



COVERSHEET

Minister	Hon Dr Duncan Webb	Portfolio	Commerce and Consumer Affairs
Title of Cabinet paper	Consumer Data Right: release of exposure daft Bill	Date to be published	13 July 2023

List of documents that have been proactively released

Date	Title	Author
June 2023	Consumer Data Right: release of exposure daft Bill	Minister for Commerce and Consumer Affairs
19 June 2023	Consumer Data Right: release of exposure daft Bill CAB-23-MIN-0245 Minute	Cabinet Office

Information redacted

YES

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Some information has been withheld in order to protect the confidentiality of advice tendered by Ministers of the Crown and officials.

In Confidence

Office of the Minister of Commerce and Consumer Affairs

Chair, Cabinet

CONSUMER DATA RIGHT: RELEASE OF EXPOSURE DRAFT BILL

Proposal

1. This paper:
 - 1.1. seeks agreement to release an exposure draft of the Customer and Product Data Bill and accompanying discussion document;
 - 1.2. seeks decisions on changes to the enforcement agency under the legislation from that previously agreed by Cabinet; and
 - 1.3. provides the additional information requested by the Cabinet Economic Development Committee (DEV) on the estimated financial implications of the consumer data right (CDR) [DEV-22-MIN-0151 refers].

Relation to government priorities

2. The Prime Minister's 2023 Statement to Parliament stated that the Government will introduce legislation establishing a CDR framework this year. Releasing an exposure draft of the Customer and Product Data Bill for public feedback prior to the election is an important part of meeting this timeline.
3. Through the Digital Strategy for Aotearoa and the Digital Technologies Industry Transformation Plan, the Government is supporting the growth of the digital sector and lifting the digital economy. The release of an exposure draft of the Customer and Product Data Bill supports New Zealand's journey to a safe and prosperous digital future. Data plays a key role as it fuels growth, drives innovation, and enables the development of new products and services across different sectors.

Executive summary

4. A robust and workable CDR legislative framework will enable customers to compare, manage and switch between product and service providers by securely sharing their data. It is arguably the single most transformative step that the Government can take in the near term to achieve a more innovative and competitive, and therefore productive economy.
5. On 30 June 2021, DEV agreed to establish a CDR legislative framework [DEV-21-MIN-0145]. The CDR will require businesses that hold data (data holders) to share prescribed data that they hold about their customers (customer data) with trusted third parties (accredited requestors), on the customer's request and consent. The CDR will be rolled out on a sector-by-sector basis via designations made on the recommendation of the responsible Minister.

6. On 27 July 2022, DEV made further decisions on the CDR including that the Commerce Commission be responsible for CDR enforcement [DEV-22-MIN-0151]. Other functions would be carried out by the Ministry of Business Innovation and Employment (MBIE) and the Privacy Commissioner. DEV invited the Minister of Commerce and Consumer Affairs to report back on financial implications.
7. Since those decisions were made, officials have identified several issues that suggest a model with three regulators is not workable in practice (partly based on Australian experience). The division of functions is not clear due to significant overlap between functions, and this will make it difficult for businesses and consumers to understand and engage with the CDR. A model with three regulators is also likely to suffer from inefficiencies from separating non-privacy compliance and enforcement from related functions such as accreditation and promotion of the CDR.
8. I propose to address these issues by consolidating the CDR compliance and enforcement functions of the Commerce Commission into MBIE, and therefore implementing a model with two regulators.
9. Under this revised model, the indicative ongoing costs of the CDR to government are in the range of Confidential advice to Government a year on average, once banking is designated, and allowing for designation of no more than one other sector in each subsequent year. It is intended that some of these costs be recovered from sector participants. However, these indicative costs may change and overall costs will vary significantly depending on the desired approach to implementing the CDR. I would expect these costs to be much higher if there were to be three regulators.
10. I propose to release for public consultation a draft Customer and Product Data Bill, with an accompanying discussion document. While the public has had the chance to comment on the issues to be addressed by the bill at a high-level, this will be the first opportunity for interested parties to consider how the detailed implementation of the overall CDR is expected to work. It is likely that, following consultation on an exposure draft bill, significant refinement of the bill will be needed prior to its introduction into the House.

