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Secretariat
Statutory Review of the Consumer Data Right
The Treasury
Langton Crescent
PARKES ACT 2600

Submitted electronically: CDRstatutoryreview@treasury.gov.au

Re: Statutory Review of the Consumer Data Right - Issues paper

Red Energy and Lumo Energy (Red and Lumo) welcome the opportunity to respond to the issues paper for the independent review of the *Competition and Consumer Act 2010*, which contains the primary legislation for the Consumer Data Right (CDR).

Red and Lumo have consistently supported the CDR and recognise the potential benefits it will generate for Australian energy consumers. It will assist them with their energy choices, encourage efficient energy use and facilitate efficient investment in solar, batteries and other distributed energy resources. The potential benefits are wide ranging and include product innovation, reduced energy prices and more efficient use of energy infrastructure. These are in addition to the benefits that the issues paper identifies (on pages 7 and 8).

However, our support for the CDR is qualified and dependent on the controls that apply to data use and storage. Our customers' privacy and safety and the integrity of their data is of primary importance to us, while any dilution of existing protections also creates compliance risks due to existing privacy and energy regulatory obligations. The CDR necessarily creates a trade-off between allowing for the transfer and storage of sensitive energy data between different entities and the risk of data breaches.

Energy retailers are currently implementing the CDR, which means we do not have practical experience with the operation or regulatory administration of the CDR so our response to the issues paper reflects our experience with the regulatory process to designate the energy sector and develop CDR rules for energy, and the ongoing process to develop data standards.

We also note suggestions in the paper about how the CDR could evolve, including the proposal to allow for action initiation by accredited data recipients (ADRs). This would be a substantial change to the established regulatory framework for energy and should only proceed following extensive stakeholder consultation and comprehensive analysis of the associated risks.

Development of energy rules

The issues paper seeks views on the legislative framework for the CDR. The hierarchy of instruments and process for initially designating and then developing specific rules for an industry

are well established. Red and Lumo had numerous opportunities to contribute to consultation on energy rules and amendments to the core Rules, initially by the Australian Competition and Consumer Commission (ACCC) and then the Treasury. Looking ahead, the legislative structure provides a sound foundation for extending the CDR to other industries.

This is a function of the legislative structure but in the case of the energy designation, was also due to the manner in which the entities administered their functions. For example, the ACCC was able to assess different options for facilitating the transfer of CDR data between holders and ADRs (gateway vs. peer to peer) and selected an option that could be easily implemented and at reduced cost. On the other hand, Treasury placed greater emphasis on a consistent approach across industries and determined that the CDR should be available to (effectively) all energy consumers regardless of their level of consumption as this would be consistent with how the CDR applies or will apply in other industries. This was despite most retailers noting that the commercial and industrial segment is highly sophisticated and competitive for both the supply of energy and supporting advice, including brokerage services.

The energy policy decision has been to exclude this segment from the scope of many of the core protections available to small consumers under the National Energy Customer Framework and the Victorian equivalent. The question of whether the decision under CDR to include all consumers will generate a net benefit will only become apparent over time.

These issues highlight the importance of a broad and coordinated approach to the development of CDR Rules and any amendments to ensure it is aligned with regulations that are specific to each sector. The legislation provides for this at the designation stage by mandating that the Minister ensure the Treasury consults with the ACCC, the Office of the Australian Information Commissioner, and the '*regulator of the relevant sector*' and this should apply also to the Rules to enact each designation and for significant amendments to the Rules that cut across different industries. This will ensure an appropriate balance between developing the CDR with common rules to support interoperability and maintaining core consumer protections within each designated industry. This also implies a role for the Australian Energy Market Commission, Australian Energy Regulator and the Essential Services Commission, in light of their regulatory functions in the energy sector.

This is also highly relevant for the issue of action initiation, which is discussed in more detail below and will require a coordinated approach to ensure the CDR does not undermine the well established concept of explicit informed consent.

We can point to other aspects of the energy sector that further demonstrate why it is important to consider the broader impact of any proposed changes to the core CDR Rules. For example, energy retailers have unique regulatory responsibilities that reflect our role as providers of an essential service. We are obligated to provide ongoing support to consumers who are experiencing payment difficulties and this often involves obtaining information that many consumers would consider to be highly sensitive. More recently, we have obligations to support consumers who may be experiencing family violence; these rules currently apply in Victoria and Red and Lumo have proposed a rule change to introduce similar protections elsewhere. Support

for such consumers may involve withholding data in some circumstances when there is reason to believe that disclosure could threaten a customer's safety.

The sensitivity of personal information in these situations is clear, but we also note the sensitivity of other energy sector data, such as meter data. The Supplementary Privacy Impact Assessment of the Consumer Data Right for the energy sector concluded that 'energy data does not generally have the same sensitivities as banking data'.¹ While this may be the case for some consumers and for some energy datasets, energy data in general is still highly sensitive and our customers expect that we will maintain their privacy and safety by protecting their data. We do not believe that the relative sensitivity of energy data is a basis for relaxing controls over data handling or the regulation of CDR participants now or at any future point.

