

The logo for Optus, consisting of the word "OPTUS" in a bold, teal, sans-serif font.

Submission in response to
The Treasury

**Exposure draft
legislation to enable
action initiation in the
Consumer Data Right**

Public Version

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INTRODUCTION

1. Optus welcomes the opportunity to comment on the Treasury's consultation on Exposure Draft legislation of proposed changes to the Competition and Consumer Act 2010 (CCA) to enable action initiation as part of the Consumer Data Right framework (the Bill).
2. Optus understands the intention is that the action initiation framework will be applied to new sectors in a similar fashion to the existing CDR framework – that is, the first declaration step is similar to the CDR designation process with further specific rules to be made after that.
3. Optus notes consultation on this proposed action initiation consultation has occurred at the same time the telecommunications industry is undertaking detailed consultation on the CDR Rules to apply to the telecommunications sector, operational enhancements to the CDR regime generally, as well as initial development of data standards for the telecommunications sector. This has imposed a material impost on industry and companies to fully engage with the CDR process. The effect of running multiple concurrent consultations is to reduce the ability of interested parties to provide meaningful comments. There does not appear to be a compelling reason for the action initiation consultation to have occurred while other CDR consultations are underway.
4. The action initiation scheme appears to be quite separate to the existing CDR regime, in that it does not necessarily depend on the sharing of CDR data. Therefore, it requires its own detailed analysis and consideration of its proposed operation. As the consultation has occurred at the same time as other CDR consultations, Optus has not had sufficient time to undertake a detailed analysis of all proposed changes to the legislation and the proposed operation of the scheme.
5. Optus considers this is not consistent with the best practice approach to consultations as outlined in the Best Practice Guidance Note issued by the Office of Best Practice Regulation.¹ Optus considers that the action initiation amendments should be delayed until further detailed consultation has been undertaken with affected parties.
6. Optus has had the opportunity to review the letter provided by Communications Alliance and supports the points made in that letter. Optus has some further comments below but notes that this is not a comprehensive review of the action initiation scheme given competing consultations.
7. Optus does not support the introduction of an action initiation scheme at this time due to the lack of proper consultation with key impacted industries. The scheme should be delayed until an up-to-date cost-benefit analysis for action initiation or a post-implementation review of the CDR in telecommunications has been undertaken. There is no justification to extend the regime where the CDR regime has not yet proven to be beneficial to consumers or industry.

¹ <https://obpr.pmc.gov.au/resources/guidance-obpr-procedures/best-practice-consultation>

JUSTIFICATION FOR ACTION INITIATION NOT CLEAR

8. There has been insufficient evidence presented that demonstrates a clear need to enable action initiation as part of the Consumer Data Right framework – especially with regard to the telecommunications industry.
9. While Optus has not been afforded sufficient time to assess the full implications of the action initiation proposal (due to multiple concurrent CDR-related consultations), we have the following concerns.
10. On balance, the case for the proposed changes has not been made. No clear benefit has been identified; the cost to industry has not been estimated; and finally there appears to be no clear policy problem that needs to be addressed. The action initiation proposal appears to be a solution looking for a problem. Optus again reiterates that all CDR) related actions be paused until a proper review of the regime has been undertaken and clear net benefits demonstrated.

Costs of action initiation and CDR should be minimised

11. Optus is concerned about the overall policy approach to CDR and the trend to introduce new legislation or rules prior to regulatory impact assessments being completed and without a full appreciation of the impact on designated industries. This has occurred from the introduction of the CDR legislative amendments to the CCA in 2018 and Optus' concern is that this will continue with action initiation.
12. Should this approach be repeated in relation to action initiation, Optus considers an overarching concern needs to be on ensuring minimal implementation and compliance costs to relevant sectors.
13. For example, at the time the CDR amendments to the CCA were introduced it was estimated that compliance costs for banking would be around \$86.6 million per year, and in the energy sector by around \$9.9 million per year.² There was no assessment of any costs to the telecommunications sector at that time even though it was clear the expectation was that the CDR regime would apply to telecommunications in future. It was stated that the regulatory impact for telecommunications and other sectors would be assessed during the designation and rules making processes.³ A subsequent report by Grant Thornton 3 years later at the time the telecommunications sector was designated identified regulatory costs across the sector totalling more than \$100m.⁴ We also note that no off-setting benefits were estimated by the Treasury at the time.

