

Submission by



to the

Ministry of Business, Innovation & Employment

on the

Options for Establishing a Consumer Data Right in New Zealand Discussion Document

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PO Box 1925
Wellington
Ph: 04 496 6562
Mob: 021 375 061

CONSUMER DATA RIGHT DISCUSSION DOCUMENT – SUBMISSION BY BUSINESSNZ¹

1.0 INTRODUCTION

1.0 BusinessNZ welcomes the opportunity to make a submission to the Ministry of Business, Innovation & Employment (MBIE) on the 'Options for Establishing a Consumer Data Right in New Zealand' Discussion Document (referred to as 'the Document').

1.1 Given where the use of consumer data is heading globally, we believe there are economic opportunities for New Zealand if the introduction of a Consumer Data Right (CDR) is done effectively and efficiently, and most importantly provides a pathway for innovation. Any future steps must consider the needs, concerns and opportunities for the business community.

RECOMMENDATIONS

1.2 It is recommended that:

- a) The development of any CDR in New Zealand provides opportunity to both harness innovation and improve our standing as a place to do business (p.4);*
- b) Existing processes within identified sectors are properly considered before any form of a CDR is applied to them (p.6);*
- c) The private sector is given the ability to broaden the use of CDR through their own initiatives (p.7);*
- d) Proper cost-benefit assessments are undertaken that relate to any future recommendations that arise from future policy process (p.7);*
- e) The Government acknowledges offshore decisions around a CDR, but seeks to base decisions on what is best for New Zealand (p.8);*
- f) MBIE provide a clearer picture of next steps for the policy process, which should include the opportunity to submit via a second discussion document, as well as the eventual development of a draft bill (p.9);*
- g) A private sector advisory group is established to provide guidance and viewpoints on the governance structure of a consumer data right (p.9);*
- h) The Government look to use regulatory sandboxes or similar regulatory testing grounds when looking to develop regulation that seeks to keep up with the pace of innovation (p.9);*
- i) The process around implementation timeframes takes into account needs and differences across sectors (p.10);*
- j) A CDR includes only observed data (p.10);*

¹ Background information on BusinessNZ is attached as Appendix One.

- k) The incorporation of product data is dependent upon advice from relevant sectors around what data can legitimately be compared (p.11);***
- l) If read/write access were specifically outlined in a CDR, it should initially provide for read access, with scope for write access once risks have been properly identified and solutions developed. (p.11);***
- m) Any framework around a CDR is flexible enough to take into account technological changes that lead to new data requirements (p.12);***
- n) The accreditation regime allows for intermediaries to provide some of the systems or infrastructure that may be necessary to obtain accreditation (p.12);***
- o) A Digital Identity Trust Framework is progressed as soon as possible. Also, an appropriate balance is made between minimising risks for vulnerable consumers and overbearing processes around seeking consents (p.13);***
- p) A measured and evidence-based approach is taken to further work around liability, enforcement and redress, including recognition of the long-term implications of breaches in the public eye (p.14);***
- q) Any future required changes to the Privacy Act are reflective of legitimate and proven concerns around privacy (p.15);***
- r) Existing government departments oversee the running and enforcement of a CDR, rather than the creation of a new government entity (p.15);***
- s) The issue of reciprocity is considered further in any CDR policy process going forward (p.16); and***
- t) If a CDR is to proceed, the government provides a revised set of options beyond this current round of consultation (p.16).***

2.0 OVERARCHING THOUGHTS & COMMENTS

Background

- 2.0 Overall, BusinessNZ agrees with the notion that individuals and businesses should have greater choice and control over their data. When people have more control over what they provide to others in terms of personal information, there is a greater chance that trust deepens and opportunities eventuate. For some businesses, data portability is a key ingredient to innovation in their industry. A process that leads to the best implementation of consumption data portability should help towards unlocking various innovative products and services that they may currently not be able to undertake.
- 2.1 We also recognise the importance of protecting consumer information and data. A regime that seeks to benefit both consumers and businesses, including improved transparency and customer experience, provides a long-standing advantage for the economy. To ensure we get to this point, the regulatory environment needs to look at what is best for both sides, particularly when there is ample opportunity to further promote digital investment, innovation and competition. If a CDR is constructed along

these lines, then the business community, including BusinessNZ, is more likely to support it.

