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Monday 5 October 2020

Consumer Data Right Project Team
Commerce, Consumers and Communications
Ministry of Business, Innovation & Employment
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By email: consumerdataright@mbie.govt.nz

Submission: Options for establishing a consumer data right in New Zealand

This submission on the Ministry of Business, Innovation and Employment (MBIE) discussion document, Options for establishing a consumer data right in New Zealand, August 2020 (the Document) is from the Financial Services Council of New Zealand Incorporated (FSC).

The FSC is a non-profit member organisation and the voice of the financial services sector in New Zealand. Our 77 members comprise 95% of the life insurance market in New Zealand and manage funds of more than $83bn. Members include the major insurers in life, disability and income insurance, fund managers, KiwiSaver and workplace savings schemes (including restricted schemes), professional service providers, and technology providers to the financial services sector.

Our submission has been developed through consultation with FSC members and represents the views of our members and our industry. We acknowledge the time and input of our members in contributing to this submission.

The FSC's guiding vision is to be the voice of New Zealand's financial services industry and we strongly support initiatives that are designed to deliver:

- strong and sustainable customer outcomes
- sustainability of the financial services sector
- increasing professionalism and trust of the industry.

We welcome the opportunity to provide feedback on options for establishing a consumer data right (CDR) in New Zealand. The FSC and its members are supportive of the desired outcomes of consumer welfare and economic development that MBIE sets out as the drivers for a CDR. However, further foundational work is needed, to help clarify the specific issues that need addressing.

At the outset, we consider it critical to define the fundamental objectives of a CDR, including, but not limited to, a clear definition of client data and establishing who are the primary holders of data where that information is required across several sectors, for example health information used by insurers. There are overarching concerns in relation to costs which can be largely alleviated if the CDR framework is well considered and consulted with sufficient implementation timeframes. There are risks and benefits for each of the proposed options in the Document and as such, we encourage further analysis, evidence gathering, continued consultation and discussions with all sectors. This is especially important given that overseas, similar CDR initiatives have required significant industry

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cost and resource to implement, and considerable implementation challenges, with the benefits still yet to be evidenced on a large scale.

We welcome continued discussions.

I can be contacted on [redacted] to discuss any element of our submission.

Yours sincerely

Richard Klipin
Chief Executive Officer
Financial Services Council of New Zealand

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Options for establishing a consumer data right in New Zealand

Your name and organisation

Name	Richard Klipin
Organisation (if applicable)	Financial Services Council of New Zealand Incorporated (FSC)

Responses to discussion document questions

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?***

The FSC and its members are supportive of the desired outcomes of consumer welfare and economic development. However, further foundational work is needed, to help clarify the specific issues that need addressing.

Whilst privacy concerns and risks have been identified in the Discussion Document (the Document), such as the use of screen scraping in paragraph 14, it is an area that requires more development. In particular, the interaction with privacy requirements pursuant to the Privacy Act 2020. We encourage the Office of the Privacy Commissioner to be heavily involved in the policy decisions around the development and implementation of a CDR, should it be taken forward and consideration be given as to whether the Office of the Privacy Commissioner may be the most suitable regulator for a CDR. We also recommend further consideration of a possible accreditation process to give consumers confidence of what organisations or new technology solutions such as apps have been approved and meet the required standards or guidelines.

Unlike the Open Banking Regime in the United Kingdom,[1] there is currently no legislation in New Zealand that governs or enforces regulatory compliance on data holders to share their data. We consider it critical to define the fundamental objectives of a CDR. In particular, is it aiming to enable data sharing across all business sectors, which is a similar approach to Australia, or limited to selected sectors, such as banking in the United Kingdom, as this will determine the structure and placement of any legislation required for a CDR.

[1] An application of Article 20 – Data Portability of the EU GDPR.

