



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Consumer Data Right: Exposure draft legislation to enable action initiation

ACCC Submission

October 2022

Introduction and Role of the ACCC

1. The Australian Competition and Consumer Commission (ACCC) is pleased to contribute to Treasury's consultation on the exposure draft legislation to enable action initiation in Consumer Data Right (CDR). This submission sets out the ACCC's views on key legislative amendments to the *Competition and Consumer Act 2010* (Cth) (the CCA) proposed by Treasury in the exposure draft Bill (**Draft Bill**).
2. The ACCC is an independent Commonwealth statutory agency that promotes competition, fair trading and product safety for the benefit of consumers, businesses, and the Australian community. The ACCC's responsibilities are to enforce compliance with the competition, consumer protection, fair trading, and product safety provisions of the CCA, regulate national infrastructure and undertake market studies.
3. The ACCC's CDR roles include accrediting data recipients, establishing and maintaining a Register of accredited persons and data holders, monitoring compliance and taking enforcement action in collaboration with the Office of the Australian Information Commissioner (OAIC), considering exemption applications and providing guidance to stakeholders about their obligations under the CDR. The ACCC also plans, designs, builds, tests, manages and secures the enabling technologies for the CDR, and supports participants throughout their lifecycle, including testing and onboarding. The ACCC looks forward to working with Treasury, the Data Standards Body and the OAIC to continue to expand the CDR.
4. The ACCC supports the expansion of CDR to include action initiation but considers that action initiation should not be enabled until the protections outlined in this submission are implemented. Once adequate protections are in place action initiation will help to grow and develop the economy-wide CDR by increasing its functionality, thereby increasing the potential benefits to competition and consumers.
5. This increased functionality is a fundamental change to the nature and scope of CDR, and will require a significant expansion of the ACCC's regulatory functions on top of our existing regulatory responsibilities for CDR.
6. The ACCC submits that action initiation functionality will need to be built up over time as it introduces significant additional complexity and risk to the CDR. Strong consumer protections will be required within both the CDR regulatory framework that regulates the giving of instructions by consumers, and within the sectoral and privacy legislation that applies to the 'action layer'. This is necessary to build consumer trust in the CDR and ensure that consumers who use the CDR to undertake actions are appropriately protected. This submission sets out some threshold issues that should be considered as the detailed framework for action initiation is developed and implemented.

CDR's interaction with sectoral regulatory frameworks

7. The ACCC notes that the draft legislation does not specify the detailed arrangements for action initiation, instead providing the legal architecture to support future implementation decisions made by the Minister through declarations or amendments to the CDR rules.
8. The CDR rules will govern the instruction layer and will determine the detailed arrangements for key implementation issues. These include whether action initiators will require a higher tier of accreditation than data recipients, liability for the performance of unauthorised actions, and the interface between CDR and sectoral regulatory obligations. This is consistent with the approach to the legal framework for CDR data sharing.
9. The ACCC anticipates that there will be significant complexity in the interface between CDR and sectoral regulatory obligations. This is because instructions to take an action will occur within the CDR regulatory framework, while the action itself, whether it

comprises a payment or some other form of action, will take place outside the CDR regulatory framework.