- 2.2 From our perspective, if a CDR is to proceed, developing an optimal regime needs to involve significant input from the business sector. Any framework around it would need to ensure that there is cost-efficient access to market for new-entrant participants, as well as being safe and easy to use for voluntary consumer participation. Regulatory initiatives need to be supported with adequate evidence and assessment.
- 2.3 We agree with the points raised in paragraph 12 of the Document that the recent COVID-19 pandemic has meant a reevaluation of the digital transformation of the economy is needed. At the very least, it shows that people can adapt very quickly to new ways of communicating and exchanging information in an efficient manner. However, at the same time, we do not subscribe to the idea that a major adverse effect like COVID-19 should be the primary catalyst for significant policy changes in an economy. Overall, any potential change needs to be weighed up against all costs and benefits, particularly looking out beyond any current adverse effect. A poorly thought through regime that hinders businesses and creates unnecessary compliance costs will only exacerbate the adverse impacts of the COVID-19 pandemic.
- 2.4 Overall, BusinessNZ believes that some form of CDR is an eventuality across many countries, but what that will look like is very much open to discussion. The Document points out a number of countries that have already decided *'to intervene by engaging in legislative reform to promote consumer data portability or strengthen existing privacy rights'*. These include the European Union and most recently Australia. The Document also points out that the United Kingdom has introduced data portability regimes in specific sectors. As the successes and failures around the actions of these early adopter countries are better understood, so will be the future path around how best to implement a CDR in other countries.
- 2.5 Last, we believe that the decision to introduce a CDR should also include the goal of making New Zealand an easier place to do business, along with ensuring that any CDR does not disadvantage start-up technology to the advantage of established technology. As a small economy at the furthest corner of the world, we face a number of natural barriers compared to many other countries we typically compare ourselves with. However, if we can ensure a CDR is fit for purpose within New Zealand and provides the opportunity for innovative solutions, then we will be in a better position to harness its full potential when a CDR does not create new barriers to entry for particular sectors.

Recommendation: That the development of any CDR in New Zealand provides opportunity to both harness innovation and improve our standing as a place to do business.

- 2.6 While the Document asks a series of questions in relation to a CDR being introduced in New Zealand, we would instead like to take the opportunity to outline the issues we believe are the most important when examining any future work towards developing one.

Existing mechanisms in New Zealand

- 2.7 Paragraph 11 of the Document mentions existing sector-led initiatives in New Zealand to promote data portability, namely those in the electricity and banking sectors.

However, it also points out that these initiatives *'do not appear to be delivering the full range of positive outcomes for consumers as yet'*. Therefore, we would like to make some general observations about both of these sectors.

The Electricity Sector

- 2.8 From BusinessNZ's perspective, it would be fair to say that the electricity sector has already taken a number of specific initiatives in terms of making consumption data available to both individuals and businesses. In particular, efforts have been made by electricity retailers to invest in systems to allow customers to understand their electricity consumption patterns and make such data available free of charge to consumers to download and provide to third parties.
- 2.9 In fact, access to more real-time consumption and other energy data, typically generated by smart meters, and the ability to authorise the sharing of this data with third party service providers, are key enablers of digital innovation in the electricity sector.
- 2.10 The Electricity Authority (EA) "Additional Consumer Choice of Electricity Services" (ACCES) project and new data access arrangements under the Default Distributor Agreement are steps in the right direction. However, more open and real-time access should be encouraged to enable innovation to flourish in the sector.
- 2.11 Any data rights that are introduced must take into account such industry-specific arrangements and any industry-specific concerns which will need to be worked through. For example, in the electricity sector electricity retailers are not necessarily the owners of data per se, but rather the users of data.
- 2.12 Improved access to electricity data such that new data-driven products and services are both possible and commercially viable is a worthy goal. This will obviously require work to get it right, in particular the protection of privacy and intellectual property rights, but the benefits are worth pursuing.
- 2.13 Last, we would like to point out that the UK's Energy Data Taskforce is engaged in a similar project, with a number of expected benefits. These include:
- Improving data flows to optimise the operation of the energy system;
 - Improving the handling of real-time data and forecasting capabilities to integrate efficiently solutions such as demand response, electric vehicles and storage;
 - Improving data visibility;
 - Providing better access to data for both existing and new players in the system; and
 - Increasing competition in existing markets; enabling the creation of new markets.
- 2.14 Therefore, some in the electricity sector may see a CDR as something that does not raise too many red flags, but more likely a case of tidying up the over-arching legislation that is used to enforce disclosure by electricity retailers. In short, they take the view that the sector is already complying with much of a CDR regime. Alternatively, some believe that the changes in the sector have not been wide or swift enough, so there is much more to do. What this shows is that it is important the government fully understands the work that has already been undertaken by industry players before proposing any preferred approaches that directly impact specific sectors.

