

MBIE

Via email: consumerdataright@mbie.govt.nz

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Options for establishing a consumer data right in New Zealand

Thank you for the opportunity to provide a submission on MBIE's discussion paper "Options for establishing a Consumer Data Right (CDR) in New Zealand" (Paper). Mercury's submission is attached at Appendix A in the format provided and we have summarised our key points below.

A New Zealand Consumer Data Right should build on existing data sharing arrangements

Data innovation is moving at pace internationally and creating new opportunities for banks and other institutions to utilise financial technology to improve consumer-oriented services. We have seen the European Union (EU) enact the Payment Services Directive (known as "PSD2") in 2015, the United Kingdom (UK) introduce open banking regulation in 2018 and Australia's Consumer Data Right (ACDR) go live at the beginning of 2020. The introduction of these regulations in Europe has enabled some financial services providers to share data from thousands of banks across multiple countries to accredited third party providers (TPPs) through a secure, single application programming interface (API). These platforms promise the industry the ability to empower consumers by increasing their ability to find new products and offer clarity over their finances.

Sector led initiatives in New Zealand in the banking and electricity sectors indicate increased data portability is already well progressed. In the banking sector, led by Payments NZ, progress has been made to develop "open banking" through the agreement of shared standards. In the electricity sector numerous initiatives have been implemented to give consumers and third parties greater access to their consumption data:

- Retailers have developed systems to allow customers to understand their electricity consumption and this data is available to consumers free of charge, for example on Mercury's free app and website customers can view up to date electricity charges and daily/hourly usage patterns and easily download data to provide to third parties;
- The Electricity Authority (EA) has introduced several amendments to the Electricity Industry Participation Code 2010 (Code) to enable:
 - Consumers to share their electricity consumption data with trusted third parties;¹ and
 - Sharing consumption and other energy data typically generated by smart meters with distributors.²

¹ "Quick Wins for Increasing Access to Electricity Services - Making it easier for consumers to share their consumption data – Decision paper", Electricity Authority, 14 January 2020

² "The Default Distributor Agreement – decision paper", Electricity Authority, 16 June 2020



A CDR framework should provide scope for these sectors to build on the data portability mechanisms that they have already established without the need for significant regulatory intervention. Mercury supports any regulation being light handed and enabling rather than compliance heavy.

The form of a CDR should not be predetermined

Mercury would emphasise the importance of not predetermining the form that a CDR should take. MBIE has expressed a preliminary view in the paper that a sectoral designation approach (Option Two), like the ACDR is the option most likely to meet MBIE's assessment criteria. While Mercury broadly supports this preliminary view, we note that the ACDR only went live for the banking sector on 1 July 2020 and was formally applied to the energy sector on the same date. It is too early to judge the effectiveness of this regulatory regime in terms of stimulating innovation and creating benefits for consumers.

Early feedback on the ACDR is that it has been extremely expensive for the major banks to administer.³ It remains to be seen if these costs will be outweighed by the benefits of data provision. In New Zealand, we have the advantage of being able to learn from the lessons of the ACDR. Any CDR in New Zealand should undergo rigorous cost benefit analysis so that data holders can be confident that the benefits of providing data would clearly exceed the development costs of providing the data in a format that can be shared. It should not be assumed either that the Australian model is also the right model for New Zealand.

Stimulating innovation should be a core assessment criterion for a CDR in New Zealand

In Australia, some commentators have expressed concern that the complex regulatory environment governing the ACDR will increase the cost and complexity for financial institutions to meet open banking rules⁴ and risk a focus on compliance rather than innovation. Further, the ACDR in Energy introduces the Australian Energy Market Operator (AEMO) as a middleman in the data retrieval process. Some stakeholders are concerned that this will have a detrimental impact on innovation as the CDR data market matures as well as adding complexity to the customer experience.⁵

While it is too early to assess the impacts of Australia's CDR, in Europe and the UK both incumbent and challenger banks are now viewing open banking as an opportunity to compete and innovate rather than a compliance exercise.⁶ Despite initial resistance to mandated changes, banks have begun to embrace rather than resist the impacts of open banking.

A well-designed CDR will provide a regulatory framework that stimulates innovation whilst avoiding "innovation by enforcement".⁷ Mercury submits that innovation should be one of MBIE's core assessment criterion when considering the form of a CDR.

