



COVERSHEET

Minister	Hon Kris Faafoi	Portfolio	Commerce and Consumer Affairs
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List of documents that have been proactively released

Date	Title	Author
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Information redacted

NO

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In Confidence

Office of the Minister of Commerce and Consumer Affairs

Cabinet Economic Development Committee

APPROVAL TO RELEASE DISCUSSION DOCUMENT: OPTIONS FOR ESTABLISHING A CONSUMER DATA RIGHT IN NEW ZEALAND

Proposal

- 1 This paper seeks approval to release for public consultation a discussion document titled *Options for establishing a consumer data right in New Zealand*. The discussion document seeks feedback on whether to establish a consumer data right to give individuals greater choice and control over their data, and the key elements of any such right.

Executive Summary

- 2 Businesses hold increasingly large volumes of data about consumers, but it is often difficult for consumers to utilise this information for their benefit. A consumer data right would introduce a mechanism for requiring businesses to securely share consumer data with third parties on the consumer's consent, in a consistent machine-readable format.
- 3 In recent months the digital transformation of our economy has accelerated as consumers and businesses transact online in greater volumes. A consumer data right could help to build the digital economy by enabling new and innovative products and services to emerge. This innovation can facilitate increased competition and improve consumer welfare, as consumers will be able to compare products more easily and seamlessly switch between different product providers.
- 4 Businesses, particularly smaller businesses, will also benefit from a reduction in search and switch costs, increased innovation and productivity. During the response to COVID-19, concerns around merchant service fees and a lack of competition in the payments sector were exacerbated. A consumer data right could lead to innovative and secure means for consumers to buy goods and services and reduce the associated costs for businesses in these challenging economic times.
- 5 To date, there have been some sector-led initiatives to facilitate secure consumer data sharing, notably in the banking sector. However, progress has been slow and I am concerned that there will continue to be delays due to the commercial incentives of incumbent service providers.
- 6 I propose to release for public consultation a discussion document that seeks feedback on whether New Zealand needs a consumer data right, and how any such consumer data right should be designed. A consumer data right could act as a regulatory back stop that could be applied where sector-led initiatives are inadequate.

Background

- 7 As consumers increasingly interact online, the volume of data held about them and the opportunities this data present are growing rapidly. New products and services have emerged which allow consumers to authorise the secure transfer of their data to trusted third-parties. This is known as 'consumer data portability' and allows individuals and businesses to compare products or services more easily, manage their finances, transact across multiple suppliers or seamlessly change suppliers.

Secure data portability presents economic and consumer welfare benefits

- 8 Giving consumers and businesses the ability to leverage the data held about them presents a real opportunity for New Zealand. It can facilitate increased competition and innovation, and build the digital economy by fostering this innovation and allowing sectors, such as the fintech sector, to thrive.
- 9 Secure consumer data portability can improve consumer welfare by facilitating more informed decision making, which can incentivise providers to generate a wider range of products and services that better meet consumer needs. It can also strengthen existing privacy protections by giving consumers greater choice and control over their data, and the ability to use this data for their benefit.
- 10 During the COVID-19 pandemic there was a noticeable shift to contactless payments and an acceleration of the digital transformation of the economy. This exacerbated concerns about the limited competition in the payments sector, the difficulty that merchants have switching providers and the existing high merchant service fees. While merchant service fees have been temporarily waived or reduced in some cases, these fees have an adverse impact on businesses, particularly smaller retailers, and these costs ultimately get passed on to consumers.
- 11 Enabling consumer data portability in the banking sector would allow the development of alternative payment solutions that could provide greater convenience and security when consumers are shopping in stores or online. For example, it will allow providers of alternative payment solutions to access data from a consumer's bank account and securely make payments from their accounts with the consumer's consent. While it might take some time for these innovative solutions to emerge, allowing consumer data portability could help contribute to the ongoing recovery effort by reducing payment fees charged to retailers.

Overseas regulators have intervened to enable secure data portability

- 12 Internationally there is increasing recognition of the importance and value of data and the benefits it can have for consumers. Some jurisdictions have intervened to strengthen consumers' ability to use, share and access their data for their advantage, including Australia, the European Union and the United Kingdom.
- 13 In New Zealand there has been some progress to allow consumer data portability, notably in the electricity and banking sectors. However, these initiatives are not yet delivering the full potential benefits for consumers. In the electricity sector, steps have been taken to make it easier for consumers to

compare and switch between different providers. The banking sector has agreed to some common standards that underpin how data is shared, but there has been little progress implementing these standards.

There are barriers preventing secure data portability in New Zealand

- 14 A number of concerns have emerged in both of these sector-led initiatives. I have heard that data-holders are reluctant to share data with third parties, due to commercial or privacy concerns. Inconsistent approaches in terms of sharing data and obtaining consents have emerged both within sectors and across sectors, and there are high barriers to entry which may deter innovative products and services from coming to market. Further, some of the solutions that have emerged could pose an unnecessary risk to consumers, and may not place restrictions on how data can be used.
- 15 I have informed the banking sector that I am disappointed with the lack of progress they have made. I have my doubts that sector-led solutions, such as the banking sector, will materialise due to the strong commercial incentives on incumbents who may wish not to expose themselves to heightened competition. Establishing a consumer data right that enables secure consumer data portability could act as a regulatory backstop that could be applied when sector-led solutions do not materialise or are inadequate.

