5 October 2020

Consumer Data Right Project Team

Commerce, Consumers and Communications
Ministry of Business, Innovation & Employment
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Submission on Options for establishing a consumer data right for New Zealand

This submission on whether to develop a consumer data right in New Zealand is from Cortexo, emhTrade, Our Energy and Saveawatt, with coordination and independent support from CTQ Advisors.

> *Cortexo is a grid-edge software platform that enables a greater uptake of distributed energy resources on electricity networks*
>
> *emhTrade is an energy software company. We are creating the future of energy by shaping tomorrow's energy flexibility marketplace*
>
> *Our Energy is an innovative energy technology company with a proprietary online platform that matches real-time data from those producing their own electricity with others in their communities*
>
> *Saveawatt is a business and consumer focused consultancy that uses bulk buying and the latest technology to assist and inform its customers in the renegotiation of energy and utility supply contracts*

We appreciate the opportunity to provide our perspective on how consumers can realise the benefits of easily obtaining and using their data. No part of this submission is confidential.

We consider a consumer data right is essential for effective data portability

A consumer data right is essential for effective data portability and for Aotearoa New Zealand to attain the economic and consumer benefits available from using the ever-increasing volumes of data from the everyday economic activities of individuals and businesses.

As recognised in the discussion paper, data portability will deliver material economic benefits by assisting Aotearoa New Zealand to deal with a variety of well-documented productivity, well-being, and decarbonisation challenges through the creation of a deeper and wider pool of potential solutions to these challenges.

More specifically, we consider effective data portability is critical to the innovation across the energy supply chain necessary to reduce and remove carbon emissions from the electricity supply, transport, and industrial sectors. Our energy transition will only occur from freeing up access to consumer data to deliver a smarter grid, and more open, flexible markets which make best use of our traditional and emerging energy resources such as household solar and battery storage, electric vehicles and demand management tools.

Effective data portability will not occur without a legislated consumer data right

Effective data portability will not occur without a legislated consumer data right and the associated development of standard data infrastructure.

We have reached this conclusion after seven years advocating for effective data portability in the electricity sector. Unfortunately, despite the time and effort expended, the electricity sector does not have effective data portability.

We consider the following are necessary for effective data portability:

- a specific obligation on data holders to share a consumer's (individual or business) data, with a clear bias towards enabling data access, recognising security and privacy obligations of holder and requestor – it is a consumer's data and they should be able to share it with whomever they want
- build on existing privacy and data security obligations applying to data holders and data requestors through the Privacy Act to clearly express the practical effect of existing expectations on data holders to promptly respond to data requests and on data requestors to properly manage consumer data – existing privacy and data security obligations provide robust risk management tools but many parties use 'privacy and security risks' to obfuscate and frustrate a consumer's right to share their data
- data infrastructure based on common standards and protocols which explicitly recognise consumer expectations and outcomes, for example, by requiring protocols which mean the response to a data request reflects the fastest reasonably practicable approach, not the slowest – this is critical requirement if Aotearoa New Zealand is to fully realise the benefits of data.

What exists now in the electricity sector for electricity consumption data does not achieve effective data portability. The impact is to severely restrict the possible data use cases and the associated innovation and consumer benefits.

A key reason is the response times to data requests do not reflect consumer expectations or readily available technology. For requests made in July and August 2020, the average response time was 3.5 days[1]. Based on consumer expectations and readily available technology, responses to data requests should occur within seconds.

We consider the consumer data right, and the associated data infrastructure, must be developed with constant reference to the consumer experience and expectations. The purpose of a consumer data right is to deliver tangible benefits and value to consumers. Trade-offs made between trust, reach, speed, cost and flexibility should be tested against whether the trade-off materially diminishes the consumer experience and expectations.

[1] Electricity Authority, EMI, average business days to respond to a data request from the data requested, available at: https://www.emi.ea.govt.nz/r/bjdcg.

Our experience highlights a clear market failure preventing effective data portability

Our experience from the seven-year process to establish effective data portability for electricity consumption data highlights a clear market failure.