Third party provider accreditation is fundamental

Balanced against the need to encourage innovation should be the need for information security and privacy. The success of a CDR relies on high levels of consumer trust over the way a company manages their data and a third-party accreditation regime would support this outcome. Mercury strongly supports improving the security and privacy of consumer data and removing the need for data holders to have multiple bilateral agreements with separate data

³ "How innovation and security could unlock open banking in Australia", M ke Booth, Ernst & Young, March 2019

⁴ Ibid

⁵ "Consumer Data Right in Energy – Position paper: data access model for energy data position paper" Australian Competition and Consumer Commission, August 2019

⁶ "Open banking opens opportunities for greater customer value – Reshaping the banking experience", John Hallsworth, Robert Ruark and Ian Pollari, KPMG Global, May 2019 and "Open Banking in the UK: what's happened so far", Joanne Kumire, Pulse 11:FS, August 2019

⁷ "The big UK banks talk about open banking successes and failures so far", Scott Carey, Computerworld, November 2019



holders. Third party accreditation is a feature of both the ACDR and the UK's open banking regime and Mercury would support this as part of any CDR introduced in New Zealand.

We also agree with MBIE at paragraph 50 of the Paper that “care will need to be taken to ensure that the accreditation regime does not exacerbate competition concerns by deterring innovative businesses from entering the market.” To this end, we would support a regime where the private sector is able to fulfil the role of intermediary in providing some of the systems or infrastructure necessary to obtain accreditation.

Data reciprocity would provide an incentive for data holders to engage

Mercury notes MBIE's observation that progress in the banking and electricity sectors has been relatively slow and the initiatives do not appear to be delivering the full range of positive outcomes for customers. For data holders, like Mercury, New Zealand's strict privacy and data security obligations mean systems to verify and seek consent are essential but can also lead to frustrations from third-parties. There is also a perception that data sharing is aimed at meeting the needs of the consumer or the TPP but for the data holder it is the imposition of an obligation rather than a benefit. This Paper provides a catalyst for industry to consider the opportunities that data portability may offer while addressing fundamental concerns over consumer rights to the privacy of their personal information.

One way that this issue can be addressed is by creating reciprocal data sharing rights. The Paper is silent on whether the obligation on entities to make their customer's data shareable would also extend to the entities with whom their data is shared. In the UK and the EU under PSD2 banks are obliged to make payments information accessible to non-bank players. The non-bank players however do not have a reciprocal requirement to make their own core customer data (which typically differs from payments) shareable with the banks. The asymmetry or lack of reciprocity means that a regulation intended to facilitate the entrance of new players and promote competition and consumer choice in the payments market has created a competitive disadvantage for banks and other financial services firms. This only adds to the growing risk of concentrating power in the hands of a few big technological players.⁸

On the other hand, a framework that contains reciprocal obligations would enable the raw data held by companies in all industries to be accessible by any firm on similar terms when requested by the customer. All entities nominated by a customer would have access to the same amalgamated data pool from which they could each run their own analytics and compile their own respective offerings to the customer. This would incentivise and reward businesses that invest in greater data analytical capabilities. It would also drive better data literacy amongst consumers who would gain a better understanding of the value of their personal data to businesses.

Mercury strongly supports the inclusion of reciprocal rights. A CDR that incorporates benefits for business will not only encourage local industry support and buy-in but will make New Zealand a more attractive place for international companies to do business.

Involve the private sector in the CDR research process

Given the critical decisions that MBIE will be required to make around the form of a CDR, we strongly recommend the establishment of a private sector advisory group that would conduct its own research and make recommendations to the Government on what an optimal CDR might look like for both business and consumers. This group could be made up of representatives from the banking, electricity and insurance sectors who are likely to be amongst the first sectors to be “designated” under any legislative framework. It should also include representatives from the financial technology (FinTech) sector to better understand the potential of data portability and the future technologies that legislation should anticipate. An advisory group of this nature would provide expert capability to the Government throughout the process rather than waiting for the consultation stage when often certain decisions have already been made.

⁸ “Reciprocity in customer data sharing frameworks”, Brad Carr, Daniel Pujazon, Pablo Urbiola, Institute of International Finance, July 2018



Advice to the government should be high level

We are uncertain whether MBIE proposes to advise the Government on the demand for a CDR in New Zealand or whether having determined that there is interest, MBIE will go further and recommend one of the specific options discussed in the Paper. Mercury considers that the purpose of this consultation should be to gauge interest rather than choose the form that a CDR should take and that MBIE's advice to the Government should reflect this. Significant research must be undertaken into the pros and cons of the various CDR options before any decision is made on specific form. We look forward to a highly consultative regulatory process to ensure that we choose the right form of CDR for New Zealand.

Please don't hesitate to contact me at [REDACTED] if you have any questions in relation to this submission.