Proposal to consult on establishing a consumer data right

- 16 I propose to release for public consultation the attached discussion document *Options for establishing a consumer data right in New Zealand*. The paper seeks feedback on whether a consumer data right is needed, the high-level design of any such consumer data right, and the elements that would need to be incorporated into its design.
- 17 I want consumers to have access to a wider range of products and services that better meet their needs. A consumer data right which enables secure data portability, upon the consent of a consumer, across a range of sectors could help to achieve this outcome by giving consumers greater choice and control over their data. This would encourage the development of new products and services that utilise this data to help consumers make more informed decisions and find products or services that better meet their needs. In turn this will promote competition, innovation, economic development and good outcomes for consumers.

A consumer data right would require a legislative framework

- 18 A consumer data right would create a legislative framework which improves the ability for consumers to access and use data held about them by securely sharing their data with trusted third-parties. This consumer data right could include:
- 18.1 'read access' to allow a consumer's data to be transferred but not altered; and
- 18.2 'write access' to allow a consumer's data to be changed or added to at their direction and with their consent.

- 19 In order to allow consumers to better compare products, a consumer data right can also apply to ‘product data’ – that is data held by a business about the products and services it offers, such as its fees or pricing structure. Currently, this information is not consistently publicly available, and may not be provided in a machine-readable format. This information could provide significant benefits in sectors such as the insurance sector, where there are high search and switching costs.
- 20 Consumer data would only be shared with the individual’s consent, and its collection and use would be limited to the parameters of the consent. A key part of obtaining consents will be establishing the identity of the individual, which will be made easier through the creation of a Digital Identity Trust Framework as recently agreed by Cabinet [GOV-20-MIN-0027 refers]. This Framework is intended to accelerate the development and update of digital identity services that are secure, trusted and interoperable.
- 21 Importantly, a consumer data right would reduce the ability for data holders to unduly restrict access to data and would require the information to be shared in a consistent, machine-readable format. This will ensure that third parties can utilise the data for the benefit of consumers, benefiting the wider economy.

There are four main options for establishing a consumer data right

- 22 The discussion document seeks feedback on four main options for the establishment of a consumer data right. These options are:
- 22.1 retain the status quo where the development of consumer data portability will be left to individual sectors on a voluntary basis;
 - 22.2 a sectoral-designation approach which establishes an overarching high-level legislative framework that can be applied to specific sectors or markets through secondary legislation;
 - 22.3 an economy-wide approach which establishes a blanket principles-based consumer data right that sits across the entire economy; and
 - 22.4 a sector-specific approach where individual consumer data rights could be established on a sector-by-sector basis without an overarching legislative framework.
- 23 Based on the initial analysis carried out by officials, the sectoral-designation approach appears to be the option that is most likely to lead to secure consumer data portability across the economy. It will allow for a consumer data right to be applied to sectors where there is a need, and provides flexibility so the detailed requirements can be designed during the designation process. It would also allow businesses to benefit from the consumer data right, and would allow the consumer data right to apply to ‘product data’ in a way that would not be possible by strengthening existing privacy rights. This approach could open up opportunities for alignment with the Digital Identity Trust Framework, and the Australian Consumer Data Right that is currently being rolled out.

Feedback is sought on how a consumer data right could be designed

- 24 The discussion document seeks feedback on how a consumer data right could be designed, should government choose to establish one. In particular, the discussion document seeks feedback on six main design elements that could be included in primary legislation:
- 24.1 designation process: the ability for the consumer data right to be applied to certain sectors or markets, and the procedural requirements for the designation process;
 - 24.2 scope of the designation: the scope of any designation, including the boundaries of a given sector, the types of data and data holders that are subject to the consumer data right;
 - 24.3 rules and data standards: the ability for detailed rules to be developed that effectively set out how the consumer data right would function, including how consumer consents can be received, and standards to ensure that data is shared in a consistent manner;
 - 24.4 accreditation: establishing an accreditation regime for third-parties to give data-holders assurances that consumer data is adequately protected;
 - 24.5 privacy safeguards: additional privacy safeguards that provide detail on how privacy can be maintained while enabling secure data portability; and
 - 24.6 liability, enforcement and redress: providing a liability and enforcement regime, and ensuring that consumers can access redress.

Consultation feedback will inform policy decisions

- 25 I will use the feedback received to help determine if a consumer data right is needed in New Zealand and, if so, how it should be designed. I want to explore and consider the views of New Zealanders to ensure that we find the best solution for New Zealand.

Financial Implications

- 26 There are no financial implications from the release of the attached discussion document.
- 27 Should government decide to establish a consumer data right there are likely to be significant implementation costs. The extent of these costs, and whether they should be Crown or third party funded, will depend on the detailed design of the regime. For reference, the Australian Government has forecast that the implementation of its consumer data right (which uses a sectoral-designation process) will be AUD 90 million over five years.