10. Further, it may not always be clear to the consumer whether the action is taking place within the CDR or outside it. Consumers should have confidence that strong consumer protections, privacy and information security safeguards apply irrespective of whether they are sharing data, issuing an instruction, or having an action performed on their behalf. CDR action initiation should be designed to promptly provide certainty to the consumer about the outcome of their action, for example whether the intended action has been completed, rejected, or failed.
11. In expanding to action initiation, it is essential to maintain strong trust in the CDR regulatory framework's ability to achieve its important pro-competitive and pro-consumer objectives while protecting privacy. High levels of consumer trust will be essential to ensure consumers are willing to use CDR to initiate actions on their behalf. Therefore, the ACCC considers it fundamental for Treasury to ensure that the range of complex regulatory issues that may arise are addressed when developing the detailed obligations that will underpin action initiation, including appropriate implementation timelines. The current regulatory architecture is not sufficient, and the issues that must be addressed as prerequisites to the introduction of action initiation include:
 - Whether the relevant sectoral framework under which a class of action(s) will be performed requires reform to ensure that strong consumer protections, privacy and information security safeguards apply, irrespective of whether the consumer is sharing data, issuing an instruction, or having an action performed. This should be considered before any type of action is declared by the Minister.
 - Whether the relevant sectoral framework provides sufficient consumer safeguards in circumstances where consumers will be both sharing their data and agreeing for actions to occur consequential to that data sharing.
 - Whether all action service providers that will perform a particular type of action are subject to the requirements of the *Privacy Act 1988* or comparable Privacy Safeguards to ensure that there are sufficient protections for consumer privacy at the action layer. Since the Privacy Safeguards will generally not apply at the action layer, it will be important to ensure that all action service providers are subject to privacy legislation and that relevant recommendations from the Privacy Act Review are implemented before enabling actions under CDR.
 - Whether the delineation of regulatory responsibilities between the ACCC and relevant sectoral regulators is clear, in circumstances where the action itself takes place outside the CDR.
 - How to design a liability framework at both the instruction and action layers to ensure that there are clear arrangements for allocation of liability. This should include ensuring as a precondition to the implementation of action initiation in any sector, that there is a comprehensive liability regime in place in that sector. Consumers should not bear the risk of fraudulent activity or unauthorised payments, nor be exposure to liability, while undertaking actions through CDR. This will require, amongst other things, that reforms to the ePayments Code identified in the 2021 Payment Systems Review are in place before payment initiation is implemented.
 - How to ensure transparency about the business models of accredited action initiators to enable consumers to give fully informed consent. For example, whether an action initiator receives a commission for referring a consumer to a particular provider.

- The need for a risk assessment overseen by AUSTRAC to comprehensively assess the resilience of the proposed framework to money laundering and terrorism financing threats.
12. These complex regulatory issues will need to be managed in addition to the ACCC's ongoing compliance and enforcement activities relating to CDR.
 13. If appropriate sectoral regulatory controls are not already in place for all sectors for which types of actions are declared, the ACCC recommends the Government considers prioritising the development and implementation of these regulatory controls outside of CDR before allowing actions of those types to occur using CDR.

Implementation considerations for payment initiation

14. Payment initiation via CDR will represent a very significant change to the Australian payments landscape. The ACCC considers that the interaction of action initiation with relevant sectoral frameworks will be particularly complex in relation to payment initiation. While in many sectors there is a mature regulatory framework that oversees actions such as switching providers, the 2021 Payments System Review noted the need for a change in regulatory approach to payments in light of technological developments over the last two decades, to ensure that payments remain safe, efficient and effective.¹
15. While the ACCC appreciates the significant interest from Fintech firms and other innovative firms for CDR's expansion to payment initiation, the ACCC considers that a range of payment licensing issues identified in the Payments Review, including in relation to the scope and application of the ePayments Code and associated dispute resolution processes, require consideration before the detailed framework for CDR payment initiation can be progressed. CDR payment initiation will be most effective if the existing regulatory framework for payments, particularly for unauthorised and mistaken transactions, is fit-for-purpose before payment initiation is implemented. The allocation of liability, which is discussed below, will be a key aspect of this.
16. To avoid unacceptable risk to all CDR participants including the ACCC as Registrar, it is important that payment initiation is designed in a manner that does not undermine, and where possible enhances, the effectiveness of Australia's regimes for Anti-Money Laundering, Counter-Terrorism Financing, and sanctions.
17. In designing CDR payment initiation, particular regard should be had to the relevant 'International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation' published by the Financial Action Task Force (FATF)². Consistent with FATF Recommendation 15, a formal risk assessment of the proposed design for CDR payment initiation should be undertaken, presumably by AUSTRAC, before implementation and before material future changes to the scope of payment initiation.
18. Recommendation 5.6 of the second Farrell review, into 'Future Directions for the Consumer Data Right' recommends that

*Consumer Data Right payment initiation should be designed to allow competition among payment systems in order to improve consumer outcomes. By enabling flexibility in implementation, Consumer Data Right payment initiation should leverage future developments in the payments system.*³
19. The ACCC supports encouraging competition between payment systems. Other pro-competition measures, including access arrangements, should also be considered in the

¹ Payments System Review Report, <https://treasury.gov.au/sites/default/files/2021-08/p2021-198587.pdf>, p. 13.