The underlying problem is that data holders have the ability and incentive to delay or prevent a consumer's request to share their data with another party. The impacts can be observed in the electricity and banking sectors where data holders have not readily supported effective data portability.

The reluctance of data holders to support effective data portability reflects a market failure arising from data holders incurring costs, while the benefits accrue to consumers.

For electricity retailers, the major cost is from increased competition from consumers using innovative big-data products and services, such as more sophisticated comparison and switching services or energy management services. Frustrating effective data portability avoids the costs of greater consumer control and increased competition. Implementation costs are minor compared to the threat to the traditional retailing model and profit margins of data-enabled competition.

An economy-wide consumer data right with legislative backing would address the market failure by establishing minimum expectations for data portability and provide data users with the confidence to invest in products and services which delight the customer.

Thoughts on scope and design

We note the preference for a sectoral approach to introducing a consumer data right. We consider this a reasonable approach with the qualification that the data right should apply to consumer data and datasets regardless of the industry sector of the data holder.

From our experience as technology innovators and from operating in the electricity sector, we consider the consumer data right will most likely deliver the immense benefits if it reflects the following design features:

- applies to both individuals and businesses
- covers all data held about the consumer, plus data a consumer would find useful (ie, product data), regardless of the industry sector. An example of a dataset could be sector-specific "electricity data consumption data" (consumer data) or "electricity retail pricing data" (product data). Or it could be "carbon reporting data" (cross sector)
- makes the distinction between the consumer data right and the associated data infrastructure. There must be a clear right for consumers to nominate a party to access their data, regardless of whether the data holder is in a designated sector. Consumers and innovation shouldn't be forced to wait on a potentially long-winded designation process with ample opportunity for data holders to frustrate data access
- the data infrastructure supporting the consumer data right is accessible to data holders and data requestors regardless of industry sector. A plug and play approach will support innovation
- adopts data infrastructure with standard protocols and processes which do not reflect a lowest common-denominator approach
- builds on existing data privacy safeguards established through the Privacy Act. The Privacy Act establishes clear obligations on data holders and data requestors. Additional safeguards are not obviously necessary
- avoids data privacy safeguards and accreditation processes which limit consumers ability to access their data will undermine the intent of the consumer data right, constrain innovation and materially reduce the benefits

- be introduced via stand-alone legislation.

From an energy sector perspective, if Aotearoa New Zealand is prepared to spend billions of dollars on major grid upgrades and the development of technologies like green hydrogen and pumped hydro storage, it makes sense to also complement these with the much smaller and lower risk investments required to improve data access and portability. The already proven and scalable software and database technologies exist currently, alongside willing and able innovators, skills and talent that can extract value for New Zealand's consumers and communities within reasonable timeframes.

Please contact Craig Evans, CTQ Advisors, with any questions regarding our submission on [redacted] or at [redacted] We have extensive experience in the practical challenges with establishing data portability and are happy to elaborate on this experience to inform the design of a consumer data right regime.

Yours sincerely,

Terry Paddy, Managing Director, Cortexo

Martin White, Chief Product Officer, emhTrade

John Campbell, Chief Executive, Our Energy

Tim Rudkin, Chief Executive, Saveawatt

5 October 2020

Submission on discussion document: *Options for establishing a consumer data right in New Zealand*

Name	Terry Paddy, Martin White, John Campbell & Tim Rudkin
Organisation	Cortexo, emhTrade, Our Energy & Saveawatt

Does New Zealand need a consumer data right?

1 *Are there any additional problems that are preventing greater data portability in New Zealand that have not been identified in this discussion document?*

We consider the fundamental problem is that current regulatory settings do not explicitly support effective data portability. They were not designed with data portability in mind.

From our experience, the underlying problem is data holders have the ability and incentive to delay or prevent a consumer's request to share their data with another party.

Efforts to establish an effective data portability framework for electricity consumption data have been underway since 2013.

The current iteration of arrangements for portability of consumption data introduced this year are modelled on the Australian energy consumer data right, but do not deliver effective data portability.

