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

Introduction

1. This submission is made by Matthews Law, a specialist competition & regulatory law firm. Our practice spans competition law, economic regulation, consumer law & privacy law.

2. Thank you for the opportunity to provide comments on the discussion document (**DD**). This introduction briefly summarises our key points. We respond to specific questions below.

3. We wish to reinforce the benefit of consistency with what is, or may be seen as, international best practice. Already many New Zealand businesses either consider it necessary or desirable to comply with GDPR and/or ACDR obligations. This may mean that implementation costs are not as high as might be thought. However, a Cost Benefit Analysis (**CBA**) is critical to ensure any added obligations are efficient and the costs of regulation are minimised.

4. We appreciate the reason why there has been no CBA to date, but this will obviously be an important part of next steps, including design. We suggest that the CBA be conducted comparing options 2 (sectoral-designation) & option 3 (economy-wide). This is because:

    a. Option 1 (status quo) does not appear realistic for the reasons identified in the DD.

    b. Similarly, option 4 (sector–specific) seems to have more possible risks/costs and fewer benefits, including a lack of consistency or scalability.

    c. On balance, option 2 seems more likely to achieve the balance of getting a broader framework right while potentially having lower implementation costs and reducing risk.

5. We support stand-alone legislation. However, if the CDR regime were to be incorporated into existing legislation, the Privacy Act may be the most appropriate "fit".

6. Our comments are necessarily subject to consideration of an appropriate CBA and review of proposed legislation.

Matthews Law
20 October 2020

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

Your name and organisation

Name	Andy Matthews, Gus Stewart, Genelle Seah, Danny Xie
Organisation	Matthews Law

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?*
	No comments at this stage.
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?*
	Broadly yes. We note the benefits and costs identified may (at least partly) offset each other. For example, the CDR may both: • enable innovation, by endorsing the digital economy, and delay innovation, by removing the current opportunities in data portability; • facilitate competition, by allowing multi-homing and encouraging unbundling, and impede competition, by imposing barriers to entry; • strengthen privacy, by improving security and control, and weaken privacy, due to increased risk of security breaches; and • increase efficiency, by increasing productivity, and decrease efficiency, because of implementation costs. Overall we agree there is likely a net positive benefit to consumer welfare, especially because the benefits tend to be of a more long-term character than the costs.
3	*Are there additional benefits, costs or risks that have not been explored in the above discussion on a consumer data right?*
	We emphasise the benefits in consistency with other jurisdictions, particularly Australia & the EU. Many businesses are already seeking to ensure compliance with these regimes. Clarity is also an important benefit for business (*cf* regulatory uncertainty). From that perspective, if a CDR is *likely* to be adopted, in some respects it might be a case of "*the earlier the better*" (obviously subject to a CBA and appropriate design.)

4	*What would the costs and benefits be of applying the consumer data right to businesses and other entities, in addition to individuals?*
	For the reasons noted in our introduction, we suggest a detailed CBA comparing options 2 (sectoral-designation) and 3 (economy-wide), including the costs and benefits of applying the CDR to businesses. The CBA could potentially include the status quo as a base case. We would prefer to comment further as this process develops (and are happy to engage with MBIE in the meantime), but a preliminary comment is that the regime would seem to be far more wide-ranging if it also conferred a right to businesses and other entities. Unlike a natural person, a business has no personality interests in its data. Its interests in controlling its data will likely relate almost solely to its ability to capitalise on its data, which on its face is not necessarily the interest the CDR is intended to protect. Extending the regime to businesses would require careful and targeted analysis of how businesses may take advantage of this right for purposes not originally intended.
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 would prefer to comment further as this process develops (and are happy to engage with MBIE in the meantime), but a preliminary comment is that views on which types of data to include/exclude will likely differ depending on the option that is ultimately adopted. If both types of data (ie consumer data and product data) are included (defined) in a CDR, this could create greater flexibility under option 2 (sectoral-designation), ie an ability to apply either one or both types of data in a designated sector, but could lead to potential "overreach" under option 3 (economy-wide), ie less sophisticated sectors being subject to the same obligations as more sophisticated (and data heavy) sectors.
6	*What would the costs and benefits be of including both read access and write access in a consumer data right?*
	We note the benefits for both read and write access noted in the DD. We agree that there are also some risks associated with write access that will need to be carefully worked through during the design phase. For example, facilitating write access may take away control from consumers and reallocate it to third parties, unless the consumer has clear understanding of the changes the third party makes. Knowledge of the fact that the third party may make changes will generally not be enough transparency to consider the consumer to be in "control" of their data. Similar to our preliminary comment under question 5, if both types of access are included (defined) in a CDR, this could create greater flexibility under option 2 (sectoral-designation) but could lead to potential "overreach" under option 3 (economy-wide).
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 it clear that there will need to be a regulatory regime in place at some stage so encourage MBIE to proceed with an appropriate CBA and legislative design/drafting for comment.

