

**Submission to the Ministry of Business, Innovation & Employment on the options for
establishing a consumer data right in New Zealand**

Real Estate Institute of New Zealand

28 September 2020

1. INTRODUCTION

- 1.1 The Real Estate Institute of New Zealand Inc ("**REINZ**") is a membership organisation representing more than 14,000 real estate professionals nationwide. REINZ members specialise in all facets of real estate including residential sales, rural, auctioneering, business brokerage, commercial and industrial sales, leasing and residential property management. Members of REINZ aspire to best practice standards and are bound by the REINZ Codes of Agency Practice and Individual Membership. REINZ is the heart of the New Zealand real estate industry and is constantly working on improvements in technology, presentation of data, communications and education to benefit both members and members of the public.
- 1.2 It is currently unclear whether and how a CDR would or could apply to the real estate industry (we note that real estate is not captured in overseas jurisdictions). REINZ is nonetheless grateful for the opportunity to submit on MBIE's August 2020 Discussion Document regarding options for establishing a consumer data right ("**CDR**") in New Zealand (the "**Discussion Document**"), as REINZ members may deal with institutions that could be captured by a CDR.
- 1.3 As an industry organisation committed to best practice standards and positive and enduring relationships between members, Consumers¹ and other industry stakeholders, REINZ supports MBIE's CDR objectives set out in the Discussion Document, including continued improvement in consumer welfare and economic development.
- 1.4 REINZ's preferred option of those outlined in the Discussion Document is "Option 1" (Status Quo) given there are already numerous examples of businesses reaching commercial arrangements to enable data portability, and the introduction of regulation risks imposing unnecessary requirements that stifle such commercial arrangements or are "not fit for purpose" for specific sectors.
- 1.5 However, in the event that Option One is not selected, and a mandatory CDR is established in New Zealand, REINZ considers that the structure of any such CDR should be carefully considered to avoid unintended adverse consequences. For example, it is important that the imposition of any mandatory CDR does not:
- (a) create barriers to entry and erode value to Consumers through detailed, heavy-handed legislation and associated high implementation and compliance costs for participants;
 - (b) disincentivise Data Holder investment in value-added or enhanced data by requiring mandatory sharing of such data free of charge, which would potentially result in poorer outcomes for Consumers; and

¹ As "Consumer" is defined in the Discussion Document.

- (c) create an uneven playing field for Data Holders by mandating asymmetrical data sharing, resulting in Consumers not benefiting from the value that could be realised from reciprocal data sharing by third party recipients of CDR data ("**Data Recipients**").

1.6 For these reasons, the implementation of any mandatory CDR legislation should be principles-based, and as simple and narrow as possible, and leave the prescriptive requirements for any given industry to secondary or tertiary legislation to allow the requirements to be tailored with that relevant industry in mind. This is to minimise the risk of unintended consequences, and will allow for better-targeted regulations than an overly ambitious upfront approach.

2. SUBMISSIONS

Submission 1: The CDR legal framework should comprise principles-based legislation, with discretion for in-scope participants to self-determine the detail of how they will achieve prescribed outcomes

- 2.1 MBIE's preliminary view is that the Australian-style multi-sector industry designation regime described as "Option Two" in the Discussion Document would be most appropriate CDR structure in the New Zealand context. If a mandatory CDR is to be implemented in New Zealand (whether under any of Options Two, Three or Four), a degree of centralised legislation and regulation ("**General Framework**") is likely to be required as a result of the nature of the rights and obligations involved.
- 2.2 However, REINZ is concerned that if the General Framework is too detailed and prescriptive, the CDR will not realise the full benefits of potential achievable value to Consumers, productivity improvements or growth of the digital economy.
- 2.3 Whilst the Australian regime is the only precedent globally for a multi-sector CDR, REINZ does not believe that it is a perfect blueprint for a New Zealand CDR. New Zealand makes a commitment under the trans-Tasman MOU on Coordination of Business Law ("**MOU**") to coordinate with Australia on business law matters where appropriate. However, the MOU also acknowledges that good reasons may exist for the law to be different in New Zealand. REINZ is of the view that there are numerous good reasons to deviate from the highly prescriptive approach taken in the Australian CDR General Framework.
- 2.4 In particular, MBIE has noted that "cost" will be a key assessment criteria for selection of the relevant CDR framework. The cost to the Australian Government and in-scope sector participants of designing, implementing and operating the Australian CDR has been significant.
- 2.5 As noted in the Discussion Document, the committed funding from the Australian Government to resource regulatory bodies involved in CDR governance over just the first few years has been in the region of AU\$90 million (and that figure does not include the cost associated with the design and enactment of the CDR framework).
- 2.6 There have also been significant costs borne by Data Holders and Data Recipients under the Australian regime. To participate in the CDR ecosystem, Data Holders and Data Recipients incur both upfront, as well as ongoing, costs, including technology costs (such as system build and integration), business costs (such as change management, risk and compliance)

