

# Submission to MBIE Consultation: Options for establishing a consumer data right in New Zealand

## Rebecca Fairbrother

I have ten years' experience in the payments industry.

Currently, I am the founder of *Merchant Advocacy & Guidance Network* (Magnet), an industry association to represent, advocate for and educate New Zealand businesses which take payments from customers.<sup>1</sup> And I help businesses secure better merchant fees, as owner of *FairPay*.

From 2009 to 2016 I worked at the *Reserve Bank of Australia* in the payments policy and regulation unit, which supports the *Payments System Board*.<sup>2</sup> In 2017 and 2018 I worked at the *Australian Payments Network*, the payments industry body.<sup>3</sup>

## Submission

### Does New Zealand need a consumer data right?

Yes.

As MBIE notes, a consumer data right (CDR) would promote innovation and competition, increase productivity, strengthen privacy and data security, and improve consumer outcomes. Further to these benefits, implementing a CDR in New Zealand will mitigate the risk of us 'being left behind'.

I agree with the benefits and costs set out by MBIE. (Question 2)

The scope outlined by MBIE is appropriate. The CDR should apply to consumer data and product data, and provide for both read and write access. (Question 5)

### What form could a consumer data right take in New Zealand?

I agree that New Zealand should introduce a sectoral-designation approach (Option 2). This approach allows for consistency across the economy but flexibility among sectors.

A single CDR that would ultimately apply to the entire economy is appropriate. The fundamental principles of the consumer's right to their own data are unchanged across sectors. Having one law is more likely to avoid creating loopholes. (Question 10)

---

<sup>1</sup> <https://magnet.org.nz/>

<sup>2</sup> <https://www.rba.gov.au/publications/annual-reports/psb/2020/>

<sup>3</sup> <https://www.auspaynet.com.au/>

**Rebecca Fairbrother**

Founder, *Merchant Advocacy & Guidance Network* <https://magnet.org.nz/>  
Merchant Services Broker, *FairPay*

# Submission to MBIE Consultation: Options for establishing a consumer data right in New Zealand

Rolling out application of the CDR on a sector-by-sector is better than introducing stronger security and privacy laws across the economy at once (as with GDPR), for the reasons outlined by MBIE. (Question 11)

Moreover, a single CDR with sectoral designation will over the longer term be more efficient and less costly. This will outweigh any short-term gains in speed and cost that might be realised in Option 4. (Question 12)

The status quo is not an option. (Question 9)

## How could a consumer data right be designed?

The key elements and details of what they should cover identified by MBIE are appropriate.

Enshrining a high-level piece of primary legislation that delegates details to, for instance, regulations provides for flexibility in the future; the process of changing legislation is more time consuming than adapting regulations. (Question 16)

There are no areas where more detail should be included in the primary CDR legislation. Indeed, the process and standards for accreditation, and liability, enforcement and redress should be delegated to regulations for the above reason. (Question 18)

## Accreditation (Question 17)

Problems with the accreditation regime in Australia have been identified by the *Select Committee on Financial Technology and Regulatory Technology*, which published its interim report in September 2020.<sup>4</sup> In particular, that the barriers to entry for data recipients in open banking are too high and this will prevent adequate competition in the sector.

The Committee recommended that the *Australian Competition and Consumer Commission* (ACCC) “...finalise rules for intermediary and third party access to CDR banking data by late 2020, and enable intermediaries to enter the CDR ecosystem as soon as possible thereafter.” (Recommendation 20)<sup>5</sup> The ACCC published amendments to the *Competition and Consumer (Consumer Data Right) Rules 2020* (CDR Rules) on 1 October 2020, which “...permit the use of accredited intermediaries to collect data, through an expansion of the rules relating to outsourced service providers.”<sup>6</sup>

Furthermore, the ACCC launched a consultation on 30 September 2020 regarding proposed changes to the CDR Rules that would, *inter alia*, “Introduce new accreditation levels: creating new pathways for service providers to become accredited data recipients.

---

<sup>4</sup> [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Financial\\_Technology\\_and\\_Regulatory\\_Technology/FinancialRegulatoryTech/Interim\\_Report/section?id=committees%2freportsen%2f024366%2f72381](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Financial_Technology_and_Regulatory_Technology/FinancialRegulatoryTech/Interim_Report/section?id=committees%2freportsen%2f024366%2f72381)

<sup>5</sup> [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Financial\\_Technology\\_and\\_Regulatory\\_Technology/FinancialRegulatoryTech/Interim\\_Report/section?id=committees%2freportsen%2f024366%2f72884](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Financial_Technology_and_Regulatory_Technology/FinancialRegulatoryTech/Interim_Report/section?id=committees%2freportsen%2f024366%2f72884)

<sup>6</sup> <https://www.accc.gov.au/media-release/consumer-data-right-rules-amended-to-include-intermediaries>

**Rebecca Fairbrother**

Founder, *Merchant Advocacy & Guidance Network* <https://magnet.org.nz/>  
Merchant Services Broker, *FairPay*

# Submission to MBIE Consultation: Options for establishing a consumer data right in New Zealand

...intended to lower barriers to entry and reduce compliance costs for service providers that do not require unrestricted access to CDR data.”<sup>7</sup>

New Zealand could consider a tiered, risk-based accreditation regime.