² <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>.

³ Future Directions for the Consumer Data Right, October 2020, <https://treasury.gov.au/sites/default/files/2021-02/cdrinquiry-final.pdf>, p. xx.

policy mix to achieve competitive outcomes, and may be relevant where one network offers unique features than cannot easily be replicated. Payment systems have a natural lifecycle and will at some point approach their end of life. The desire for competition should not necessarily require industry to invest in integrating CDR payment initiation to outdated payment systems, nor prevent the retirement of those payment systems at the appropriate time. Selection of payment systems for integration to CDR payment initiation should take into account considerations such as Anti-Money Laundering and Counter-Terrorism Financing obligations and should also take into account the proposed strategic plan for the payments ecosystem recommended by the Payments System Review.⁴ We welcome further engagement with Treasury on implementation considerations for payment initiation.

Applying a 'proof of concept' approach to launching action initiation

20. Payment initiation is likely to be the 'action type' with the highest residual risk, and will require robust regulatory protections at both the action and instruction layers. There may be benefits in launching action initiation with a non-payment 'action type' such as switching energy providers, either before or together with payment initiation, to ensure the regulatory, technical and consumer protection settings originally contemplated are optimal in practice and suitable for future extension to initiation of other action types.

Liability framework

21. The ACCC considers that action types should not be declared unless and until the liability framework that applies to both the instruction layer and the action layer for a particular action type is clear and comprehensive. We have assumed that liability at the action layer would be determined under sectoral legislation, as actions occur outside of CDR. We have also assumed that liability for actions initiated via CDR channels would be consistent with liability arrangements for actions initiated through non-CDR channels.
22. We would appreciate further clarification about which obligations the ACCC would be responsible for enforcing where an action was not properly authorised by a CDR consumer. This scenario may involve consideration of both breaches of CDR obligations and breaches of sectoral regulation outside CDR, and the division of regulators' responsibilities is currently not clear.
23. The Draft Bill proposes to introduce a new subsection 56GC(1) that ensures CDR entities acting in good faith and in compliance with the law are not liable for actions or proceedings in relation to certain conduct. However, the Draft Bill does not detail the liability framework for fraud or misuse that would otherwise apply at the instruction layer. The ACCC suggests that Treasury include additional liability provisions that clarify the liability framework for the instruction layer of CDR action initiation to underpin the new subsection 56GC(1), to ensure that it does not shift liability to consumers. Having a clear and consistent liability framework ensures the ACCC, sectoral regulators that regulate the action layer, and affected parties have clarity on the appropriate recourse in the event of a problem, regardless of which action a consumer is instructing under CDR.
24. We note that the liability framework will materially impact many aspects of the design for action and payment initiation, and potentially the successful adoption of those services. At a high level, when developing a liability framework for action initiation, the ACCC considers that the framework should:
- Clearly establish which party will be responsible for providing consumer redress in the case of fraud or unauthorised actions, taking into account the different ways this could occur and responsibility for the actions of authorised representatives such as CDR representatives or outsourced service providers

⁴ Payments System Review Report, <https://treasury.gov.au/sites/default/files/2021-08/p2021-198587.pdf>.