and indirect costs (such as change impacts, servicing and supporting Consumers).² In 2018 Westpac CEO Brian Hartzler estimated that the initial cost to Westpac of implementing Open Banking under the Australian CDR was likely to be in the region of AU\$150 million to AU\$200 million.³

- 2.7 A prescriptive General Framework exacerbates implementation costs because it mandates the method of compliance in a "one size fits all" manner which may not be consistent with existing industry standards and practices, or the state of technology, in a particular sector or for individual participants within a sector. For example, if a multi-sector regime is enacted, certain sectors (e.g., highly regulated industries or those that deal with highly sensitive personal information) may require higher security and accreditation standards than other in-scope sectors. Imposing the high water mark of these requirements across all sectors in the General Framework could result in the cost of participation being too high and deter adoption. Equally, enshrining the lowest common denominator in the General Framework could put highly regulated entities in breach of industry regulation, introducing risk and potentially eroding Consumer trust.
- 2.8 Another example where a prescriptive General Framework may produce inefficient outcomes is MBIE's proposal to mandate both "read" and "write" access under the CDR in all in-scope sectors. Whilst write access has clear benefits in the banking context (e.g., processing payments), it is unclear how write access would deliver value to Consumers in other industries (including the real estate industry). We do not believe that the benefits of write access in the real estate industry would justify the additional implementation, security and compliance risks and costs that Data Holders would be subject to. REINZ is concerned that a prescriptive or broad upfront approach to the CDR General Framework could result in costs to participants outweighing Consumer benefits in a number of areas.
- 2.9 The significant cost associated with a highly-standardised and prescriptive General Framework like the Australian regime actually favours deep-pocket incumbent Data Holders who are best placed to absorb those sorts of costs. In REINZ's view, this is not an optimal approach to achieve MBIE's stated objectives of increasing competition. In fact, REINZ is concerned that this sort of heavy-handed and detailed General Framework could actually create unintended (and unnecessary) barriers to entry for smaller-sized participants.
- 2.10 Growing the digital economy and associated innovation and productivity benefits are other core objectives of the New Zealand CDR proposal. Deciding what to mandate in the General Framework, and what to leave to the market to determine on a sector-specific basis, should therefore also involve consideration as to the pace of innovation and whether detailed and prescriptive legislation / regulation can keep pace with market developments. In REINZ's view, prescribing too much detail in the General Framework will result in the legislative requirements quickly becoming obsolete, limiting innovation.
- 2.11 The New Zealand CDR should also avoid the complexity and uncertainty associated with unnecessary layering of different legal standards in the same functional area, or attempting to re-write already well established bodies of law which apply more widely than just the CDR (e.g., privacy law). Layering of legal standards increases compliance risk to participants and causes them to incur unnecessary compliance costs, which could actually impede adoption of the CDR.
- 2.12 The Australian CDR's data safeguards are an example where a prescriptive General Framework has resulted in multiple different standards applying to a participant in the same

² Australian Treasury, "Review into Open Banking in Australia" (July 2017), available [here](#).

³ Article available [here](#).

functional area at the same time. Under the Australian CDR, all three of the Australian Privacy Act 1988 (Cth), CDR data Safeguards and the GDPR can apply to a Data Holder simultaneously. This layering effect is unnecessary, increases uncertainty (and therefore risk) and also increases the complexity and cost associated with compliance.

- 2.13 REINZ believes that the most effective legal framework to achieve MBIE's stated CDR objectives would be to mandate certain minimum standards in a principles-based General Framework (for example, minimum technical standards to ensure baseline interoperability and core data safeguards to protect Consumer data), but provide participants with the autonomy to self-determine how the prescribed outcomes will be achieved.
- 2.14 For the reasons set out above, REINZ's view is that a principles-based approach is most likely to achieve the assessment criteria proposed by MBIE of "flexibility", "cost" and "speed". Provided that General Framework is designed appropriately with the right checks and balances in place to ensure prescribed outcomes are met by participants, it would also effectively support MBIE's assessment criteria of "trust" and "reach".