## Privacy safeguards (Question 17)

Privacy rights under the *Privacy Act 1993*<sup>8</sup> should be augmented under a New Zealand CDR framework to strengthen consumer confidence. MBIE should have regard to the Australian CDR Rules and *Privacy Safeguard Guidelines*<sup>9</sup> when developing additional privacy safeguards.

### *Consumer consent*

Consent should be a standalone element of a New Zealand CDR framework. An effective, safe and trusted CDR hinges on a robust and well-designed consumer consent framework.

MBIE notes that “... it is necessary to create a framework where consumer consent is required before information is transferred.” Consent under a CDR must be considered in greater depth than this, having regard to overseas jurisdictions.

In Australia, the CDR Rules stipulate that “...consent given by a CDR consumer to collect and use CDR data is: (a) voluntary; and (b) express; and (c) informed; and (d) specific as to purpose; and (e) time limited; and (f) easily withdrawn.”<sup>10</sup>

The *Financial Conduct Authority* (FCA) in the UK advises consumers that third parties “...can only provide these services if you give them your explicit consent.” and that when providing services it “should give you enough information to understand: the nature of the service; how it will use your data; and whether it will share your data with anyone else”<sup>11</sup> Furthermore, the FCA considers consent in its current consultation on ‘open finance’ (essentially a broadening of open banking). Its report is due in December.<sup>12</sup>

In Europe, GDPR and PSD2 both set out requirements for explicit consent.<sup>13</sup> GDPR: “Consent should be given by a clear affirmative act establishing a freely given, specific,

---

<sup>7</sup> <https://www.accc.gov.au/focus-areas/consumer-data-right-cdr-0/consultation-on-proposed-changes-to-the-cdr-rules>

<sup>8</sup> From December this Act will be superseded by the *Privacy Act 2020*

<sup>9</sup> The Privacy Safeguards Guidelines are published by the *Office of the Australian Information Commissioner* (OAIC) <https://www.oaic.gov.au/assets/consumer-data-right/cdr-privacy-safeguard-guidelines-v2.0-july-2020.pdf>

<sup>10</sup> Subdivision 4.3: *Consents to collect and use CDR data*

<https://www.accc.gov.au/system/files/CDR%20Rules%20-%20Final%20-%206%20February%202020.pdf>

<sup>11</sup> <https://www.fca.org.uk/consumers/account-information-and-payment-initiation-services>

<sup>12</sup> <https://www.fca.org.uk/publication/call-for-input/call-for-input-open-finance.pdf>

<sup>13</sup> The *European Data Protection Board* published *Guidelines on the interplay of PSD2 and the GDPR* in July 2020 [https://edpb.europa.eu/sites/edpb/files/consultation/edpb\\_guidelines\\_202006\\_interplaypsd2andgdpr.pdf](https://edpb.europa.eu/sites/edpb/files/consultation/edpb_guidelines_202006_interplaypsd2andgdpr.pdf)

**Rebecca Fairbrother**

Founder, *Merchant Advocacy & Guidance Network* <https://magnet.org.nz/>  
Merchant Services Broker, *FairPay*

# Submission to MBIE Consultation: Options for establishing a consumer data right in New Zealand

informed and unambiguous indication of the data subject's agreement to the processing of personal data relating to him or her..."<sup>14</sup>

PSD2: "Payment service providers shall only access, process and retain personal data necessary for the provision of their payment services, with the explicit consent of the payment service user." and "The account information service provider shall: provide services only where based on the payment service user's explicit consent..."<sup>15</sup>

## *Entity protections*

Privacy law does not apply to non-natural persons. As such, consideration should be given to how to protect businesses and other entities in a comparable manner so they can be confident their data will not be misused.

## Liability, enforcement and redress (Question 17)

To promote confidence among consumers, data holders, data recipients and other stakeholders, allocation of liability must be established under a clear and comprehensive framework.

A simple complaint process should be available to consumers where breaches of the CDR occur.

## Interoperability with overseas jurisdictions

I agree that interoperability with other countries could be beneficial. As such it is important to include sufficient flexibility in the legislation to allow for additional rules that would cover interoperability in future. However, details of this should be left for future consultation. (Question 22)

## Legislative design

I agree that the CDR should have its own stand-alone act, for the reasons outlined by MBIE. (Question 23)

Whether to have multiple regulators or a single regulator should be left for future consultation. However, it is worth noting that the Select Committee recommended, having identified fragmentation in the regulatory oversight framework, that "...the Australian Government establish a new national body to consolidate regulatory responsibilities in relation to the implementation of the Consumer Data Right."<sup>16</sup> (Question 24)