Benefits of action initiation are unclear

14. In relation to action initiation, it is unclear to Optus how this offers greater benefit than existing channels for processing instructions. There are multiple systems, channels and processes through which current and prospective customers can engage with Optus. Primarily the My Optus App is simple, easy to use and supports the account management functions contemplated by the action initiation framework. It seems counter intuitive and less efficient and streamlined for a customer to use a third party avenue,

² Treasury Laws Amendment (Consumer Data Right) Bill 2019 Explanatory Memorandum, p. 3.

³ Treasury Laws Amendment (Consumer Data Right) Bill 2019 Explanatory Memorandum, p. 3.

⁴ Consumer data right: Telecommunications sectoral assessment Final report, November 2021 (Attachment B).

then need to separately authenticate their identity and consents with the provider to undertake a transaction that could be done simply via the one app..

15. Notwithstanding this, easily switching providers is already well-supported in the telecommunications industry with established processes and number portability Codes. A person could switch their mobile or nbn provider in a matter of minutes and hours (in contrast to switching mortgages or other banking products). Indeed, the example noted in the Explanatory Material for the bill supports the view that there is less need and less demonstrable benefit to CDR in the telecommunications sector.⁵ In the example, the person moves to an area with only one provider, as there is clearly no need to share CDR data because you are unable to compare plans. It would seem a more convoluted process that a customer contact a third party to initiate the switch, instead of directly contacting the telecommunications provider. If a customer does wish to change plans they would still need to go through sales processes (including any relevant identity and credit checking processes anyway). On the basis of the information available, the scope of action initiation appears to be potentially very broad.

Legislation/instrument development approach has proven problematic

16. Real world experience has shown that the sector-by-sector legislative/instrument development approach is proving to be problematic for the following reasons:
 - (a) The initial legislation/instruments seems to be heavily geared towards banking;
 - (b) There is an ongoing failure to recognise distinct sectoral differences during policy development stages such as designation, sectoral assessment and rule-making; and
 - (c) Assumptions that only minor tweaks need to be made to instruments for these to be fit-for-purpose to other sectors is incorrect.
17. Optus has concerns if this same approach to policy development continues for action initiation or other schemes that may be considered in future. A key example of the problems with this approach can be seen in developing the CDR Rules for the telecommunications sector. The approach taken was to develop 'General Rules' with sector-specific schedules added for each sector.
18. The General Rules are obviously heavily geared towards the initial sector subject to CDR (banking) with the expectation that 'sector-specific' rules are then developed as a separate schedule. This effectively leads to sector-specific CDR Rules needing to be developed by exception – that is, by trying to understand how the General Rules apply to telecommunications and identify the necessary exceptions. It was difficult for the telecommunications industry to provide any comment on the General Rules when these were developed as no engagement on designation and potential regulatory impact has occurred with the sector. Therefore, trying to identify exception use cases to the General rules is a detailed and time-consuming process. This is a complex and difficult approach to policy development.
19. This approach to policy/rules/instrument development increases the risk that a regime/scheme will be ill-suited to specific sectors, overly (and unnecessarily) complex, difficult and costly to implement, when benefits seem to be difficult to identify or quantify. Optus submits that a more considered approach needs to be adopted going forward.

⁵ Treasury Laws Amendment (Measures for consultation) Bill 2022: Consumer Data Right – Implementing action initiation, Exposure Draft Explanatory Material p. 16.