Legislative Implications

- 28 The release of the discussion document does not raise any legislative implications. A Bill would be required to establish a consumer data right should government decide to do so.

Impact Analysis

Regulatory Impact Statement

- 29 The RIA panel at the Ministry of Business, Innovation and Employment has reviewed and confirmed that the discussion document substitutes for a Regulatory Impact Statement. The discussion document is likely to lead to effective consultation and support the delivery of a quality Regulatory Impact Statement.

Climate Implications of Policy Assessment (CIPA)

- 30 The Ministry for the Environment has been consulted and confirms that the CIPA requirements do not apply to this proposal as the threshold for significance is not met.

Population Implications

- 31 The establishment of a consumer data right will interact with Māori data sovereignty and the notion that Māori data is taonga that is to be held, protected and used by Māori. Taonga are protected by Article 2 of Te Tiriti o Waitangi. Should government decide to establish a consumer data right, Māori engagement will be important to ensure that it is designed in a way that builds trust and value for Māori, and is consistent with the principles of Te Tiriti o Waitangi.
- 32 There are likely to be specific implications for disabled people from establishing a consumer data right. A consumer data right may positively benefit the participation of disabled people in the digital era. If implemented with due consideration of accessibility requirements, it can give disabled people confidence that they are able to manage their personal data by ensuring that informed authorisation and consent decisions has been made. Consultation will be undertaken with disabled people's organisations and accessibility experts throughout this work.

Human Rights

- 33 The options included in the discussion document are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Consultation

- 34 The following agencies have been consulted: Department of Prime Minister and Cabinet (Policy Advisory Group), Treasury, Department of Internal Affairs, Ministry of Justice, Office of the Privacy Commissioner, Commerce Commission, Financial Markets Authority and the Electricity Authority.
- 35 My officials have also consulted a number of interested industry stakeholders and experts in the field of consumer data portability and open banking in New Zealand and Australia.

Privacy Commissioner Comment

- 36 The Privacy Commissioner supports the introduction of a right of personal information portability. The Commissioner recommended a right of data portability in 2017 and 2018 and has since undertaken significant further work on the issue. Internationally, data portability is most commonly treated as an extension of existing privacy rights, particularly the right of individuals to access their personal information. The Privacy Commissioner is happy to work with officials to develop any consumer data right.

Communications

- 37 I propose to release the discussion document in August 2020 for an eight week public consultation and I propose to issue a media statement on its release.
- 38 I expect that there will be some divergent views in response to the consultation. Some banks may view a consumer data right as unnecessary because they have made some progress towards open banking, or due to their commercial interests. Depending on how it is designed, a consumer data right could help support sector-led initiatives, or could act as a regulatory backstop to be applied where sector-led solutions are not adequate.
- 39 Some individuals may object to businesses being required to release data to third-parties even with a consumer's consent, claiming that it could expose consumer data to a potential breach of their privacy. This is a legitimate concern and it will be vital that any consumer data right has adequate safeguards to maintain privacy and limit access to data to trusted third-parties alone.

Proactive Release

- 40 I intend to proactively release a copy of this paper in whole within 30 business days of decisions being confirmed by Cabinet.

Recommendations

The Minister of Commerce and Consumer Affairs recommends that the Committee:

- 1 **note** that a consumer data right would enable the secure portability of consumer data between data holders, such as banks, and trusted third-parties with a consumer's consent;
- 2 **note** that a consumer data right would enable innovative products and services to emerge which will help fintech and other sectors grow, promoting economic development and aiding the recovery from the impacts of COVID-19;
- 3 **note** that a consumer data right would benefit consumers by encouraging increased competition and innovation which will lead to the development of better and more affordable products and services;
- 4 **note** that the attached discussion document seeks feedback on:
 - 4.1 whether New Zealand needs a consumer data right;
 - 4.2 how any consumer data right could be designed, including:

I N C O N F I D E N C E

- 4.2.1 options for establishing a consumer data right, including a right that can be applied across the entire economy, and an approach where it is applied to certain sectors through secondary legislation;
 - 4.2.2 the elements of a consumer data right including the need to establish consistent data standards, an accreditation regime for third-parties, additional privacy safeguards, and means of enforcement and consumer redress;
- 5 **agree** to the release of the discussion document titled *Options for establishing a consumer data right in New Zealand*, subject to any minor or technical amendments, in August 2020 for an eight week public consultation;
 - 6 **invite** the Minister of Commerce and Consumer Affairs to report back to the Cabinet Economic Development Committee on the outcome of the consultation before the end of 2020;
 - 7 **note** that the Minister of Commerce and Consumer Affairs will issue a media statement on the release of the discussion document;
 - 8 **agree** that the Minister of Commerce and Consumer Affairs proactively release a copy of this paper within 30 working days of decisions being confirmed by Cabinet.

Authorised for lodgement

Hon Kris Faafoi

Minister of Commerce and Consumer Affairs