Yours sincerely



Jo Christie

Regulatory Strategist



Appendix A: Mercury submission on discussion document: Options for establishing a consumer data right in New Zealand

Attached



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

Your name and organisation

Name	Jo Christie
Organisation	Mercury

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?*

An additional problem from Mercury's perspective is that there is a lack of understanding on the part of both businesses and consumers as to the opportunities that data portability offers. This is possibly because we have not yet seen the benefits of international developments in data portability in New Zealand so for most participants it is still a relatively abstract concept making it challenging to weigh the relative costs and benefits. This is compounded by privacy and data security obligations and high profile public breaches that have made businesses wary of sharing data, particularly when they receive little reciprocal value. For this latter reason we strongly support a CDR including data reciprocity, as discussed in our cover letter. A successful CDR must address privacy and security of data issues whilst at the same time encouraging data holders (not just TPPs) to invest in innovative data solutions.

We would also recommend that as part of the future consultation process, MBIE provide educational material to stakeholders using examples from the UK and Europe illustrating how data portability is beginning to reform consumer empowerment and competition in the banking sector.

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?*

Mercury agrees with the broad outline of costs and benefits identified in the Paper however a rigorous cost-benefit analysis including the following considerations will be required before any decision on the form of any CDR should be progressed:

- Types of data provided: what would the costs and benefits be for the provision of different types of consumer datasets and how would costs and benefits change if product data is included in the data right? Any benefits of providing certain datasets should clearly exceed the administrative/development costs of providing the data in a format that can be shared.
- Implementation and ongoing compliance: these costs have been considered significant in Australia and it is too early to determine whether these are justified by the benefits of the ACDR. Extensive research into other jurisdictions where data portability has been implemented (eg the UK and Europe) should be undertaken to provide a balanced view of the true costs and benefits of each of the options considered in the Paper.

3

Are there additional benefits, costs or risks that have not been explored in the above discussion on a consumer data right?

Mercury would add a further potential risk that if the CDR is not designed correctly it could have a negative impact on innovation. For example, New Zealand should watch the Australian model closely to see whether the involvement of so many regulatory bodies creates a compliance heavy regime rather than one that promotes innovation.

4

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

No comment at this stage.

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')?

Mercury agrees that the CDR should include both consumer data and product data. The extent to which product data is included however should be subject to robust consultation with industry experts and is likely to differ between sectors. This is an example of where a private sector advisory group, (as discussed in our cover letter), would have valuable input.

6

What would the costs and benefits be of including both read access and write access in a consumer data right?

This a question that requires a cautious approach and the answer is likely to differ between sectors.

We note that open banking in the UK has both data sharing (read access) and payment initiation (write access) however this applies only to transaction accounts and just to nine banks. The New Zealand banking sector has so far followed the UK model closely and the industry pilot to inform API specifications for both read and write access identified significant value in write access. The ACDR has taken a more cautious approach and will not initially include write access although this may be added once open banking has been embedded. The Australian Government did not want to put the success of the ACDR at risk until consumer trust in third parties acting on their behalf and confidence in the fact that their data is secure has been embedded. Stakeholders in the Australian FinTech sector are disappointed with this outcome as write access is seen as having the greatest potential to empower customers and improve bank competition.⁹

⁹ "Open Banking: Payment initiation – completing the vision", Deloitte, December 2019

We broadly support a CDR including both read and write access, however the details of the data and how it must be shared should be addressed in the sector specific designations. A CDR framework should be high-level with a focus on the principle of data portability and allowing flexibility for industry to decide best fit.

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?*

An additional outcome for consumer welfare might be a greater understanding by consumers of the value of their data to businesses.

8 *Do you have any comments on our proposed criteria for assessing options? Are there any additional factors that should be considered?*

As discussed in our cover letter, Mercury submits that “innovation” should be included as an additional criterion for assessing options.

9 *Do you have any comments on the discussion of Option one: Status quo?*

See our cover letter for an outline of the current arrangements in the electricity sector that already support data portability and are consistent with a CDR.

10 *Do you have any comments on the discussion of Option two: A sectoral-designation process?*

Mercury broadly supports a sectoral designation approach however for the reasons we have already discussed in our submission would urge MBIE to conduct further research into the success of data portability in other jurisdictions such as the UK and Europe before determining that option two is preferred. In summary:

- MBIE’s assessment criteria has not factored in which option would best stimulate innovation;
- Option two is based on the ACDR which only went live in July 2020 therefore it is too early to judge whether it can or will achieve the desired outcomes;
- In the UK and the EU where open banking has had more time to develop huge innovation is starting to be seen and therefore, we should not dismiss elements of option four (see below at question 12);

- The ACDR involves a complex regulatory system that may result in a costly and compliance heavy regime where it is uncertain whether benefits will ultimately outweigh costs.