Background

11. On 30 June 2021, DEV agreed to establish a CDR legislative framework [DEV-21-MIN-0145]. The CDR will require businesses that hold data (data holders) to share prescribed data that they hold about customers (customer data) with trusted third parties (accredited requestors), on the customer's request and consent. The CDR will be rolled out on a sector-by-sector basis via designations made on the recommendation of the responsible Minister, starting with banking.
12. The CDR framework agreed is consistent with recommendations of the Productivity Commission in its April 2021 report, *New Zealand firms: Reaching for the frontier*. The Productivity Commission noted that in the modern economy, consumer data is a valuable asset in its own right. Establishing a consumer data right would open opportunities for innovative digital businesses to devise new products and services that can lift productivity and enhance wellbeing.

13. On 27 July 2022, DEV made further decisions on the CDR [DEV-22-MIN-0151] including:
 - 13.1. that the Commerce Commission be responsible for CDR enforcement;
 - 13.2. that the Privacy Commissioner and Human Rights Review Tribunal be empowered to investigate and provide redress for complaints relating to breaches of CDR privacy and information security safeguards involving personal information, in line with Privacy Act 2020 processes.
14. DEV invited the Minister of Commerce and Consumer Affairs to report back on financial implications and noted that Cabinet would then consider the release of an exposure draft of a CDR bill.

CDR enforcement agency

15. Previous Cabinet decisions on the CDR split regulatory functions between the Ministry of Business, Innovation and Employment (MBIE), the Commerce Commission and the Privacy Commissioner [DEV-22-MIN-0151]. Under the model that was agreed by Cabinet:
 - 15.1. MBIE was given several functions, including advising on secondary legislation, developing and deciding on data standards, accrediting data receivers and promoting the CDR.
 - 15.2. The Privacy Commissioner was given responsibility for the compliance and enforcement of privacy matters. This function has a close relationship with its existing functions under the Privacy Act 2020.
 - 15.3. The Commerce Commission was given the compliance and enforcement function for non-privacy matters. This reflected its proven track record in dealing with competition and consumer matters.
16. Since those decisions were made, officials have undertaken further design work on a CDR bill and consulted further with industry and Australian officials.
17. This work has identified issues that suggest a model with three regulators is not workable in practice. In particular:
 - 17.1. The current division of functions is not clear in practice due to significant overlap between functions. For example, there are large areas of overlap between MBIE's proposed function of accrediting data requestors and the Commerce Commission's compliance and enforcement function.
 - 17.2. Such a model will make it difficult for businesses and consumers to understand and engage with the CDR. Having three agencies responsible for different functions makes it harder for businesses and consumers to understand who they should be speaking to about particular issues. It also makes it more difficult for regulators to co-ordinate on responses to CDR participants and increases the chances of participants 'falling through the cracks'.

- 17.3. The division of functions means some functions will not be as efficient as they could be. There are natural co-dependencies between functions such as the accreditation function, the promotion of CDR function, and the compliance and enforcement function. There would be benefits and efficiencies from housing them within the same entity, which are lost as they are split between different regulators.
18. These issues have been borne out in the Australian experience, where a similar model with three regulators has been in operation. The Australian *Statutory Review of the Consumer Data Right* report found that a model with three regulators in Australia led to a lack of 'ownership' among the regulators. Because distinctions between roles and functions were sometimes unclear, there were gaps in the regulatory framework where regulators assumed others would take the lead. This caused confusion for consumers and CDR participants, created unnecessary work for regulators, reduced regulator effectiveness and could have slowed uptake of the CDR.
19. I propose to address these issues by consolidating the CDR compliance and enforcement functions of the Commerce Commission into MBIE, and therefore implementing a model with two regulators.
20. MBIE is well-equipped to perform compliance and enforcement functions, and has experience creating, staffing and managing enforcement teams. MBIE currently holds a compliance and enforcement role in relation to the Companies Register, the Financial Service Providers Register, New Zealand's radio spectrum, the Intellectual Property Office and more. MBIE also has the most CDR subject-matter expertise of any government agency, whereas the Commerce Commission would need to build this expertise up. MBIE has a greater depth of IT-system expertise and associated audit experience, which will be important for CDR compliance and enforcement.
21. The Privacy Commissioner has broad responsibility under the Privacy Act 2020 to monitor and enforce compliance with the Privacy Act 2020, including providing redress for breaches of an individual's privacy and receiving reports of notifiable privacy breaches. I note that the Privacy Commissioner will continue to be responsible for the compliance and enforcement of privacy matters, including in the CDR regime. The Minister of Justice is responsible for the Privacy Act 2020, and therefore for defining the Privacy Commissioner's functions, powers and penalties.