Action initiation does not appear dependant on CDR regime

20. Optus disagrees that the process simply builds on the existing CDR system (as noted in the Explanatory Memorandum)⁶ as it clearly is intended to facilitate consumers taking actions regardless of whether there has been CDR data shared beforehand. As noted in the example referred to in the Explanatory Material, the switch to another mobile provider did not require the sharing of CDR data beforehand. Because action initiation is not dependant on the sharing of data under CDR, action initiation is therefore a distinctly separate concept and framework.
21. Therefore, it would be appropriate for action initiation to be subject to proper consideration of the likely costs and benefits prior to legislation being introduced, rather than positioning action initiation as part of the CDR framework. It is conceptually separate, and data holders may not even end up as action service providers under the action initiation framework.
22. If the same approach to action initiation continues to be followed, it would seem it will be implemented and applied to sectors the same as CDR, without proper consideration of the costs and benefits of the scheme. Such costs will continue to be borne by consumers.

Unclear impact on existing authentication and law enforcement activities

23. It is unclear how the action initiation scheme interacts with existing customer authentication requirements in telecommunications and the operation of law enforcement activities, such as interception warrants. These issues do not seem to be explored in the Explanatory Materials and Optus considers that they warrant further investigation.
24. For example, the Telecommunications Service Provider (Customer Identity Authentication) Determination 2022 (the authentication determination) operates to require multi-factor authentication steps where a consumer requests undertaking a high-risk transaction. High-risk transactions include the type of account management activities contemplated by the action initiation scheme, such as:
 - (a) A customer losing access to their telecommunication service (cancellation of the service);
 - (b) A change to the customer's personal information, business information or account security information;
 - (c) Adding or removing a person as a customer's authorised representative;
 - (d) Disclosure to the requesting person a customer's personal information, business information or account security information;
 - (e) An additional ongoing or a large one-off charge being applied to a customer's account.⁷
25. The only person who can make such high-risk transaction requests is the account holder, or if there is a nominated authorised person listed on the account. A third party

⁶ Treasury Laws Amendment (Measures for consultation) Bill 2022: Consumer Data Right – Implementing action initiation, Exposure Draft Explanatory Material p. 15

⁷ Telecommunications Service Provider (Customer Identity Authentication) Determination 2022, s. 6.

not listed as such on the customer's account could be considered an 'unlisted authorised representative' if they are authorised to act on behalf of the customer (e.g. authorised by the customer or a court/tribunal). In such cases, the requesting third party needs to provide documentary evidence that they are authorised by the customer to act on their behalf. The authentication determination notes that documentary evidence could be an enduring power of attorney or a financial management order.

26. Such documentary evidence is a critical requirement of the authentication determination and its focus on preventing fraud. Anyone purporting to be acting on behalf of a customer, must have some clear legal authority on which to do so in order to prevent fraud. It is not clear to Optus what evidence is contemplated under the action initiation scheme to prove that the third party (i.e. an action initiator) has legal authority to act on behalf of the customer. Optus considers it must be clearly established what documentary evidence is required so that correct advice can be provided to telecommunications providers so that they are compliant with the authentication determination.
27. Further, Optus holds concerns that the action initiation scheme may negatively impact some law enforcement activities. That is, whether the action initiation scheme would enable someone to set up an automated process with the third-party initiator to switch providers such that this could frustrate legal intercept and/or other law enforcement activities. This warrants further consideration.
28. The above are important points in considering how measures targeted at preventing fraud and activities assisting law enforcement agencies could be impacted by the action initiation scheme. It may be that telecommunications should not be subject to the action initiation scheme if a solution cannot be found. Optus submits that telecommunications providers are already incurring significant cost for implementing CDR in the sector when the benefits are unclear, therefore, it should be carefully weighed up whether the action initiation scheme is necessary for telecommunications if this is also going to require further measures to address potential fraud risks and/or further support law enforcement activities.

ADDITIONAL COMMENTS

29. Notwithstanding the general comments above, Optus has further comments on the some of the proposed amendments. As noted, Optus has not been able to comprehensively review all proposed legislative changes given competing concurrent CDR consultations.