The key limitations are: the arrangements are not comprehensive, only applying to historical consumption data held by electricity traders (other consumer data is created and stored); inappropriate performance standards, particularly regarding timeliness of responding to data requests; a lack of clarity regarding the actual cost of data access; and a lack of consistent enforcement of requirements.

Our key insight from this 7-year process is data holders will not voluntarily introduce effective data portability which delivers on consumer expectations or realises the immense value of data.

The concerns listed in the discussion paper (paragraph 13) are all symptoms of ongoing efforts of data holders to frustrate data portability for a range of valid and less valid reasons.

The underlying cause of the reluctance of data holders to support effective data portability is a market failure arising from data holders incurring costs, without necessarily realising an offsetting economic benefit.

For electricity retailers, the major cost is from increased competition from consumers using innovative big-data products and services, such as more sophisticated comparison and switching services or energy management services. Implementation costs are minor compared to the threat to the traditional retailing model and profit margins of data-enabled competition.

An economy-wide consumer data right with legislative backing would address the market failure by establishing minimum expectations for data portability and provide data users with the confidence to invest in products and services which delight the customer.

2	*Do you agree with the potential benefits, costs or risks associated with a consumer data right as outlined in this discussion document? Why/why not?*

We consider a consumer data right and effective data portability would realise significant economic benefits from innovation, productivity gains and superior consumer experiences.

We are not convinced the costs and risks listed are necessarily material as they either do not relate to introducing a consumer data right or require qualification.

- Data security and privacy risks do not increase from effective data portability unless there is a problem with the Privacy Act and related legislation. Data holders must manage consumer data according to the Privacy Act. Concerns regarding increased security and privacy risks, for example because more firms access consumer data, indicate a problem with the application of the Privacy Act, not data portability. The Privacy Commissioner has not to date indicated the Privacy Act is deficient, for example regarding determining where liability rests.[2] As such, we consider minimal economic costs will be incurred associated with data security and privacy risks from implementing a consumer data right.

- Implementation costs incurred by Government and industry will be minor relative to the innovation and productivity benefits. We consider caution is required when assessing implementation costs. Industry claims regarding implementation costs can reflect the decisions of individual firms rather than efficient costs. No business holding consumer data can convincingly claim surprise at moves to introduce data portability given the electricity, banking sectors locally, and the introduction of consumer data right in the European Union and Australia. All firms holding consumer data should already be considering how to invest in systems required to achieve effective data portability.

- Barriers to entry will not be increased by requiring businesses to hold consumer data in a particular way so that it can be shared in the appropriate format. Entrants typically face barriers due to incumbent firms applying a bespoke and proprietary approach to data infrastructure. Well-designed standard data infrastructure for data portability will reduce barriers to entry.

- There will be no delay in innovation from firms waiting for a consumer data right. Innovation is delayed every day due to a lack of effective data portability. We do not consider any industry sector will achieve effective data portability without a consumer data right. It has taken the electricity sector seven years to get partial data portability. Given the clear incentives on data holders to frustrate effective data portability, it is inconceivable that progress will occur absent intervention. Innovation requires a consumer data right.

[2] The opinion given by Victoria Casey QC to the Electricity Authority, October 2019, available at, https://www.ea.govt.nz/dmsdocument/25989-advice-from-victoria-casey-qc, provides a useful overview of the nature of privacy 'risks' faced by data holders giving third party access to a consumers electricity consumption data.