Release of an exposure draft bill and accompanying discussion document

22. Release of an exposure draft bill is important to ensure that the design and drafting of the CDR bill is fit for purpose, prior to introduction in the House. While the public has had the opportunity to comment on the issues to be addressed by the bill at a high-level, this will be the first opportunity for interested parties to consider how the detailed implementation of the overall CDR regime is expected to work. It is likely that, following consultation on an exposure draft bill, significant refinement of the bill will be needed. The bill is likely to be most successful if these changes are made prior to its introduction in the House and referral to the select committee process, rather than trying to identify and address all significant issues during the latter stages.

23. I propose to release the draft Customer and Product Data Bill with an accompanying discussion document, attached to this paper. The discussion document includes:
- 23.1. an introduction and overview of the CDR;
 - 23.2. an explanation of key implementation details, including processes for customers to give consent to data transfers, and for requestors to be accredited;
 - 23.3. seeking feedback on any adjustments that are necessary to ensure that both the CDR bill and its implementation meet diverse customer needs and interests, and serves collective and individual Māori interests in data;
 - 23.4. seeking further feedback on safeguards for ethical use of customer data, and further testing stakeholder views on system settings such as handling of complaints and penalties; and
 - 23.5. seeking feedback on technical matters and system settings in the bill.
24. Some issues that the discussion document raises may be the subject of further Cabinet policy decisions prior to introduction. These include:
- 24.1. What time limits should apply to customer consents to data sharing? Cabinet has previously agreed that consents would be time limited, which protects customers who forget that they have consented to ongoing data transfers, or who have low motivation to review their settings and check they are still aligned with their needs and interests [DEV-21-MIN-0145]. However, the experience in the UK, where all consents were deemed to expire after 90 days, is that a large proportion of customers inadvertently lost access to data-enabled services that they still wanted to use. The discussion document therefore seeks further feedback on how to balance ease of use for customers and maximising participation with maintaining adequate customer control of data sharing.
 - 24.2. What safeguards, if any, beyond the Privacy Act 2020 should apply to ensure ethical use of CDR data and action on behalf of customers (action initiation)? Safeguards for ethical use of CDR functions have been advocated for by submitters in previous consultations on the CDR, and Australia recently introduced legislation to Parliament proposing a fair conduct requirement for accredited receivers.
 - 24.3. How best can the CDR uphold Treaty of Waitangi/Te Tiriti o Waitangi obligations in the design of the regulatory framework, and enable iwi and hapū to realise opportunities from CDR data? Alongside the analysis and questions provided in the discussion document, officials will be undertaking further engagement with Treaty/Te Tiriti partners on these matters.

Exposure draft includes regulation-making powers relating to remedying contraventions of the Act

25. As part of developing the bill, officials have identified that when action initiation (eg bank payments) are brought into the CDR scheme, specific remedies will be needed

for non-compliance. For example, banks may need to reimburse a customer for penalty fees or interest they incur as a result of late payment. Similar requirements are likely in future sectors to be designated.