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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 believe a more detailed problem statement, evidentiary basis and cost benefit analysis should be produced as a first step. The table contained at page 10 of the Document is very high level, and it is not clear what supporting evidence MBIE has for some of the issues identified. There are benefits associated with a CDR, including promoting competition in certain areas and encouraging innovative products to be developed, but also huge risks particularly in relation to protecting privacy and ensuring consumers understand the scope of a CDR and who may potentially have access to their data. We note that Australia chose to exclude insurance from the scope of its Australian Consumer Data Right that went live on 1 July 2020. We believe that there are good grounds for also excluding life insurance from the initial scope of any CDR in New Zealand. Our view is that consumers will not be best served by addressing life insurance first. Unlike banks, who hold a significant amount of transactional data about their customers within their systems, life insurers, for the most part, hold a limited amount of information about their customers (depending on how a CDR is defined). Most customer information held by a life insurer will have been sourced from third parties, for example, health information, or are likely to be commercially sensitive such as pricing information. There is also the risk that the costs may be passed onto consumers. Whilst nearly all New Zealanders will have at least one bank account, far less have insurance products, meaning that the cost for life insurers implementing the technology needed for a CDR will be spread across a much smaller customer base. The risks of a consumer switching from an existing policy to a new policy are set out in more detail below. Alternatively, the electricity or transactional banking sectors, which are more easily able to be compared, would set the scene to enable a CDR to be rolled out in a phased approach. We note however, that search and switch is unlikely to change substantially with life insurance as the result of a CDR being implemented. Search and switch is generally not difficult under the existing regime, and where complexity exists, this is due to the complex nature of the insurance risk assessment process which a CDR will not overcome or address. In addition, commercially sensitive information, such as underwriting risk assessments, will remain withheld under existing privacy legislation.
3	***Are there additional benefits, costs or risks that have not been explored in the above discussion on a consumer data right?***
	Potential benefits: If introduced, a CDR would provide a significant opportunity for the New Zealand business sector to understand the open data movement that is occurring globally, and seize this opportunity to understand the importance and risks associated with the data they collect, process and store. Not only could a CDR promote innovation and allow consumer driven

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benefits, but it would also allow New Zealand to strengthen data governance frameworks and provide data owners/consumers with an enhanced sense of control over who holds their data and how it is used. Businesses will be encouraged to create new products and business models that would further enhance customer experience and availability of options.

In the insurance industry, a CDR has the potential to provide enhanced transparency, which may serve to demystify aspects of the insurance application and assessment process. This could lead to reduced complaints and improved levels of consumer trust in the industry.

Risks:

There is a risk to consumers that they provide permissions without understanding that they are enabling third parties to access CDR data, particularly where the conduct of the third party itself may be subject to limited regulation (please refer to our comment on question 1 above regarding possible accreditation). This presents further risks of poor customer outcomes and possible data breaches through the third parties use of consumer data. Minimum technical and security standards for third parties (including the obtaining and revoking of consent) and involvement in data sharing must be agreed and set prior to the implementation of a CDR.

Whilst the Privacy Act 2020 should address issues of liability for data breaches where a third party data loss occurs, there is the potential for associated brand reputation damage and loss of consumer trust, not only in the providers but also in a CDR. A public awareness and education component of any CDR model is vital to ensuring its success.

A CDR may encourage consumers to frequently replace life insurance products. The risks to consumers of switching an existing policy to a new policy were set out in detail in the 2016 Financial Markets Authority Paper "Replacing life insurance – who benefits?"[2] It was noted that "a consumer does not need to have a bad experience to be harmed. They are buying the transfer of risk, and the harm is the difference in risk transferred because of poor financial advice."

[2] "When a consumer switches from an existing policy to a new policy, they may gain some benefits (such as a reduced premium), but they may also lose some benefits. If the change is not in the best interests of a consumer, then this harms them. Examples of possible changes, and how these could harm a consumer, include:

- different policy exclusions (a consumer could have a medical condition that is excluded from the new policy)
- differences in cover (a consumer may have a medical history of heart disease, but the new policy has less coronary cover)
- a change in premium (a consumer may end up paying for insurance they don't need, or may pay lower premiums in the short term but higher premiums in the long term)
- a difference in the financial stability of the new insurer or reinsurer (a consumer may end up paying higher premiums, or find it harder to make claims)
- a difference in customer experience, service or claims processes (a consumer may find it harder to deal with their new insurer)."

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In addition, there is the risk of lessening competition and innovation in the financial industry and aligning data formats for a CDR means product providers will be required to collect the same information, therefore encouraging similar products to enter the market. This presents a possible risk of a lack of differentiation and innovation in product choices for consumers. Products and benefits (especially in insurance) are not directly comparable on a price basis alone. Differences in benefit wordings that are relevant and important to consumers may be lost if price becomes the only differentiator. In addition, there is a possible risk of reducing access to personalised advice should competing with Fintechs prove unsustainable to advisers.

We encourage more research to be undertaken to understand the extent of possible negative consequences a CDR could have.