Submission 2: Requirement for costs and benefits analysis prior to designating any given sector

- 2.15 The Discussion Document canvasses a sectoral-designation approach, and correctly notes that the implementation costs for both government and industry may be significant.
- 2.16 For these reasons, if a sector-designation approach is adopted, REINZ's view is that before any given sector is designated as being subject to the CDR that there be a requirement in the CDR legislation mandating that a cost/benefit analysis and consultation process be conducted.
- 2.17 In particular, before any CDR designation is made, it should be required that:
- (a) appropriate consideration and examination is given to the economic reasoning and empirical evidence for making the designation to demonstrate that the quantified benefits (to Consumers and other users of the scheme) outweigh the quantified costs (to entities required to participate in the scheme); and
 - (b) there be a detailed and transparent consultation process, so that the industry in question can submit on the appropriate Consumer data rules and standards for that industry.
- 2.18 This is to mitigate the risk of the CDR framework for any given industry not being "fit for purpose" or creating significant negative externalities such as:
- (a) loss of Consumer trust in the data ecosystem in that sector;
 - (b) imposition of substantial and unjustified compliance costs on that sector;
 - (c) distorting fair competition and product/service differentiation in a given sector;
 - (d) hampering investment and innovation into data analytics in a sector;
 - (e) impeding entry or expansion of providers within a sector; and/or
 - (f) disadvantaging local businesses against offshore or "out of scope" businesses.

- 2.19 REINZ's view is that it is only once such a cost/benefit analysis, and consultation process, has taken place that the necessary secondary or tertiary legislation should be introduced to bring a new sector into the scope of the CDR framework.

Submission 3: The CDR should not apply to enhanced data

- 2.20 We agree with MBIE's preliminary view that data to which Data Holders have applied insight or analysis, such that the value of the raw data has been enhanced ("**Enhanced Data**") should not be in scope of a CDR. If Data Holders are required to share Enhanced Data (or are required to do so without adequate compensation) they will be disincentivised to invest in generating it. This will lead to poorer Consumer outcomes, which is counter-productive to the objectives of the CDR. Excluding Enhanced Data from the CDR and/or permitting Data Holders to charge a commercially reasonable fee for it is also consistent with the approach taken in several overseas jurisdictions, including Australia, the EU and UK.

Submission 4: Reciprocity should be a core principle of any New Zealand CDR

- 2.21 Reciprocity is the principle that, in addition to Data Holders being required to share CDR data with Data Recipients at the direction of a Consumer, Data Recipients are also required to share CDR data that they hold concerning that Consumer with Data Holders where the Consumer directs the Data Recipient to do so. Reciprocity is a foundation principle of the Australian CDR regime.
- 2.22 The Australian position is based on research by the Australian Productivity Commission who found that a system in which all accredited parties are participating fully is more "vibrant and dynamic", facilitating competition and innovation to improve consumer outcomes.⁴
- 2.23 REINZ is of the view that, provided the Consumer always remains in control of their CDR data (and that CDR data is only ever shared at the Consumer's direction and with their consent), reciprocity should also form a core principle of any New Zealand CDR.
- 2.24 Reciprocity is essential to ensure that a CDR leads to fair outcomes and a level playing field for all CDR participants, particularly in the context of the potential entry of deep-pocket global technology companies (such as Apple, Facebook, Microsoft and Google) into local in-scope sectors (for example, Facebook Marketplace's real estate offering). Reciprocity also encourages investment and innovation by all parties (including Data Holders), resulting in the best possible outcomes for Consumers in the long term.
- 2.25 Given that the objectives of the New Zealand CDR proposal are wider than just increasing competition, the scope of the reciprocity principle will need to be defined to ensure it is not unintentionally constrained by other aspects of the CDR framework. In particular, the definition of CDR data will need to take into account the Consumer and product information that could be unlocked and shared under the principle of reciprocity to ensure that optimal Consumer outcomes are achieved and objectives such as productivity improvements / growth of the digital economy, are fully realised. This again is likely to require sector specific secondary/tertiary legislation, rather than any attempt at a "one size fits all" upfront General Framework.

⁴ Page 44 of Australian Treasury report entitled "Open Banking" dated December 2017, available [here](#).

3. CONCLUSION

3.1 REINZ is grateful for the opportunity to submit to MBIE on the CDR proposal outlined in the Discussion Document.

3.2 All enquiries on the submission may be directed to:

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