26. I am therefore seeking Cabinet's agreement to a regulation-making power to prescribe steps that a person must take to avoid, remedy or mitigate any actual or likely adverse effects arising from a contravention of the Act or secondary legislation. This power is currently provided in the draft bill.

Relationship between CDR and market study into personal banking services

27. On 29 May 2023, Cabinet agreed in principle to for the Minister of Commerce and Consumer Affairs to require the Commerce Commission to undertake a competition study (market study) into any factors that may affect competition for the supply or acquisition of personal banking services [CAB-23-MIN-0193 refers]. The Commission's market study will take place over 2023/24, with its final report released by 31 July 2024.
28. Progress on open banking, which is enabled by CDR, is intended to increase competition in the sector. A fully operational open banking system will make it easier for customers to compare services and switch to alternative providers. It will also drive innovation, which will lead to an increase in more affordable services.
29. Therefore, the release of the draft bill and its subsequent introduction into the House will give the Commerce Commission and those it consults during the market study with the opportunity to better understand the design and implementation timeframe of the CDR, and its potential impact on competition.

Financial implications

30. The indicative ongoing costs of the CDR to government are approximately **Confidential advice to Government** a year on average, once banking is designated, and allowing for designation of no more than one other sector in each subsequent year, in the absence of any cost recovery via levies or fees. These costings include additional activities carried out by both MBIE and the Privacy Commissioner. They also include a non-departmental contingency of **Confidential advice to Government** a year for litigation. Key assumptions are that:
 - 30.1. new sectors are continuously added at the rate of one a year;
 - 30.2. there is pro-active monitoring and enforcement activity by regulators (rather than relying only on complaints);
 - 30.3. government seeks to achieve good consumer awareness of CDR safeguards (rather than how it all works); and
 - 30.4. there is initial investment to encourage uptake at the establishment of the regime, but uptake is primarily driven by the design of the scheme and the use-cases offered by the market using CDR infrastructure.
31. I note that consultation on the exposure draft bill is likely to result in policy, detailed design or operational changes which may have cost implications. In particular,

inclusion of any requirements on industry additional to those in the draft bill will further increase monitoring, compliance and guidance cost (but likely decrease the number of receivers seeking accreditation).

32. Total costs will vary significantly depending on the desired approach to implementing the CDR, including future designations, marketing and communications.
33. Confidential advice to Government [REDACTED]
[REDACTED]
[REDACTED] This funding will be required to progress the CDR beyond passage of primary legislation, i.e. to begin designating sectors and implementing the CDR.
34. The Bill provides for cost recovery through fees and levies. The extent and design of cost recovery will be considered as part of the regulation and designation consultation processes, after the Bill has passed. The Bill provides that fees can be charged to accredited data recipients when applying for or changing accreditation. The levy-making power allows sector-specific levies to be charged. Specific levies could reflect the benefits or risks of operating in that sector (e.g. maintenance of sector-specific CDR rules and data standards).

Legislative Implications

35. The Customer and Product Data Bill currently holds a priority category [REDACTED] Confidential advice to Government [REDACTED] on the 2023 Legislation Programme. Confidential advice to Government [REDACTED]
[REDACTED]
However, as per the Prime Minister's priorities letter for the Commerce and Consumer Affairs portfolio, I intend to introduce the bill before the end of the year.
36. The proposed Act will bind the Crown.

Treaty of Waitangi/Te Tiriti o Waitangi implications

37. The customer data which will be designated into the CDR will hold value and opportunity for all. Within designated data, some Māori data¹ could potentially be considered a taonga (treasure) by Māori. Tikanga associated with data governance practices may also be relevant to design of the CDR rules, standards and user interfaces.
38. As part of the exposure draft process, officials will engage on:
 - 38.1. how a Treaty/Te Tiriti and te ao Māori lens could inform the detailed design of the CDR,

¹ Māori data is data that is produced by Māori, or that describes Māori and the environments they have relationships with

- 38.2. the opportunities or risks that the implementation of the CDR could present for iwi, hapū and Māori individuals, businesses and organisations.
39. Officials are also taking account of work underway as a result of the Mana Ōrite Relationship Agreement between Statistics New Zealand and the Data Iwi Leaders Group. This agreement includes a workstream to develop a Māori data governance model for how Māori and Government could shift towards a Te Tiriti-based Government data system. The Māori Data Governance Model was released on 26 May 2023, and officials will consider the relevance of this report in the further policy development of the CDR.