Costs:

Please note the resourcing and IT costs associated with systems are addressed generally at question 4 of this submission below. Any costs incurred present a risk of being passed on to consumers which is contrary to the consumer benefits that a CDR offers in principle.

4	***What would the costs and benefits be of applying the consumer data right to businesses and other entities, in addition to individuals?***

Our members have expressed concerns of the cost implications of consolidating data held within an organisation and making it available in a prescribed consistent format for CDR purposes. For many financial organisations who have legacy systems and legacy products such as managed funds (which were never developed with data sharing in mind), or multiple complex systems holding data in various repositories such as insurance, it is a complex undertaking to obtain and share data. It is recommended that this cost be taken into consideration when assessing the scope of the CDR and what products managed or offered by an entity or business the CDR is intended to apply to. The resources required to enable a CDR would effectively mean that such resources may not be used for other customer centric initiatives or innovation, for example, addressing under insurance and financial literacy, so this would need to be weighed against perceived possible consumer benefits of a CDR.

Costs can only be assessed when we have further detail regarding, for example, whether data is required to be made available immediately (in real time), the amount and type of data to be shared and the format for the data. All providers currently have their own data formats and modification for prescribed formats for CDR purposes will incur significant resourcing and IT costs which has the risk of being passed on to consumers.

The benefits of having the CDR apply across the board are consistencies in approach so that an entity does not have to check how a product is held in order to determine whether a CDR applies to the product. However, it is noted that the process for how a customer that is a trust, business or other entity structure would give consent for the CDR (including joint owners) will need to be predetermined. These factors will need to be taken into account in the timeline for implementation and for sharing if a CDR is established.

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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')?***
	As noted in paragraph 22 of the Document, we agree that market data is less likely to be used by consumers and should therefore be excluded from a CDR. We agree that only "observed" or "provided" data should be subject to a CDR and that "derived" data should be excluded from the definition of "consumer data". Including "derived" data would run the risk of relitigating an underwriting decision in the context of insurance. The decision to decline insurance or a loan could form part of data included in the CDR, but the reasons for the decision should not be included as that is often proprietary information provided by the insurer's insights, analytics and processes. If legacy product data is included in the scope of the CDR, then this is likely to become a complex, expensive and error prone exercise given the legacy systems on which the information is held and the lack of connectivity with those systems and archaic code that many of those systems rely on.
6	***What would the costs and benefits be of including both read access and write access in a consumer data right?***
	The initial focus should be for read access only, but with a clear pathway so that write access can be provided once the CDR is embedded. There are obvious risks associated with write access such as privacy issues, the information being edited or incorrectly used, fraud and financial risks for consumers, particularly those who are most vulnerable. We support the inclusion of write access due to the innovation and opportunities it provides and benefits for consumers, for example, reminders to customers that it is time for them to pay their bill before late payments are incurred. It will also increase the efficiency of consumers being able to switch between products and provide an end-to-end solution for consumers. However, strong controls would need to be developed to ensure the system cannot be utilised to fraudulently access consumers' information and financial facilities. Due to the differences in the underlying nature and risks associated with write access, strong cyber-security controls would also be vital along with consideration of existing legislative processes such as AML/CFT, KYC and Customer Due Diligence checks.
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?***
	The members of the FSC can see the pros and cons for proposed options one, two and four which are set out in response to the questions in this section. We suggest that more foundational work, in the form of more analysis and evidence around the perceived problems and benefits that the Document is trying to address and realise and continued