The Banking Sector

- 2.15 Looking at the banking sector, work has been ongoing around the idea of 'open banking', primarily led through the Payments NZ. We note that the associated letter to Application Programming Interface (API) providers by the Minister of Commerce and Consumer Affairs in December 2019 acknowledged the considerable work undertaken in this space, and that much of what they are doing is world-leading. However, it was also noted that the Minister viewed progress as slow around the implementation of the standards between API providers and third parties.
- 2.16 A key point made by the Minister in his letter that outlined a future CDR process stated that *"At this stage, it is my intention that this work would only establish a legislative framework for the sharing of consumer data in particular designated sectors and would not necessarily be implemented unless necessary and appropriate. This would give industry further opportunity to continue to make progress and find its own solutions to the types of issues I have outlined above"*. Therefore, in a similar vein to the point made above, it is important that throughout this CDR process the Government provides the opportunity for sectors who have already begun frameworks to ensure leeway for these to grow, without the prospect of regulatory burden hampering them. At the very least, a degree of 'jaw-boning' may lead to swifter action that is industry led, rather than one that takes a more rigid regulatory approach.
- 2.17 In relation to existing processes offshore, most of the major banks in New Zealand have been closely following developments in Australia given the recent CDR process there. As there are strong banking industry links between our two countries, the exchange of information and learnings is typically high across the Tasman. In relation to this exchange of information, we understand that the general view taken from the main banks involved in the process in Australia is that it has been very expensive to administer. While there was always the expectation of costs associated with such changes, these have generally been higher than what would normally have been expected. Therefore, we believe there is the opportunity to learn from poorly thought through policies processes if the banking sector were one of the first sectors in New Zealand to be part of a CDR.
- 2.18 Given what we discuss further below, the issue around sequencing needs to be carefully thought through. In short, which sector or sectors will be the first to be affected by any legislation associated by a CDR if it is to proceed? In determining this, it will be critical for the government to listen to these industries. In particular, they need to take into account the different position of sectors in their data journey, as well as the scope for each sector to learn from each other and from experiences offshore.

Recommendation: That existing processes within identified sectors are properly considered before any form of a CDR is applied to them.

Beyond the main players

- 2.19 Throughout the Document, the banking, electricity and insurance sectors are mentioned as potential first cabs off the rank for a CDR. However, if a CDR is to proceed that provides real value across the economy for both consumers and businesses, one needs to look beyond these sectors in terms of other avenues and opportunities where data can be securely shared with trusted third parties.

- 2.20 While we discuss the role of third parties more below, we wish to be very clear that any eye towards other sectors and datasets as part of what a CDR regime can achieve does not mean the extension of sectorial regulations so that eventually all sectors will be caught up under it. Instead, it means steps are achieved by the government and private sector working together so as further opportunities for innovation and economic growth are made a reality. The key here is that any future developments are private sector-led, with the Government doing its best to provide a clear and non-interventionist pathway around how this can proceed.

Recommendation: That the private sector is given the ability to broaden the use of CDR through their own initiatives.

Proper cost-benefit assessment

- 2.21 The table on page 10 of the Document provides an initial guide around the potential benefits and costs associated with establishing a CDR. We believe a rigorous investigation and a robust cost-benefit assessment should take place if there is a decision to proceed with a CDR in New Zealand.
- 2.22 In particular, we believe careful cost/benefit consideration should be given to what data is shared. This means that we would expect any benefits of providing data would clearly exceed the administrative/development costs of providing the data in a format that can be shared.
- 2.23 From a costs perspective, we envision that there would be initial implementation costs for industry, then a general increase in compliance costs on an on-going basis. As pointed out above, in Australia these costs have been considered significant, and have not been uniformly applied across sectors. To that point, we expect costs to be quite 'lumpy' when comparing one sector with another. Therefore, the Government needs to have an oversight of how costs affect one sector compared with another.
- 2.24 Overall, we would expect a rigorous cost-benefit assessment, which includes compliance costs, to be undertaken throughout the policy process.

Recommendation: That proper cost-benefit assessments are undertaken that relate to any future recommendations that arise from future policy process.