8	*Do you have any comments on our proposed criteria for assessing options? Are there any additional factors that should be considered?*
	We broadly agree with the proposed criteria. As part of that criteria, we encourage MBIE to consider the implementation and compliance costs for small businesses in the CBA, and whether it would be appropriate for the CDR design to distinguish between larger and smaller businesses however defined. (While not directly relevant, we note proposals to extend the unfair contract terms regime under the Fair Trading Act 1986 to "small trade contracts" where a $250,000 per 12-month period threshold would apply.) (This comment also applies more generally to other legislation/regulatory regimes.)
9	*Do you have any comments on the discussion of Option one: Status quo?*
	This does not seem to be a viable option over the relatively near future for the reasons noted in the DD. However, this comment is subject to our view that a careful CBA needs to be conducted, which should include or be supplemented by an appropriate legislative design review. Any proposal would obviously need to have likely net benefits.
10	*Do you have any comments on the discussion of Option two: A sectoral-designation process?*
	We can see that this option offers the benefit of having a broader legislative framework in place, but with implementation where there is the clearest immediate net benefit. It would also seem to allow some flexibility in design and application (as opposed to being "one size fits all"). Having the framework in place would also enable other businesses to be prepared (or self-implement) as a matter of "best practice".
11	*Do you have any comments on the discussion of Option three: An economy-wide consumer data right?*
	On its face, this appears to be a costly option. But this will depend on the design, and it is difficult to comment further without a clear idea of the detail and a CBA. Related to our comments under question 8, a "one size fits all" approach risks disproportionately burdening smaller businesses that may not be as "equipped" as larger business with more sophisticated systems and greater resources.
12	*Do you have any comments on the discussion of Option four: Sector-specific approach?*
	We broadly agree with the concerns identified in the DD. This option could be seen as the "worst of all worlds". *Cf* option 2 (sectoral-designation), which also enables a sector-specific approach, but is scalable and has less risk of inconsistency.
13	*This discussion document outlines four possible options to establish a consumer data right in New Zealand. Are there any other viable options?*
	No comments at this stage.
14	*Do you have any comments on our initial analysis of the four options against our assessment criteria?*
	We broadly agree with the initial analysis. As noted, we suggest a CBA is conducted comparing options 2 (sectoral-designation) & option 3 (economy-wide).

15	*Do you agree or disagree with our assessment that Option two is most likely to achieve the best outcome using the assessment criteria?*
	On a "first principles" basis this appears correct (subject to our comments on a CBA and design).
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?*
	Broadly yes.
17	*Do you have any feedback on our discussion of any of these key elements?*
	No comments at this stage.
18	*Are there any areas where you think that more detail should be included in primary legislation?*
	No comments at this stage.
19	*How could a consumer data right be designed to protect the interests of vulnerable consumers?*
	No comments at this stage.
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?*
	No comments.
21	*How could a consumer data right be designed to ensure that the needs of disabled people or those with accessibility issues are met?*
	No comments at this stage.
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?*
	We consider this very important. It has the potential to offer greater consistency in understandability and interoperability, as well as reduced costs.
23	*Do you have any comments on where a consumer data right would best sit in legislation?*
	Our initial view is that we support standalone legislation (subject to our comments on design, including clarity around any overlap with existing protections in the Privacy Act). However, if the CDR regime were to be incorporated into existing legislation, the Privacy Act would seem the most appropriate "fit".
24	*Do you have any comments on the arrangements for establishing any new bodies to oversee parts of a consumer data right?*

	Creating a new regulatory body would likely involve significant time and cost. Our initial view (subject to our comments on a CBA and design) is that it would seem preferable for an existing body (or bodies) with an established and relevant skill-set to oversee the CDR. Given the inherent nature of the subject matter (which spans competition, consumer protection, and privacy law etc), the most obvious existing bodies would seem to be the Commerce Commission or the Office of the Privacy Commissioner. The Commerce Commission would seem to already have several of the requisite capabilities, which may indicate that it is a better overall fit (subject, of course, to any necessary additional resourcing). We can see benefits and synergies in the Australian approach, where the ACCC is the "lead regulator" and works with the Office of the Australian Information Commissioner (**OAIC**) and the Data Standards Body in the development and implementation of the ACDR. The ACCC and OAIC entered a memorandum of understanding in July 2020 which sets out their respective roles and responsibilities in respect of the CDR. As the lead regulator, the ACCC's role includes making the ACDR rules, monitoring compliance and taking enforcement action, and recommending future sectors to which the CDR should apply. The OIAC are the primary complaints handler under the ACDR scheme, and the See: https://www.accc.gov.au/focus-areas/consumer-data-right-cdr-0.
25	*What are the pros or cons of having multiple regulators, or a single regulator, involved in a consumer data right?*
	Multiple regulators bring diversity of thought as they generally have expertise in different specialisations. However there can also be costs and ambiguity associated with having multiple regulators dealing with overlapping subject matter. (It is for this reason that in much larger overseas jurisdictions in the past there was a reduction in the number of regulators dealing with competition law matters generally and sector-specific matters.) Arguably that is one of the considerable benefits of the Commerce Commission dealing with regulatory and competition issues, as well as consumer law issues. A single regulator can be more targeted and focused. Issues of efficiency and regulatory overlap are particularly acute in a small economy such as ours. This consideration is a critical one for the CBA and design issues. Because of costs to having multiple regulators, we prefer having one "main" regulator responsible for overseeing the CDR, with room for other regulators to be involved as appropriate.
26	*If government decides to establish a consumer data right, do you have any suggestions of how its effectiveness could be measured?*
	This is a good question and, in our view, relates to the CBA comments above. There seem to be two primary objectives: • The first is consumer side and relates to consumer control over their data and protection of such data. On this basis it may be challenging to measure, but mechanisms could include levels of consumer confidence (trust) and the number/frequency of security breach complaints. • The second affects the broader economy as a whole, and relates to enhancing data portability as a means to improve competition and efficiency, as well as providing a mechanism for dealing with the related issues around greater technological innovation and changes in portability/churn in relevant industries. Measures of the number of the

times the right is invoked and for what purposes, will give an idea of how useful the right is. Measures should also be compared to the cost of compliance to see whether the benefits exceed the costs.