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	consultation and discussions with all sectors that a CDR would impact before progressing one or a combination of CDR options. We support the broad outcomes as set out in paragraph 26 of the Document. If legislation is developed to introduce a CDR, we recommend that it would be helpful to be more specific about the desired outcomes for the CDR and what the future state with a CDR implemented is intended to look like. This may differ from sector to sector, however it is only by doing this analysis that we can see whether the costs of implementing a CDR regime are outweighed by the benefits.
8	***Do you have any comments on our proposed criteria for assessing options? Are there any additional factors that should be considered?***
	We think that the five criteria outlined in paragraph 28 are important, but they should have different weightings ascribed to them. In addition, benefits to consumers and simplicity of the data should be considered when assessing any options for establishing a CDR.
9	***Do you have any comments on the discussion of Option one: Status quo?***
	It should be recognised that industry innovation is currently happening in the financial markets context without any regulation. For example, insurers have made significant moves toward digitisation in recent years which have already achieved some of the stated benefits of a CDR which will increase due to Covid-19. Option one would build on existing industry led work underway, with increased government involvement than has previously been the case to enable prioritisation of these projects, for example API Standards in payments. However, whilst the status quo, may achieve the desired outcomes, it may be at a slower pace due to differing business priorities and resourcing in other areas.
10	***Do you have any comments on the discussion of Option two: A sectoral-designation process?***
	We agree that a principles based framework is an approach that could work well in New Zealand, similar to the approach taken in Australia. An advantage of Option two is by having proper overarching regulation detailing standards of data collection, storage and transmission protocols with secondary legislation detailing specific requirements for each industry, this would reduce the risk of individual pieces of legislation becoming outdated or out of line with other standards. Option two would also enable cross-industry data analysis for the purposes of financial advice. There are limitations to targeting one sector at a time, which are acknowledged in the Document. If taking a sector by sector approach, the consumer benefit needs to be clearly understood as an incomplete picture of their data may limit the value they perceive, and it may not make switching as easy.

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	As noted in question 2, we recommend that the initial designations be limited to those industries with a clear, transaction heavy dataset such as banking and electricity where the benefits are clear and the likelihood of reducing search and switch costs are readily apparent.
11	***Do you have any comments on the discussion of Option three: An economy-wide consumer data right?***
	Option three is the least preferred option of our members. There may be benefits to being across the entire economy, but it would take much longer and would require significant initial and ongoing investment. This also may not work for smaller companies such as those that cannot afford the technical investment. A delayed implementation is preferred so that control, privacy and security concerns can be addressed.
12	***Do you have any comments on the discussion of Option four: Sector-specific approach?***
	As noted in question 2 and 10 of this submission, provided the insurance industry was not to be designated as one of the initial sectors, the benefits of Option four are industry and public awareness and therefore may make it a good starting point for a CDR. A sector specific approach also allows for one industry to learn from the other. The concerns our members have with Option four is the risk of having large divergences between individual sector legislation which, at some point, would require alignment when an economy wide CDR is adopted. How this is addressed needs to be considered at the outset, such as a baseline or principles based guidance for all sectors to follow so sectors are aligned according to a basic model, such as the principles based, Option two.
13	***This discussion document outlines four possible options to establish a consumer data right in New Zealand. Are there any other viable options?***
	As noted throughout this submission, we encourage further analysis, evidence gathering, continued consultation and discussions with all sectors, which may result in a further viable option or a combination of the options provided.
14	***Do you have any comments on our initial analysis of the four options against our assessment criteria?***
	We think that the analysis is correct, however we recommend including the additional criteria suggested in our response to question 8.
15	***Do you agree or disagree with our assessment that Option two is most likely to achieve the best outcome using the assessment criteria?***
	The assessment criteria requires different weightings according to the relative importance of each. For example, we consider privacy to be of significant importance and needs to be

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	weighted as such. Clarity around the roles of a CDR and privacy law needs to be determined, for example, what is CDR data and what is personal information and therefore regulated by the Privacy Act. Clear boundaries will need to be defined in order to achieve the best customer outcome.
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?***
	One of the key elements of a data portability regime should be the ability for a consumer to directly access their data. There should not be complete reliance on third parties. Further clarity will be required so that there is consumer education and awareness surrounding where their data is held, so they know where to direct their enquiries and requests, for example health information is most appropriately held by their health provider rather than their insurer. A consumer should have the right to withdraw consent for their data to continue to be portable. One approach for this could be regular check in points with consumers so that they continue to be aware of the CDR and the scope of information involved in it (and who may hold their information as a result of the CDR). This right is useful to consumers in insurance and banking. For example, when a consumer completes documentation they will not need to restate information and can access products more easily if they are already a customer. A customer will also need to be able to have visibility of where they have consented, perhaps in a customer facing portal or similar or allow consumers to consent to different levels of data sharing, as opposed to an "all or nothing" approach. If the consumer expressly opts out of a CDR, there will need to be a requirement for those entities holding the information to delete it and confirm to the consumer that that process has been undertaken. From a privacy perspective, this element of the regime is essential.
17	***Do you have any feedback on our discussion of any of these key elements?***
	As noted at question 16 above, consideration needs to be given to the consumer's "right to be forgotten", methods for opting out of the regime and the process for removing the consumer's data.
18	***Are there any areas where you think that more detail should be included in primary legislation?***
	Refer to our response to questions 16 and 17 regarding opting out to strengthen privacy safeguards. Consideration could also perhaps be given to the data subject rights in the EU GDPR, for example, the Right to Object, Right to Automated Decision Making and Profiling.