Interoperability with overseas jurisdictions and the Australian situation

- 2.25 In terms of interoperability with overseas jurisdictions, the Document asks to what extent should we be considering compatibility with overseas jurisdictions at this stage of development? In relation to our comments above, it would be remiss of the Government not to consider overseas developments, and how they might be linked with any path New Zealand decides to go down.
- 2.26 The obvious comparator is Australia, especially since there have already been discussions between the Australian and New Zealand Productivity Commissions to identify areas where a trans-Tasman approach to open banking and data portability could benefit both countries. Therefore, at a broad level, BusinessNZ would fully support the Government having an eye towards Australia to understand how any option might or might not fit with what has recently been developed in that country. Also, a watch over current affairs in that space will bring to light both successes and struggles of the regime that will help inform decisions here.

- 2.27 Furthermore, looking at the policy work program over there, Australia instigated a fairly comprehensive program that involved significant ground-work and investigation of this issue. This included a detailed inquiry and various opportunities for those affected to submit. On this side of the Tasman, the process at this stage is obviously less developed. It includes:
- A sentence in 'The Future of Work' by the New Zealand Productivity Commission (although it was not focused on this);
 - The Minister for Commerce and Consumer Affairs open letter to banks in 2019; and
 - The current Discussion Document.
- 2.28 Suffice to say, we should not seek to rush the policy process on this side of the Tasman. Given it is relatively new on a global scale, we should not look to have a CDR in place without examining the costs and benefits from all sides, which includes taking into account learnings from other countries.
- 2.29 Moreover, an eye towards Australia needs to be balanced. Without doubt, there is the opportunity to learn from what decisions were reached over there. However, we should not automatically view the Australian regime as something that can simply be picked up and transplanted into New Zealand. We should aim for a CDR that works best for New Zealand in every way possible, especially after learning what advantages and pitfalls (which are discussed elsewhere in this submission) the Australian regime has so far experienced.

Recommendation: That the Government acknowledges offshore decisions around a CDR but seeks to base decisions on what is best for New Zealand.

Next steps in the policy process

- 2.30 As discussed above, any further policy development in this space should consider offshore developments. However, it is not entirely clear around what 'next steps' this policy process will be. Paragraphs 72 and 73 of the Document states that guidance will be provided to the new Government following the 2020 General Election as to whether regulatory intervention is required. If that is the case, then additional consultation will take place. However, this does not address the question around whether MBIE will provide a second round of consultation once they decide which option is optimal, or whether this decision is part of the consultation? In other words, we do not know whether advice to the new Government will take the shape of a simple 'yes/no' on whether regulatory intervention is required, or a 'yes' with the most preferred option going forward?
- 2.31 From our perspective, we would not want advice to the Government to be in the shape of a 'yes and most preferred option'. If we are to follow a highly consultative and quality regulatory process, we believe it is important that MBIE provide greater detail around next steps, which would ideally include a further round of consultation if a preferred option or options were to be put forward.
- 2.32 In addition to another round of consultation, BusinessNZ also believes that a draft Bill should be made available for consultation before a Bill is presented before Parliament. While one could argue that changes can be made during the Select Committee process, in reality, getting any substantive change by this stage is often difficult at best. Having

an additional step between the final discussion document and a Bill before Parliament provides a greater opportunity to ensure the legislation is fit for purpose.

Recommendation: That MBIE provide a clearer picture of next steps for the policy process, which should include the opportunity to submit via a second discussion document, as well as the eventual development of a draft bill.

Private Sector to help guide further changes

2.33 In relation to the points discussed above around next steps, we believe that no government department should make further critical decisions around a CDR in isolation. While we would obviously expect further discussion documents and any Bill to provide an opportunity for affected parties and the wider private sector to provide more input into the New Zealand regime, this does not always mean that the most efficient and effective regime is reached.

2.34 Therefore, BusinessNZ believes that if a CDR is to proceed, the Government should establish a private sector advisory group as soon as possible, that could continue through to say the first year of full operation to ensure the best outcomes are achieved. The recommendations and views made by the advisory group would obviously not have to be adhered to, but they would help steer the Government down the most optimal path for both consumers and businesses, as well as assisting in working through issues that MBIE and other government departments may not have the expert capability to deal with.

2.35 Given the banking, then energy and telecommunications sectors in Australia are the first cabs off the ranks for a CDR, if New Zealand were to go down a similar path then representatives of these industries would be a useful starting point. Consideration should also be given to including representatives from the insurance sector given it is referred to as a candidate for a CDR.