3	*Are there additional benefits, costs or risks that have not been explored in the above discussion on a consumer data right?*
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4	*What would the costs and benefits be of applying the consumer data right to businesses and other entities, in addition to individuals?*
	The benefits and costs of a consumer data right are equivalent for individuals and businesses and other entities. Excluding businesses and other entities assumes they individually have sufficient bargaining power for firms holding their data to provide effective data portability. This is unlikely given the ability and incentives for data holders to not share data. The marginal cost of including businesses and other entities is likely to be close to zero, while the benefits would be significant. Finally, it is worth noting that many NZ businesses are small. These small businesses are not so different to individuals, in both their ability to achieve data portability on their own and the benefits they can expect from effective data portability.
5	*Do you have any comments on the types of data that we propose be included or excluded from a consumer data right (i.e. 'consumer data' and 'product data')?*
	We consider some product data is exceptionally relevant to the individual and some is not. For example, a consumers specific electricity tariff as recorded by a retailer against my account is about them, but general tariff information from a retailer enabling price comparisons is not really about a specific person. However, the general tariff information is incredibly valuable for a consumer's decision making. Easier access to product data increases the usefulness and value of consumer data. The value of electricity consumption data is much reduced if it is difficult to identify the price and product best suited to your consumption profile. Inadequate requirements regarding transparency of product data in the electricity sector has created a de facto monopoly on electricity price data and significantly constrained innovation in price comparison services. We consider an overarching principle for including or excluding data types would be a preference for supporting innovation and consumer benefits over the long-term. Thus, if there would be no impact on innovation from excluding a data type, such as product data, then let it be excluded.
6	*What would the costs and benefits be of including both read access and write access in a consumer data right?*
	If write access is included as part of a consumer data right, we strongly recommend it be implemented separately and subsequently to read access. Write access will require significantly more effort to design and implement. There would be significant economic costs if read access were delayed while the technical requirements for write access were developed.

What form could a consumer data right take in New Zealand?	
7	*Do you have any comments on the outcomes that we are seeking to achieve? Are there any additional outcomes that we should seek to achieve?*
	We consider a consumer data right would improve consumer welfare and economic development, particularly by enabling innovation. Innovation is required if Aotearoa New Zealand is to successfully deal with a variety of well-documented productivity, well-being and decarbonisation challenges. Putting consumers in charge of access to, and portability of, their data will drive the creation of a deeper and wider pool of potential solutions to these challenges.
8	*Do you have any comments on our proposed criteria for assessing options? Are there any additional factors that should be considered?*
	We agree with the criteria outlined in paragraph 28 of the discussion paper. Additionally, we consider the consumer data right, and the associated data infrastructure, must be developed with constant reference to the consumer experience and expectations. The purpose of a consumer data right is to deliver tangible benefits and value to consumers. Trade-offs made between trust, reach, speed, cost and flexibility should be tested against whether the trade-off materially diminishes the consumer experience and expectations. For example, current arrangements for the electricity sector make unnecessary trade-offs between trust, cost and flexibility resulting in a slow minimum timeframe for delivering data. The impact is to make the arrangements ineffective for most consumer-focused services and applications. The hoped-for innovation is not occurring because the consumer experience was not carefully considered in specifying the data portability requirements.
9	*Do you have any comments on the discussion of Option one: Status quo?*
	The status quo will not deliver effective data portability.
10	*Do you have any comments on the discussion of Option two: A sectoral-designation process?*
	We consider the consumer data right should apply to a consumer's data regardless of the industry sector of the data holder. An example of a dataset could be sector-specific "electricity data consumption data" (consumer data) or "electricity retail pricing data" (product data). Or it could be "carbon reporting data" (cross sector). This avoids the confusion of which sectors are designated and means complete datasets relevant to each consumer become available to solve a given problem rather than, for example, only being to get carbon emissions data out of one sector.