11

Do you have any comments on the discussion of Option three: An economy-wide consumer data right?

Mercury agrees with MBIE that an economy wide model such as the GDPR may not fully realise the benefits of a CDR as it would be limited to information relating to individuals only and may not apply to businesses or product data.

12

Do you have any comments on the discussion of Option four: Sector-specific approach?

Mercury would like to see MBIE conduct further research into a sector-specific approach, such as that adopted by the UK and the EU pursuant to PSD2 for the following reasons:

- This is the model that New Zealand's banking sector approach is based on;
- New Zealand can look to the UK and Europe for successes and failures;
- The UK and Europe approach may give industry more flexibility due to less regulation;
- MBIE suggests the lack of an over-arching legislative framework would reduce the likelihood of multiple open sectors being interoperable. This interoperability may be achievable however by other means such as the application of shared API standards to each sector so that the technology is able to communicate. This lighter regulatory touch might encourage industries to develop more innovative market led solutions to the issue of interoperability;
- Another concern raised by MBIE is that a sector specific approach may not address privacy and security concerns in multiple sectors. Mercury however is unsure why this option would preclude the establishment of an accreditation regime and privacy safeguards.

13

This discussion document outlines four possible options to establish a consumer data right in New Zealand. Are there any other viable options?

Mercury would like MBIE to consider combining different parts of the various options to create a less regulated regime that still provides improved privacy and data security and has the potential to work across different sectors. A private sector advisory panel as discussed in our covering letter could contribute innovative thinking towards the design of New Zealand's CDR.

14

Do you have any comments on our initial analysis of the four options against our assessment criteria?

While Mercury agrees with much of MBIE's analysis we note that some of MBIE's conclusions would benefit from more rigorous questioning. We refer to comments at question 12 as an

example. Further, if MBIE were to include innovation as an assessment criterion as we have suggested, the results may differ.

15 *Do you agree or disagree with our assessment that Option two is most likely to achieve the best outcome using the assessment criteria?*

Mercury is undecided. In our view it is too early to judge the success of the Australian model and we would like to see considerably more research done into alternative models before any decision is made on the form of a CDR in New Zealand.

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?*

Mercury agrees with the key elements of a data portability regime outlined in this section, however we would be keen to investigate whether similar outcomes can be achieved through a more light handed regulatory approach.

17 *Do you have any feedback on our discussion of any of these key elements?*

No comment.

18 *Are there any areas where you think that more detail should be included in primary legislation?*

No comment at this stage.

19 *How could a consumer data right be designed to protect the interests of vulnerable consumers?*

A consumer data right could offer vulnerable consumers greater access to credit, budgeting, debt management and energy efficiency data. The difficulty however will be ensuring that vulnerable consumers are able to access these benefits they are also more likely to face information barriers when compared to the average consumer. Some commentators in the UK have suggested that open banking is “self-serving for finance companies rather than beneficial for customers.”¹⁰ We suspect that this is due to lack of consumer awareness of the benefits

¹⁰ “Are consumers actually benefitting from open banking?”, Karen Wheeler, Finance Derivative UK, 2019

that data portability can offer and potentially lack of confidence in the safety of their personal information. We would expect the Government to conduct an educational campaign prior to any CDR coming in to force and the CDR itself should include minimum disclosure requirements about how data is used together with undertakings around data security.

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 comment at this stage.

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 comment 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?*

International compatibility should be a key consideration, particularly in relation to trans-Tasman data opportunities.

23 *Do you have any comments on where a consumer data right would best sit in legislation?*

We agree with MBIE that a stand-alone Act would provide greater flexibility to support existing laws, avoid misalignment and reduce overlap or duplication.

24 *Do you have any comments on the arrangements for establishing any new bodies to oversee parts of a consumer data right?*

Before considering whether any new bodies should be formed to oversee a CDR, New Zealand should observe carefully how the ACDR's multi-regulator approach is working in practice. Feedback from Australia has indicated that too many government departments are involved. This has created confusion over who is responsible for what and compliance is onerous. A regime that is too focused on compliance risks dampening the incentive to innovate and consumers will not receive the desired benefits of a CDR. As we have discussed above, the benefits of the regime must clearly justify the costs to implement and comply with its requirements.

25

What are the pros or cons of having multiple regulators, or a single regulator, involved in a consumer data right?

Please see our answer to question 24.

26

If government decides to establish a consumer data right, do you have any suggestions of how its effectiveness could be measured?

No comment at this stage.

Other comments

Please see our cover letter.