Recommendation: That a private sector advisory group is established to provide guidance and viewpoints on the governance structure of a consumer data right.

Regulatory sandboxes

2.36 If a CDR were to proceed, we believe consideration should also be given to the use of regulatory sandboxes and/or other alternative light-handed approaches so that more innovative ideas around a CDR could be tested, without the consequences of negative regulatory repercussions.

2.37 These sandboxes may take different shapes and sizes, so we would expect the details of each to be worked through openly between the Government and the potential sector(s) affected.

Recommendation: That the Government look to use regulatory sandboxes or similar regulatory testing grounds when looking to develop regulation that seeks to keep up with the pace of innovation.

Implementation timeframes

- 2.38 Once various sectors are examined, we would want to ensure that the Government simply does not assume that 'one size fits all' when examining the correct approach to administer a CDR regime. Once various sectors are identified, this will require the CDR to be fit-for-purpose and provide a proportionate solution for consumers and businesses. Each sector has its own unique regulatory regime and mechanisms associated with consumer access and data. It also goes without saying that it would be prudent for the Government to learn from the initial CDR rollout first, and then consider further opportunities and/or changes.
- 2.39 Following on from the point above around sequencing, we would expect the Government to ensure sufficient time is provided for any sectors chosen to ensure their systems are changed. We would expect the time required across various sectors would likely be different. For instance, the New Zealand banking sector may have some learnings from the Australian situation, although whether this will automatically translate into a smooth and swift introduction here is unlikely, given the significant difference in technological systems on either side of the Tasman. The insurance sector may be starting completely fresh and have additional complexities that would require a much longer lead in time. This goes back to our comment above that the Government needs to undertake significant consultation with various sectors to ensure their concerns are properly addressed.

Recommendation: That the process around implementation timeframes takes into account needs and differences across sectors.

3.0 SPECIFICS OF THE DOCUMENT

- 3.0 Before we take the opportunity to outline our view on certain specifics of the Document, in relation to our points above, we believe careful cost/benefit consideration needs to be given to what data is shared, and how the providers of that data can recover the costs of providing it. Several market participants will bear a high cost in making large datasets available, but with little direct benefit from providing it. This also brings into question issues around how costs will be recovered without consumers over-paying.
- 3.1 Overall, if there is little benefit to be had from providing certain information, at the very least, data should not be provided if the benefits for a specific type of data are not expected to exceed the costs. The provision of data should not create an additional cost burden for those targeted as a sector within a CDR framework.

Consumer & product data

- 3.2 If a CDR were introduced, the Document outlines initial thinking around what would be considered consumer and product data. Regarding consumer data, we agree that only 'provided' or 'observed' data would be subject to the CDR, while 'derived' data should be excluded. We agree that much derived data could be commercially sensitive in nature, plus we would not want barriers created that would inhibit developing new methods of collecting and analysing data.

Recommendation: That a CDR includes only observed data.

- 3.3 Regarding product data, the Document takes the view that a CDR should incorporate information about the products or services offered to consumers by a business (i.e. fees and interest rates for savings or different prices for electricity plans). There is a valid argument to be made that for some sectors, a direct comparison of product data can be made, but for others it becomes quickly problematic to compare apples with apples. Therefore, we would urge caution in this space and again take note of what sector representatives say regarding what is and is not feasible when it comes to comparing product data.

Recommendation: That the incorporation of product data is dependent upon advice from relevant sectors around what data can legitimately be compared.

Read access and write access

- 3.4 Paragraph 23 of the Document outlines the two main forms of consumer data portability, namely 'read access' and 'write access'. We note that the Document outlines support for both forms, so that it would *'reduce switching costs and fully realise the benefits for consumer welfare'*.
- 3.5 BusinessNZ believes that caution needs to be taken around ensuring the reach of the legislation does not generate more problems than solutions. We believe a CDR needs to be more high-level and principles-based, with a focus on the general expectation of data portability, which would include data quality and timeliness. We believe that an overt focus on the details of the data, how it should be shared, and whether it should be read-only or writable, should not be stipulated. Instead, these considerations could be addressed in sector-specific designations. At the very least, there needs to be a compromise between the value of a consistent CDR across the economy, and the ability to prioritise and tailor the approach for particular sectors.
- 3.6 If the Government were to take an immediate stance around whether a CDR would include both read and write access, we believe the most prudent first step should be 'read access' first, so as to provide an incentive to innovate and compete. If there is scope for 'write access' in the future, that could be part of any review. However, as paragraph 25 of the Document points out, there are some risks associated with write access that would need to be worked through, including trust around allowing a third party to change data, and additional functionality that could pose a heightened security risk. Furthermore, there are risks around third parties on-selling consumers' data or developing other commercial products out of consumers' data (i.e. creating new marketing data). Therefore, BusinessNZ would rather see a staged approach that takes the time to better identify and understand these risks, rather than a CDR that leaps before it can walk.
- 3.7 Overall, if 'write access' data were to be included, any CDR should ensure all regulated participants involved have the appropriate controls to ensure any such data is accurate, robust and consistent.