Rulemaking powers appear overly prescriptive

30. Notwithstanding Optus' comments above regarding the overall operation of the action initiation scheme and its potential impact on other critical protections and processes, Optus has some concerns about the prescriptiveness of the rulemaking powers.
31. Optus notes that if action initiation is to proceed, any rules should be consistent with existing established industry processes. For example, the mobile number portability Code sets out established processes and timeframes for processing customer request to port mobile numbers. Duplication or deviation from such processes may place providers at risk of failing to comply with either any action initiation rules or an industry code.
32. Optus notes that while s. 56BGA(4) states that "rules must not apply at the actions layer" there appear to be a number of draft sections that potentially conflict with this. For example, draft s. 56BGA1(d) allows for rules on requirements on an action service provider for a type of CDR action relating to how the provider processes a valid instruction. We note the system demarcation between processing 'instructions' and

'actions' may not always be clear and will differ across sectors and between action service providers. Existing systems and processes must be carefully considered in designing the rules and any data standards required to deliver action initiation, with a view to minimising systems development costs where possible.

33. Optus objects to the proposal that a CDR consumer be able to direct an action service provider to provide reports about processing of valid instructions (para 1.121, Explanatory Material). It's unclear if this refers to providing an update on processing an existing request or providing a report of historical request. In either case, there doesn't seem to be a need for such a reporting requirement.

The approach to privacy is confusing

34. Optus notes that the intention of the proposed changes to the privacy safeguards is to "create a clear delineation between the regulatory obligations at the instruction layer (which is specific to the CDR), and at the action layer (which is covered by existing privacy regulation)". It appears that Action Service Providers will need to comply with safeguards 1, 3, 4, 10, 11 and 13 for CDR data received at the instruction layer, which in turn will override the Action Service Providers obligations under the Privacy Act with respect to this data.
35. In practice, Optus considers that the proposed approach is likely to lead to significant confusion and administrative cost in the application of the required privacy protections to relevant data. The capacity to meaningfully differentiate and apply different protections to what will often be the same data seems well intentioned but ultimately impractical.
36. Optus is concerned that such an approach to privacy obligations is confusing and at the very least is likely to require further consideration once the Privacy Act Review is finalised.

Approach to fees requires further consideration

37. In principle, Optus objects to the regulation of fees that Action Service Providers may apply for the purposes of facilitating CDR action initiation. Optus submits that the costs that Action Service Providers will face to process instructions and actions will differ across sectors and providers. Imposing regulated charges has the potential to distort the market, particularly if the charges is set too low. Accordingly, Optus submits that fees should be left to market competition and the capacity of individual operators to cover relevant costs of supply.
38. Specifically in regard to rules about fees at the instruction layer (section 56BP(a)) – Optus submit that the "marginal cost of processing such instructions" will differ across sectors and providers and will therefore require case by case analysis of the cost of supply for individual Action Service Providers. At this time, it remains unclear whether and if so what fixed and/or variable costs, will be factored into calculating the marginal cost.
39. Further, the degree to which "the incentive to perform actions of that type" is a meaningful consideration in the context of mandated performance (by Action Service Providers that are data holders) remains questionable.
40. Optus submits that in setting any fees for processing at the instruction layer, the regulator should be required to have regard to the costs of systems implementation in each case as well as the need for Action Service Providers to make a return on the investment sufficient to cover the costs of maintaining the systems required to facilitate the CDR.

41. In regard to fees at the action layer – Optus considers that restricting service providers from charging a premium for processing CDR actions may provide an incentive for the operator to raise fees for all service processing (still complying with the non-discrimination principle) (para 1.71, 1.107 EM and draft subsection 56BGA(2)). As such, such a restriction may end up meaningless.
42. The costs of implementing CDR and schemes such as action initiation must be considered as they are not insubstantial and margins on many telecommunications products (particularly nbn services are extremely low). It is imperative for the ongoing sustainability for the telecommunications industry that providers are able to recover costs of any scheme implemented. Otherwise, consumers will bear costs by way of higher prices, reduced investment or reduced competition in the market if providers are unable to absorb increased costs.
43. Optus submits that the approach to fees requires further consideration.