiguous interpretation. It could mean the efficiency of the process to instruct an incoming Retailer to switch a customer. From a competition perspective, it could mean that the switching decision itself provides efficient outcomes for the customer by way of lower pricing or a more innovative offer.
- Honesty may also be interpreted to have limited meaning as an AAI might be completely transparent about its switching decisions even though those switching choices might be detrimental to the customer.
- Fairness might be more useful to define ideal AAI behaviour, but it is still a vague concept, and requires some subjective interpretation.

In all Action use cases, the AAI will be giving an instruction *on behalf of a consumer* for a certain Action to be performed by the ASP. Therefore, the common thread across all use cases will relate to the AAI acting appropriately on behalf of a consumer, and there should be protections to mitigate against failures of the AAI to act on the consumer’s behalf. E.g. where the AAI fails to follow instructions; fails to act with care, skill and diligence when executing a consumer’s instructions; fails to act in the best interests of the consumer; fails to manage actual and perceived conflicts of interest where the AAI’s interest and the consumer’s interests are not aligned (this is our main concern with Automated Switching, discussed above).

These concerns are analogous to those that arise around principal/agent relationships. We submit that Treasury should leverage the legal obligations and duties that apply to principal/agent relationships to design a revised conduct obligation for AAIs. For example, obligations to carry out

consumer instructions, acting in best interests of the principal (CDR customer), avoiding actual and perceived conflicts of interests.

Separately, we also consider that sectoral regulations may need to be uplifted as discussed in section 1.2.

### **2.3 ASP fees for processing instructions**

The Draft legislation provides that ASPs can charge fees for receiving and processing instructions received through the CDR, if the Minister makes CDR rules permitting it. We agree with this mechanism and anticipate that there will be costs in processing CDR instructions that ASPs should be able to pass onto to AAIs.

As noted above, the switching use case, and especially Automated switching, is not prevalent in the energy sector today. The switching use case also means that the Retailer will not have the initial contact with the consumer and potentially will not be obtaining the EIC from the consumer either directly, or in the Automated Switching use case it will not be obtaining EIC from the consumer at all. This means there is reduced opportunity for the Retailer to verify the customer's identity and their address. As a result, there may be additional cost borne by the Energy Retailer in separately engaging with the consumer to verify these details. This could become costly to a Retailer if they have difficulty confirming these details with a consumer or if the AAI's business practices lead to confusion and complaints by consumers that fall to Retailers to address.

### **2.4 Retailers need the ability to decline an instruction and dealing with conflicting instructions**

The draft explanatory material clarifies that ASPs will have discretion to not perform an action. Separately, ASPs should be able to decline processing an instruction submitted by an AAI. There may be valid reasons to do so where the ASP receives an instruction with incomplete data to process it; the consumer is believed not to be the appropriate person etc. We understand this might be a matter for the rules but seek to clarify it here given the draft explanatory material was explicit on the discretion to not perform an action.

The CDR framework will also need to clarify which instruction should prevail if there are two instructions that are received via the CDR and non-CDR channel which conflict. This may be a matter for the Rules.

### **2.5 Different privacy obligations for the instruction layer and action layer**

The Draft legislation is designed so that Privacy Safeguards apply to data received in the instruction layer, but that the Australian Privacy Principles (in the Privacy Act) otherwise apply where data is received and used in the action layer. While we appreciate the logic, this distinction may be too theoretical and in practice it might not work resulting in data where two sets of obligation apply.

Data that is initially received for the instruction (e.g. a person's address/National Metering Identifier (NMI) in an energy switching use case) would continue to be held by the ASP in the action layer when the customer account is set up and on a continuing basis in the Retailer's account records. The CDR legislation/CDR Rules should clarify at what point data ceases to be data in the instruction layer and becomes data held for an action, where it is the same data.

### **2.6 Data exchanges between ASP and AAIs**

The Draft legislation contemplates some data sharing from AAIs to ASPs to support the instruction for Action Initiation. We understand in the switching use case this could be data about the customer's

details including address and the NMI (identifier of physical site to be switched). We also understand that this data may or may not be CDR data.

We foresee complexities around how this data exchange will work, and suggest that Treasury should work with the DSB to map it out conceptually to identify issues:

- There may need to be two-way APIs so that ASPs can call data from AAIs, where the data provided by the AAI is incomplete. The CDR APIs might not include this today because most data flows are from the Data Holder to the Accredited Person and not vice versa.
- How does consent and authorisation apply to this data that is shared only to support the instruction? It could be potentially confusing for the customer to distinguish between general data sharing vs data sharing to support the instruction.
- Will the CDR protections and obligations only apply to CDR data that is exchanged to support the instruction and not non-CDR data? Will CDR data and non-CDR data use the CDR APIs?
- The Draft legislation contains changes to Privacy Safeguard 10 to impose an obligation on an ASP to notify disclosures of CDR data where the ASP shares data back to the AAI as part of an action.<sup>17</sup> We ask Treasury to explain the intent of this as it is not immediately obvious why an ASP would be sharing data back to an AAI for a switching Action use case.
- How to define and share necessary data without being so prescriptive that this hinders innovation or limits what consumers can access via Action Initiation compared to what they can access when dealing directly with a Retailer.

## 2.7 CDR Rules will need substantial review for Action Initiation

Finally, we emphasise the significant changes to the CDR Rules and data standards that will be needed for Action Initiation. These changes will amount to a complete revision to the CDR Rules which are focussed on privacy and data security, concepts which are relevant to data sharing but less relevant in the context of Action Initiation.

Completely new accreditation criteria will need to be designed for Action Initiation given accreditation is focussed on data security credentials. Many of the Version 3 CDR enhancements to lower barriers to ADRs and facilitate new ADR models (where an unaccredited business can leverage off an accredited person) will be irrelevant to Action Initiation.

We caution that amending the CDR Rules will take a considerable amount of time which should be factored into Treasury's timelines for the rollout of Action Initiation.

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<sup>17</sup> See [Summary of proposed changes - Exposure draft legislation to enable action initiation in the Consumer Data Right \(treasury.gov.au\)](#), Table: Proposed application of the privacy safeguards