Recommendation: That if read/write access were specifically outlined in a CDR, it should initially provide for read access, with scope for write access once risks have been properly identified and solutions developed.

Design of a consumer data right

3.8 Pages 19-21 of the Document outline a number of areas that any CDR legislation could cover. While we have no broad issues with these factors, we believe it is also important to consider the means by which the framework can be flexible enough cater to changing and new data requirements. It is inevitable that new technology will require new data inputs that as yet have not been identified in initial assessments of a sector. Therefore, a CDR that has flexibility to include such data inputs in the future would in some respects allay concerns around the detail of changes/reviews that would need to take place for the affected sector.

Recommendation: That any framework around a CDR is flexible enough to take into account technological changes that lead to new data requirements.

Establishing an accreditation regime for third parties

3.9 Paragraphs 49-51 of the Document discuss some initial thoughts around the establishment of a third-party accreditation regime, so that consumer data is only shared with entities that are able to hold the data safely and securely.

3.10 BusinessNZ agrees with the point made in paragraph 50 that states *'care needs to be taken to ensure that the accreditation regime does not exacerbate competition concerns by deterring innovative businesses from entering the market'*. We strongly believe that from a business point of view, a large part of the success or otherwise of any CDR will depend on the ability for the private sector to be allowed to be an intermediary by providing some of the systems or infrastructure that may be necessary to obtain accreditation.

3.11 Due to the inherent structures around it, public sector efforts in this space can often be inherently slow and inflexible when it comes to adapting and responding to technological change. The Government needs to provide a thoughtful and credible policy framework to ensure their response meets both the economic and technological requirements for businesses and consumers. In addition, an effective regime would also ensure that there is significant scope for third parties to thrive.

3.12 Paragraph 51 states that primary legislation could outline the processes and standards for accreditation. BusinessNZ agrees. Changing dynamics because of ongoing technological change mean that legislation that is principles-based is required. Principles-based legislation would allow the flexibility for the public and private sectors to work together and to meet new challenges, as opposed to legislation that is more prescriptive in nature.

Recommendation: That the accreditation regime allows for intermediaries to provide some of the systems or infrastructure that may be necessary to obtain accreditation.

Safeguards

3.13 Paragraphs 52-54 of the Document discuss the possibility of establishing some additional privacy safeguards in primary legislation to strengthen existing privacy rights. Overall, we agree that the establishment of safeguards that enable the secure portability of consumer data to trusted third parties is a critical step in ensuring a successful outcome.

We would also like to point out that providing a secure platform so that the day-to-day use of any framework meets the security concerns of consumers and businesses is fundamental.

- 3.14 In particular, we agree with the point made in paragraph 53 that '*A key part of obtaining an individual's consent to share data is confirming the identity of the individual*'. Therefore, we strongly support the creation of a Digital Identity Trust Framework currently being progressed. As the Document points out, this can accelerate the development and updating of digital identity services that are secure, trusted and interoperable. It again highlights the importance of the innovative potential of the private sector in harnessing such frameworks.
- 3.15 Finally, we understand the need for consumers to have a certain degree of financial and digital literacy to ensure they understand the potential risks associated with consenting to data sharing and data being used by a third party. However, at the same time, we would not want the onus to fall so heavily on the organisations seeking consent that the process becomes a significant and overbearing barrier for entering the market. Despite best efforts, there will always be people who for whatever reason do not understand or do not bother researching how their data is being used. Any process around adequate understanding for vulnerable consumers needs to be balanced against the fact that no process will be bulletproof, and that larger economic benefits on a macro scale need to be given appropriate weighting.
- 3.16 Also, we would caution around what seems to be an underlying assumption to the proposed CDR that there is universal access to technology that would lead consumers to benefit from it. While some will benefit, others who are at a disadvantage due to a lack of financial or digital literacy, or who have access problems or even be underage, may not be able to provide relevant data to providers. This could lead to them being further disadvantaged through confusion around what they are signing up for and/or paying more for goods and services than they should.