In the case of meter data, the risks to consumers from misuse does not necessarily arise from the ability to identify an individual, although this might be possible if meter data is combined with information obtained from other sources. Rather, meter data provides information about usage at a particular location which allows third parties to understand behavioural patterns, appliance use, hours of employment and extended absences from the premises. This could lead to a range of outcomes, such as risks to personal safety or to property, or to less significant issues such as unsolicited marketing and other communications to the household.

The CDR allows data holders to refuse to respond to a data request if this is the case but it is important that the broader CDR framework, including obligations on ADRs, also explicitly accounts for these situations.

Accreditation of data recipients

We also observed a number of changes to the CDR accreditation framework that occurred simultaneously to the development of energy rules for the CDR. These amendments were designed to accommodate different business models and to address the time and cost associated with becoming an ADR. Our concern with these changes was the increased granularity and therefore, complexity of the accreditation framework and how we would then explain this to our customers.

In our view, consumers will benefit from CDR when they understand it and are confident their data is safe. A function of increased complexity is that it will become harder for consumers to understand how the scheme works, e.g. which consents relate to which parties, to which datasets and for what purpose, and what they can do in the event of a data breach. In the case of 'trusted advisers', for example, the integrity of the scheme relies on the monitoring activities of regulatory agencies, such as the Australian Securities and Investments Commission, and for them to undertake a role that wasn't foreseen in the early stages of the CDR.

A further challenge is for the ACCC's regulatory administration. The more complex the accreditation framework, the greater the challenge for regulators to understand the flow of data

¹ KPMG (2020), *Supplementary Privacy Impact Assessment for the Commonwealth Department of Treasury, Consumer Data Right in the Energy Sector*

and its use. This might be between unrestricted and restricted ADRs, or those who are not accredited under the CDR Rules, for example.

Therefore, our preference is for the Government to adopt a conservative approach when considering further changes to CDR while all parties build consumer trust. In our view, this involves a stable and relatively simple framework for the accreditation of ADRs.

Action initiation and future directions for the CDR in the energy sector

The issues paper also considers the future for the CDR, noting the recommendations of Mr Scott Farrell in the *Inquiry into Future Directions for the Consumer Data Right* and describing payment and action initiation as potential 'game changers'.

Action initiation in the energy sector would allow ADRs to set up payment arrangements between consumers and service providers but more significantly, would allow an ADR to switch a consumer to a different offer or retailer. We could not support such a measure unless it was the outcome of a comprehensive review of consumer protections in the energy sector, including explicit informed consent (or EIC) provisions.

EIC is a core and well established element of the consumer protection framework under both the National Energy Consumer Framework and the Victorian equivalent. Energy retailers devote considerable resources to ensuring they obtain EIC in a compliant manner and it has been the basis of numerous regulatory actions against retailers since the creation of the competitive market. It is designed as a deliberate friction within the competitive market that forces consumers or an agent acting on their behalf, to carefully consider the implications of changing to an alternative product or service provider.

Any changes to these arrangements that the Government might consider to further develop the CDR must only occur as part of a broader review of the regulatory framework that applies in the energy sector, including the current EIC provisions. Otherwise this could lead to a situation where EIC applies in some instances but not in others. This confuses compliance activities for energy retailers and creates uncertainty for regulators and consumers about enforcement options and avenues for recourse in the event of a breach.

Our view is consistent with the conclusions of the Farrell inquiry and we draw particular attention to the following statement:

*'The Inquiry accepts that, while the CDR offers a significant streamlining of switching for consumers in most sectors, there is a range of sector-specific requirements that will continue to be friction points where consumers or accredited persons would be required to move off the CDR infrastructure to complete a switch. The sectoral assessment process can be used to identify such friction points and can provide sector-specific CDR responses or identify legislative or regulatory reforms where necessary. Consultation with both industry and sectoral regulators would be important in this process.'*²

² Australian Government (2020), *Inquiry into Future Directions for the Consumer Data Right*, page 31

Establishment of action initiation in the energy sector is enticing but this would be an extremely complex and costly change, given the existing governance arrangements, systems and protocols to transfer customers between different retailers. The existing arrangements are administered by the Australian Energy Market Operator and governed under the National Energy Retail Law and Rules and subordinate Procedures where Energy Ministers, the Australian Energy Market Commission, Australian Energy Market Operator and Australian Energy Regulator all share responsibilities. These are also likely to change in the near term with the introduction of new roles and responsibilities with the Energy Security Board's post-2025 reform program. Further consideration must also be given to the ACCC's established role to monitor the energy sector and any oversight of third party comparator services, which could include ADRs at some point. The Government and Treasury, should it decide that the benefits of action initiation outweigh the costs of implementation and ongoing administration, will need to carefully align the CDR Rules with all of these existing frameworks in the energy sector.

About Red and Lumo

Red and Lumo are 100% Australian owned subsidiaries of Snowy Hydro Limited. Collectively, we retail gas and electricity in Victoria, New South Wales, Queensland, South Australia and in the ACT to over 1.1 million customers.

We thank the Secretariat for the opportunity to contribute to its issues paper. Please contact Geoff Hargreaves, Regulatory Manager on 0438 671 750 if you have any further queries or want to discuss this submission in more detail.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Stefanie Monaco", written over a light blue rectangular background.

Stefanie Monaco
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