- Apportion liability based on which party has the greater level of control over the making of an action and/or authentication of the customer
 - Consider whether the accredited action initiator has acted in accordance with the Rules, Standards and Legislation, including the duty to act efficiently, honestly and fairly, and
 - Be capable of applying across different sectors and action types to promote certainty and ensure consistency in consumers' experience with CDR
25. There are likely to be important advantages to developing a cross-sectoral approach to the allocation of liability. This would create certainty for consumers and CDR action participants about which party will be responsible for redress of an issue and increased consistency across the action initiation framework. This will ensure the CDR builds trust, reliability and predictability, despite being a complex regulatory space.
26. The ACCC notes that in the United Kingdom, a liability model is built into the regulations that implement European Union's Payment Services Directive 2 (PSD2).⁵ This provides clarity about the allocation of liability for transactions that are unauthorised or processed incorrectly.
27. If it is not feasible to comprehensively address liability in the CCA, then we suggest that liability arrangements should be clear before an action type is declared, and the CCA should require the rules to address liability issues. Action types should not commence until there is a clear framework that assigns liability for financial loss due to breaches and errors. There may be room for a baseline liability framework to be specified, with potential for alternative or additional liability to be assumed by participants on commercial terms.

Accommodating solution delivery in the action initiation timeline

28. While the ACCC recognises the significant benefits that may be realised from action initiation, we note it is also a significant technical and solution delivery undertaking for the relevant CDR participants, the Data Standards Body and the ACCC to deliver the enabling technology solutions. Depending on design questions and the extent of re-use of any existing capabilities, it is likely that many CDR participants may need to build new systems to send, receive and process CDR instructions that are compliant with the relevant rules and standards for action initiation. Significant lead times are needed to ensure that CDR participants have adequate time to build, test and implement their action initiation solutions. Any compliance dates for new obligations should reflect the scale and scope of the changes involved for action initiation.
29. To allow for a smooth implementation of action initiation, the ACCC will need to uplift processes and technology to allow CDR participants to test their systems and comply with relevant obligations. For the ACCC this could include developing new onboarding processes, updating existing Register application programming interfaces (APIs), introducing new APIs, updating participation application and management processes, developing mock tools, engaging with other agencies on the development of action initiation Rules and Standards, updating the CDR sandbox, updating the rule 9.4 reporting template, updating Get Metrics data and expanding the conformance test suite.
30. The ACCC will also need to develop significant guidance to adequately inform participants of their new obligations and work with the OAIC to develop a coordinated approach to Compliance and Enforcement that will apply to action initiation. The ACCC will need to work with a range of sectoral and financial regulators, and relevant external

⁵ Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC.

dispute resolution schemes, to ensure there is clarity about respective roles and responsibilities.

Efficiently, honestly, fairly duty

31. The ACCC broadly supports the proposal in the draft Bill to include a duty on accredited persons to act efficiently, honestly and fairly when initiating CDR actions. The inclusion of this duty is an important starting point in recognising that the framework for action initiation needs to instil consumer trust and confidence.
32. The ACCC has previously stated that there is merit in Treasury considering whether to introduce a fiduciary duty into the CDR legislative framework that would require CDR participants to use consumers' CDR data in the consumer's best interests when providing them with a good or service.⁶ The ACCC would welcome further consideration of whether applying a fiduciary duty in CDR is appropriate.
33. While falling short of a fiduciary duty, the proposed inclusion of an 'efficiently, honestly, fairly' duty is an important safeguard for consumers. However, the draft Bill only requires an accredited action initiator to act in an efficient, honest and fair manner when engaging in conduct that includes proposing a consumer make an instruction or when giving a valid instruction under the CDR rules.
34. In comparison, the duty applying to financial services licensees applies to all "financial services covered by the licence".⁷ To ensure consumers are adequately protected when engaging with accredited action initiators, Treasury could consider expanding the efficiently, honestly and fairly duty to apply to all conduct by persons in their capacity as accredited action initiators.
35. If a fiduciary duty is not included, the ACCC considers that the duty to act efficiently, honestly and fairly should be extended to include all accredited data recipients.