Recommendation: That a Digital Identity Trust Framework is progressed as soon as possible. Also, an appropriate balance is made between minimising risks for vulnerable consumers and overbearing processes for seeking consents.

Liability, enforcement & redress

- 3.17 Paragraphs 55 and 56 of the Document touches upon issues of liability and enforcement within a regime for the CDR, including the possibility of penalties. Overall, we believe any enforcement provisions, including penalties, need to be well thought through and proportionate to what offence has taken place.
- 3.18 One of the first ports of call would be to examine the number of existing breaches over recent years and their nature. For instance, while some may be deemed to be malicious or criminal in nature, others may be solely due to human error, which in offshore studies have shown to comprise at least a third of breaches. If the number of existing data privacy breaches in New Zealand is found to be relatively small, then such analysis needs to be taken into account with regards to the reach of liability, enforcement and redress.
- 3.19 We would also like to point out that while BusinessNZ believes that the full weight of an agreed enforcement should be placed on those who intentionally cause malicious or criminal attacks, we believe a carrot, rather than a stick approach, is required around

human error. This means a more collaborative and educative approach by the Government to ensure businesses are aware of breach boundaries and how they can work through potential fishhooks. At the very least, a short grace period following a regulatory sandbox scenario (as discussed above) could be considered.

- 3.20 Last, for many businesses, once a breach has taken place (either intentionally or through human error), the damage to its reputation in the public eye can be significant. The long-term implications of this should not be underestimated, as its true cost over time can be far more than any one-off financial penalty.

Recommendation: That a measured and evidence-based approach is taken to further work around liability, enforcement and redress, including recognition of the long-term implications of breaches in the public eye.

Consumers and the Privacy Act (2020)

- 3.21 A key success for a CDR regime will be how consumers take ownership of their data, and how any sectorial or cross-cutting CDR that is introduced actively supports consumers to use it. The worst-case scenario would be a regime that has little take-up and use by consumers, yet places higher costs on businesses, which appears to be the case in Australia and the U.K.
- 3.22 Therefore, any CDR regime involving consumers needs to consider wider privacy issues including its relationship with the Privacy Act 2020. Indeed, paragraph 20 of the Document points out, as an example, how derived data may still be considered 'personal information' for the purposes of the Privacy Act 1993 if it relates to a natural person (therefore requestable under the Act).
- 3.23 While New Zealand's Privacy Act has gone through a significant review in recent years, any potential CDR regime still needs to involve an investigation of how it could fit within the updated Privacy Act. For instance, this may include broader legislation that ties in better with the privacy laws.
- 3.24 However, before anyone goes too far down this path, we believe the Government should be cognisant of whether the privacy concerns that are expressed by consumers through this policy process are truly reflective of what is actually occurring. We note that the Australian investigation did touch upon the idea of the privacy paradox, whereby there is a perceived discrepancy between the strong privacy concerns voiced by consumers who, paradoxically, do not appear to make choices that prioritise privacy. This may be due to the fact that while claiming to care about their privacy in theory, consumers see the value they derive from using a digital platform's services outweighs the price they pay in allowing the collection of their user data. Also, consumers' behaviour can be specific and contextual, which makes any weighting towards generic views regarding privacy somewhat redundant.
- 3.25 We believe the Government needs to take a pragmatic view towards privacy issues associated with a CDR regime, especially when looking through a consumer lens. It is possible that despite best efforts, a regime may be implemented that creates impediments to success such as an information and communications overload, a perceived lack of consumer interest and value, or creates a difficult system for consumers to use. In short, if you build it, one cannot always guarantee they will come.

Recommendation: That any future required changes to the Privacy Act are reflective of legitimate and proven concerns around privacy.