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19	***How could a consumer data right be designed to protect the interests of vulnerable consumers?***
	We note that types of vulnerabilities may differ between sectors and would therefore need to be specifically considered for each sector. In addition, clear guidance will be required on what is considered vulnerable in the context of a CDR.
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?***
	We agree that it is important to have a clear understanding of Maori views of data ownership to shape the possible introduction of a CDR in New Zealand.
21	***How could a consumer data right be designed to ensure that the needs of disabled people or those with accessibility issues are met?***
	We encourage early engagement with organisations who care for and advocate for disabled people and those with accessibility issues. Consumers who do not have technology or the skills to use digital technology will need to be considered so that the CDR does not become a right that is only available via digital technology.
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?***
	The EU model incorporates enforcement into the GDPR enforcement framework which is led by Information (Privacy) Commissioners in each jurisdiction. We recommend further consideration of incorporating enforcement into the powers of the Office of the Privacy Commissioner in New Zealand and modernising our privacy framework using GDPR as a reference starting point. We also encourage consideration of what has been successful in overseas jurisdictions to the benefit of consumers and establish what underlying feature of that CDR framework has helped to achieve those outcomes. From there, consideration can be given to the extent to which that approach is necessary in the New Zealand context.
23	***Do you have any comments on where a consumer data right would best sit in legislation?***
	One option that requires further assessment and consultation is for a CDR to sit in the Privacy Act and to be governed by the Privacy Commissioner. Arguments for this are that the Privacy Commissioner currently has jurisdiction over a number of different technology related tools and therefore has the skills to be able to oversee the introduction of this CDR. In addition, this would strengthen the importance of privacy as being paramount.
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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	We have concerns of the costs involved with establishing any new bodies which may ultimately be borne by industries and consumers. We encourage working with (and possibly expanding) existing bodies and regulators as much as possible as noted at question 24 and 25 of this submission. There are also existing systems and approaches such as the sharing between EQC and insurers, CCCFA requirements and parallel digital identity networks such as Realme. Further consideration is required of what currently exists and how these will run alongside or be brought into a CDR model so to avoid duplication and confusion. For example, existing data sharing pathways that are not standardised digital frameworks moved into a CDR model will have the advantage of providing standardisation.
25	***What are the pros or cons of having multiple regulators, or a single regulator, involved in a consumer data right?***
	The FSC supports a single regulator being involved in a CDR and with many of our members with businesses linked to Australia, it is noted that there have been difficulties experienced there with more than one regulator. This is largely relating to difficulties in implementation, data reciprocity issues and liability when a third party is involved. In addition, multiple regulators can lead to differing interpretations and approaches. A single regulator will enable the New Zealand CDR model to have increased simplicity and transparency. Any regulator model involved in a CDR will require resourcing. A single, and already established regulator, such as the Office of the Privacy Commissioner, would arguably involve less costs than establishing a new body or having multiple regulators, resulting in less risk of costs being passed on to consumers.
26	***If government decides to establish a consumer data right, do you have any suggestions of how its effectiveness could be measured?***
	As noted in our response to question 7, we recommend more foundational work is required before progressing one or a combination of CDR options. By adopting Option four initially, or Option two limited to specific industries with most likely benefits, the effectiveness and benefits of a CDR can be assessed on those industries that are largely similar and highly transactional. It is unclear whether tangible benefits exist outside of these industries but learnings can potentially be applied and adapted over time based on initial feedback, but with an overarching framework in place to ensure consistency of adoption for other sectors should it be determined that it would be advantageous for those sectors to be part of a CDR.

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Other comments

Timeframe
We recommend a substantial transitional or implementation period of a minimum of two years after the possible adoption of a CDR to enable industry time to adapt given the significant cost and technical barriers to achieving an effective CDR.

Cost analysis
We encourage further analysis of the costs for various sectors and entities so this can be a primary consideration in progressing a CDR with less risk of costs being transferred to consumers. For some of the smaller financial services firms, in addition to the systems costs identified in question 4 of this submission, the compliance aspects will not be small, impose further obligations and may be disproportionate. As Covid-19 continues to put a strain on the economy and resources, consideration will also need to be given to ensuring there is sufficient capacity to continue the progression of a CDR.