---

<sup>14</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679>

<sup>15</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015L2366&from=EN>

<sup>16</sup> [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Financial\\_Technology\\_and\\_Regulatory\\_Technology/FinancialRegulatoryTech/Interim\\_Report/section?id=committees%2freportsen%2f024366%2f72884](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Financial_Technology_and_Regulatory_Technology/FinancialRegulatoryTech/Interim_Report/section?id=committees%2freportsen%2f024366%2f72884)

**Rebecca Fairbrother**

Founder, *Merchant Advocacy & Guidance Network* <https://magnet.org.nz/>  
Merchant Services Broker, *FairPay*

# Submission to MBIE Consultation: Options for establishing a consumer data right in New Zealand

## Monitoring and evaluation

How to measure the effectiveness of a CDR should be left for future consultation.  
(Question 26)

Nevertheless, an explicit date for a formal review in x number of years should be set at the start of implementing the CDR. This will manage stakeholder expectations, ensure the framework is built for purpose, and allow for appropriate funding to be secured over a set timeframe.

## Other considerations

### Lessons from Australia and UK

New Zealand should learn from the Australian and the UK experiences over the past two and five years, respectively. The final section in this submission sets out key documents published in each of these countries, and other resources.

### Consumer education

The Australian Select Committee identified inadequate consumer education as a problem with open banking. It recommended that "...the Australian Government work with the banking industry to establish and implement targeted campaigns to educate consumers on the Consumer Data Right and the opportunities that Open Banking provides."  
(Recommendation 21)

### Time delays

Delays occurred in both Australia and the UK in launching an effective open banking regime. MBIE should consult with the regulators and industry in those countries to understand why, so we can develop an appropriate timeframe for implementation in New Zealand.

### MBIE consultation timeframe

MBIE should wait until current reviews in Australia and the UK (set out in the final section) are completed before making any concrete recommendations to the Government.

### Screen scraping

Screen scraping is a contentious issue, which needs to be taken into consideration in a future consultation.

**Rebecca Fairbrother**

Founder, *Merchant Advocacy & Guidance Network* <https://magnet.org.nz/>  
Merchant Services Broker, *FairPay*

# Submission to MBIE Consultation: Options for establishing a consumer data right in New Zealand

## Overseas consultations & other resources

### Australia

**Select Committee on Financial Technology and Regulatory Technology:** Interim Report, *Australian Senate* (September 2020; open – final report due 16 April 2021)

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Financial\\_Technology\\_and\\_Regulatory\\_Technology/FinancialRegulatoryTech/Interim\\_Report/section?id=committee\\_s%2freportsen%2f024366%2f72381](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Financial_Technology_and_Regulatory_Technology/FinancialRegulatoryTech/Interim_Report/section?id=committee_s%2freportsen%2f024366%2f72381)

**CDR Rules** (4 February 2020)

<https://www.accc.gov.au/system/files/CDR%20Rules%20-%20Final%20-%206%20February%202020.pdf>

**CDR Rules, changes:** accredited intermediaries, ACCC (1 October 2020)

<https://www.accc.gov.au/media-release/consumer-data-right-rules-amended-to-include-intermediaries>

**CDR Rules, proposed changes:** tiered accreditation, consent provided to third-parties, consumer experience, ACCC (30 September; open – amendments due December 2020)

<https://www.accc.gov.au/focus-areas/consumer-data-right-cdr-0/consultation-on-proposed-changes-to-the-cdr-rules>

**Privacy Safeguards Guidelines**, *Office of the Australian Information Commissioner* (July 2020)

<https://www.oaic.gov.au/assets/consumer-data-right/cdr-privacy-safeguard-guidelines-v2.0-july-2020.pdf>

**Consumer Data Right booklet**, *Australian Treasury* (9 May 2018)

[https://cdn.treasury.gov.au/uploads/sites/1/2018/05/t286983\\_consumer-data-right-booklet.pdf](https://cdn.treasury.gov.au/uploads/sites/1/2018/05/t286983_consumer-data-right-booklet.pdf)

**Open Banking Review:** Final Report, *Australian Treasury* (December 2017, published 23 March 2018) <https://treasury.gov.au/consultation/c2018-t247313>

**Rebecca Fairbrother**

Founder, *Merchant Advocacy & Guidance Network* <https://magnet.org.nz/>  
Merchant Services Broker, *FairPay*

# Submission to MBIE Consultation: Options for establishing a consumer data right in New Zealand

## UK

**Call for Input: Open finance**, *Financial Conduct Authority* (submissions received; open – report due December 2020)

<https://www.fca.org.uk/publications/calls-input/call-input-open-finance>

**The Retail Banking Market Investigation Order**, *Competition and Markets Authority* (2 February 2017)

<https://www.gov.uk/government/publications/retail-banking-market-investigation-order-2017>

## Other

Report on open banking and application programming interfaces, *Bank for International Settlements* (November 2019)

<https://www.bis.org/bcbs/publ/d486.pdf>

**Rebecca Fairbrother**

Founder, *Merchant Advocacy & Guidance Network* <https://magnet.org.nz/>  
Merchant Services Broker, *FairPay*