	For this reason, we consider it important to separate the data right and the data infrastructure for giving effect to the data right. A consumer must have a right to their data regardless of the industry sector of the data holder. This does not mean all firms across the economy need to be connected to the data infrastructure for streamlined data portability. The need for mandated standard data exchange protocols and data infrastructure for a specific industry sector could be linked to the volume of data requests. It may also be possible to take an opt-in approach to the data infrastructure, for example having standard APIs and data exchange protocols which can be used for any data type and by any firm.
11	*Do you have any comments on the discussion of Option three: An economy-wide consumer data right?*
	We consider a consumer data right should include a clear, economy-wide, obligation on data holders to share data with another party, acting on behalf of the consumer, regardless of whether the firm is operating in a designated sector (or similar). This approach separates the consumer data right and the data portability infrastructure. You can have one without the other. Consumers and innovation shouldn't be forced to wait on a potentially long-winded designation process with ample opportunity for data holders to frustrate data access.
12	*Do you have any comments on the discussion of Option four: Sector-specific approach?*
	Data portability is an economy-wide issue involving challenges outside the remit of sector-specific legislation. For example, it is not possible to override the Privacy Act through sector specific secondary or tertiary legislation, even if doing so was necessary to achieve effective data portability. A sector-specific approach will result in inconsistent application to the detriment of consumers.
13	*This discussion document outlines four possible options to establish a consumer data right in New Zealand. Are there any other viable options?*
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14	*Do you have any comments on our initial analysis of the four options against our assessment criteria?*
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15	*Do you agree or disagree with our assessment that Option two is most likely to achieve the best outcome using the assessment criteria?*
	We consider option 2 is most likely to deliver the best outcome, subject to the qualifications outlined in our response, and particularly the points made in questions 10 and 11 regarding separating the data right from the data infrastructure for providing effective data portability.

How could a consumer data right be designed?	
16	*Do you agree with the key elements of a data portability regime as outlined in this section? Are there any elements that should be changed, added or removed?*
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17	*Do you have any feedback on our discussion of any of these key elements?*
	We agree the discussion paper outlines the key elements of a data portability regime. The following represent our perspective on key considerations for each element: • Designation process (for a sector). The designation process should focus on adoption of standard data infrastructure rather than the data right. The data right should exist across the economy without restriction. The process should be developed to avoid adoption of standard data infrastructure being captured by data holders or the timing (and delivery of data infrastructure) being subject to resourcing and priority decisions of the sectoral regulator. • Scope of designation. We consider all consumer-related raw data should be subject to a consumer data right regardless of the industry sector of the data holder. • Rules and data standards. There are two key requirements. Clearly defined standards and protocols for data exchange – these are critical to portability. And effective monitoring and enforcement with a clear escalation path for non-compliance and a backstop for inaction by the sectoral regulator. • Accreditation regime. Accreditation and authorisation of data requestors should not become a trojan horse for undermining the policy intent. There must be a clear bias toward simple, streamlined data portability, and clear recognition the Privacy Act provides effective risk management tools by data holders and data requestors and appropriate sanctions for non-compliance. • Privacy safeguards. The Privacy Act provides a comprehensive set of obligations and risk management tools for data holders and data requestors. Additional safeguards should be considered only to the extent the Privacy Act requirements are demonstrated as being insufficient. • Liability enforcement and redress. The Privacy Act provides the basis for liability enforcement and redress against data holders and data requestors not meeting obligations. Additional measures are only required to the extent the Privacy Act is insufficient.
18	*Are there any areas where you think that more detail should be included in primary legislation?*
	Primary legislation should include sufficient detail to address the market failure and enable effective data portability.
19	*How could a consumer data right be designed to protect the interests of vulnerable consumers?*
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20	*Do you have any suggestions for considering how Te Tiriti o Waitangi should shape the introduction of a consumer data right in New Zealand?*
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21	*How could a consumer data right be designed to ensure that the needs of disabled people or those with accessibility issues are met?*
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22	*To what extent should we be considering compatibility with overseas jurisdictions at this stage in the development of a consumer data right in New Zealand?*
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23	*Do you have any comments on where a consumer data right would best sit in legislation?*
	The consumer data right should be introduced via stand-alone legislation. Including it as part of other legislation would make improvements to the consumer data more difficult due to the difficulty of making targeted legislative changes to important legislation like the Commerce Act.
24	*Do you have any comments on the arrangements for establishing any new bodies to oversee parts of a consumer data right?*
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25	*What are the pros or cons of having multiple regulators, or a single regulator, involved in a consumer data right?*
	-
26	*If government decides to establish a consumer data right, do you have any suggestions of how its effectiveness could be measured?*
	The effectiveness of a consumer data right will be demonstrated through invention of new business models, products and services based on consumer data. As such, consideration should be given to measuring these outcomes. Input related measures include things like number of data requestors and number of data requests, noting these do not prove anything about the impact of the data right.