Charging fees at the instruction layer

36. The ACCC supports the proposed power for the Commission to intervene to set fees applying at the instruction or action layer if the fees being charged are, or will be, inappropriate. The ACCC already has such a power in relation to fees for data sharing,⁸ and extending this to cover fees for instructing an action will serve as an important safeguard against inappropriate charging of consumers for CDR action initiation services.
37. Under the Draft Bill, the ACCC will also be able to take enforcement action if an action service provider charges higher than ordinary fees at the action layer.
38. The ACCC notes that the ability for accredited action initiators to charge fees at the instruction layer will only be enabled by specific rules. Before making such rules, the Minister must consider if the performers of actions of a particular type currently charge fees for processing instructions, if the incentive to perform actions of that type would be reduced if fees were charged for processing such instructions, and the marginal cost⁹ of processing such instructions in accordance with the CDR Rules.¹⁰
39. The ACCC broadly considers these factors to be reasonable for the Minister to consider before permitting the charging of fees at the instruction layer.

⁶ ACCC, *Statutory Review of the Consumer Data Right: ACCC Submission (May 2022)*, p. 8.

⁷ *Corporations Act 2001 (Cth)* s 912A(1)(a).

⁸ *Competition and Consumer Act 2010 (Cth)* s 56BV.

⁹ In this context, the ACCC understands that calculating marginal cost will require a comparison between the cost to provide that particular instruction through CDR and the cost of participating as an ASP but not having to process that particular instruction.

¹⁰ Draft Bill, s 56BP(aa)

40. However, in general, the ACCC recommends restraint on allowing the charging of fees at the instruction layer and considers that such fees should only be allowed where these factors strongly favour the charging of a fee.
41. In particular, the ACCC is concerned about the potential for consumers to be charged two separate fees, one at the instruction layer and one at the action layer, that may cumulatively exceed the total fee they would be charged outside of CDR.
42. Such double charging, if it exceeds costs outside of CDR, would serve as a disincentive for consumers to use CDR to facilitate actions and may ultimately undermine the effectiveness of action initiation through CDR.
43. While the ACCC may be able to consider the cumulative fee when setting the fees that apply at the instruction layer as one of “any other matters the Commission considers relevant”,¹¹ the ACCC suggests that Treasury consider adding an additional factor into draft s 56BZE to explicitly allow the ACCC to consider whether a provider’s cumulative fees for the instruction and action within CDR will exceed the cumulative fees outside CDR. This will instil greater confidence among consumers that the cost of initiating actions in CDR will be the same as outside of CDR and further strengthen the non-discrimination principle in draft s 56BZD.
44. The diagram 1.1 of the Exposure Draft Explanatory Materials shows only a simple model with one accredited action initiator and one action service provider. Further design work is likely to be required to articulate the operation of action initiation in cases where more than those two parties are involved. For example, in the case of payment initiation, the action service provider may receive a payment instruction from the accredited action initiator then pass on the payment to one or more authorised deposit-taking institutions. Issues to be considered may include that the action service provider may not have a proximate relationship with the consumer to affect the direct charging of any fee.

Minor drafting comments

Relevant legislative section	Description and/or relevant extracts	ACCC comments
Subsection 56BZE(1)	This paragraph outlines the ACCC’s power to intervene to set fees for processing a valid instruction when reasonable.	<p>S 56BZE(1) appears to only provide the ACCC with the power to set a fee for “a specified action service provider”. However, s 56BZE(4) outlines that an instrument made under 56BZE(1) specifying a class of action service providers must be made by legislative instrument.</p> <p>We suggest that Treasury consider clarifying the drafting in s 56BZE(1) to include the ACCC’s power to issue fee determinations for classes of action service providers.</p> <p>The existing s 56BV appears to contain the same drafting error, therefore, we suggest that Treasury consider clarifying the drafting in that section as well.</p>
Subsection 56ACA(b)	The subsection currently reads: “for each of those action types—the classes of data holders, of CDR data, that are to be action service providers for that type of action.”	<p>The current phrasing of this subsection is slightly inconsistent with a later subsection and may be unclear.</p> <p>We suggest for clarity that Treasury consider aligning the text in this section to draft s 56AMB which reads “within a class of data holders (of CDR data)”.</p>

¹¹ Draft Bill, s 56BZE(3)(e).