Institutional arrangements

- 3.26 Pages 23 and 24 of the Document briefly discuss how any CDR will be overseen, through one or more government agencies or independent bodies. Within that, paragraph 65 discusses the current Australian situation where a multi-regulator approach is taken through the Australian Competition and Consumer Commission (ACCC) and The Office of the Australian Information Commissioner.
- 3.27 General feedback from the business community in Australia has been that the governance model has been inadequate. The key issue is that there have been too many government departments involved, creating confusion about who takes responsibility for what.
- 3.28 BusinessNZ accepts that for a relatively small country, having one government department that oversees all aspects of a consumer data right might be difficult. However, at the same time, having a multitude of departments involved can greatly slow any policy processes, as well as key decisions that need to be made. The fact that both the European and Australian regimes are still relatively new means we cannot solely rely on what takes place over there to address how we would work through the matters here.
- 3.29 Overall, we believe a first port of call would be to examine the worth of one government agency overseeing the running of the regime, with another enforcing it. Given the cost on taxpayers, we would not want these to be two separate government departments, but instead two separate parts of one government department. From our perspective, the most likely candidates for overseeing and enforcement would be MBIE and the Commerce Commission respectively. However, if other submitters outline other feasible options, we would be open to exploring this further.
- 3.30 Last, any government department responsible for new legislation needs to ensure it coordinates with other departments that may have conflicting or similar responsibilities to ensure that the standards are aligned, and any unintended bureaucracy is avoided.

Recommendation: That existing government departments oversee the running and enforcement of a CDR, rather than the creation of a new government entity.

Reciprocity of data

- 3.31 Much like the discussion that took place in Australia, there is an argument to be made on this side of the Tasman on reciprocity for sharing customer data. If this is not considered as part of the consultation process, then it is possible for an unlevel playing field to develop between sectors.
- 3.32 In particular, we would not want a situation where one sector provides vast customer data, without receiving anything in return. Instead, we believe the Government needs to investigate situations whereby a company wanting to receive data from one or more sectors designated for a CDR could provide their own customers' data into the regime if those customers provided consent for that.

3.33 We understand other submitters will discuss the issue of reciprocity in greater detail, and in particular offshore examples, which we would expect the Government to take heed of and consider for future policy development.

Recommendation: That the issue of reciprocity is considered further in any CDR policy process going forward.

4.0 OPTIONS OUTLINED

4.0 The Document outlines four options to establish a CDR in New Zealand, namely:

- Status quo
- A sectoral-designation approach
- An economy-wide consumer data right
- Sector-specific approach

4.1 BusinessNZ does not wish to detail its thoughts on each option outlined in the Document, as we believe the focus of any consultation at this stage should be around whether a CDR should or should not proceed, and if it should proceed, what broad elements are critical for a CDR to succeed in New Zealand.

4.2 From the initial analysis table on page 18 of the Document, it appears from MBIE's perspective that option 2 (sectoral-designation) looks the most promising. This option also seems the most similar to the Australian approach. The least favourable option as far as the Document is concerned is the status quo approach.

4.3 If the decision by the Government after the current submission process is completed is that some form of CDR regime will be introduced, then general feedback by our members is that option 2 holds the most promise as a starting point for further development, followed by option 4, with option 3 the least favourable.

4.4 However, we wish to point out that if the decision involves introducing a CDR regime, we strongly advocate for the Government to take into account the viewpoints and issues outlined by submitters, and how these can be incorporated into future options. At this stage, we do not believe any of the options in the Document adequately address all our concerns. While option 2 seems to hold the greatest amount of promise, we believe the Government needs to consider a hybrid approach using different aspects of each model that considers common points raised by submitters.

Recommendation: That if a CDR is to proceed, the government provides a revised set of options beyond this current round of consultation.

Appendix One - Background information on BusinessNZ



BusinessNZ is New Zealand's largest business advocacy body, representing:

- Regional business groups [EMA](#), [Business Central](#), [Canterbury Employers' Chamber of Commerce](#), and [Employers Otago Southland](#)
- [Major Companies Group](#) of New Zealand's largest businesses
- [Gold Group](#) of medium sized businesses
- [Affiliated Industries Group](#) of national industry associations
- [ExportNZ](#) representing New Zealand exporting enterprises
- [ManufacturingNZ](#) representing New Zealand manufacturing enterprises
- [Sustainable Business Council](#) of enterprises leading sustainable business practice
- [BusinessNZ Energy Council](#) of enterprises leading sustainable energy production and use
- [Buy NZ Made](#) representing producers, retailers and consumers of New Zealand-made goods

BusinessNZ is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy and services for enterprise, BusinessNZ contributes to Government, tripartite working parties and international bodies including the International Labour Organisation ([ILO](#)), the International Organisation of Employers ([IOE](#)) and the Business and Industry Advisory Council ([BIAC](#)) to the Organisation for Economic Cooperation and Development ([OECD](#)).