Impact Analysis

Regulatory Impact Statement

40. A regulatory impact statement (RIS) was submitted at the time Cabinet approval was sought to establish a CDR [DEV-21-MIN-0145]. A supplemental RIS was submitted in relation to Cabinet's policy decisions in July 2022 [DEV-22-MIN-0151].
41. The Treasury's Regulatory Impact Analysis team has determined the proposed amendments are exempt from the requirement to provide a RIS on the grounds that they have no or only minor impacts on businesses, individuals, and not-for-profit entities.

Climate Implications

42. The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that the CIPA requirements do not apply to this proposal as the threshold for significance is not met.

Population Implications

43. I have not identified any population implications in relation to the proposals in this paper. It is feasible that innovation enabled by CDR will enable better and greater access to banking for consumers with particular needs or vulnerabilities. In relation to CDR in general, there are the following population implications, in addition to the Treaty of Waitangi/Te Tiriti o Waitangi implications above, which were also referred to in the previous Cabinet paper for the CDR [DEV-21-MIN-0145]:
- 43.1. *Consumers in vulnerable circumstances:* that the CDR will not resolve problems for individuals with limited digital literacy or who are in vulnerable circumstances. However, some CDR enabled services may be able to prevent or mitigate some risks, due to standardised safeguards. The CDR should be implemented alongside a broader focus on digital inclusion to ensure that all New Zealanders have what they need to participate in a digital world.
- 43.2. *Consumers with disabilities:* A significant proportion of people with disabilities, including Māori disabled/tāngata whaikaha, experience digital exclusion. 17.2 per cent of disabled people do not have access to the internet, compared to

4.7 per cent of non-disabled people.² A design principle of the CDR is that it does not create additional obstacles to accessibility of digital services (and has the potential to lower them). If implemented with due consideration of accessibility requirements, the CDR could give people with disabilities confidence that they are able to manage access to, and use of, their customer data.

Human Rights

44. The proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Consultation

45. The following agencies have been consulted on the Cabinet paper, discussion document and exposure draft bill: Treasury, the Ministry of Justice, Department of Internal Affairs, Office of the Privacy Commissioner, Commerce Commission and Reserve Bank of New Zealand. The following agencies were consulted on the Cabinet paper: the Department of the Prime Minister and Cabinet, the Office for Māori Crown Relations – Te Arawhiti, Te Puni Kōkiri, Financial Markets Authority, Electricity Authority, Inland Revenue, Ministry of Primary Industries and Stats NZ.

Privacy Commissioner comment

46. The Privacy Commissioner supports the introduction of a CDR, and the proposed regulatory model that retains the Commissioner as the regulator of all privacy matters. His office has been working closely with MBIE for some time to support the desired outcomes of the CDR scheme. However there continue to be significant policy design questions about the CDR scheme that are unresolved, such as the 'boundary' between responsibilities of each regulator, and how compliance and enforcement activities will practically function. An independent statutory review of the Australian CDR scheme suggests that clarity in these areas is critical to the effective functioning of the scheme. The Commissioner is also concerned by the proposed asymmetry in powers and penalties between the proposed CDR regulator (MBIE) and those of the Commissioner under the Privacy Act 2020. The Commissioner recommends that extra work is done to complete the policy and legislative design before beginning public consultation, so that any consultation with stakeholders will present them with the full picture of the proposed legislative and regulatory system.

Minister's response

47. I note the Privacy Commissioner's comment, and agree with the importance of clarity around the roles and responsibilities of regulators. I consider that reducing the number of regulators from three to two will assist this clarity by simplifying the regulatory arrangements. The exposure draft and discussion document will further test the regulatory design of the CDR, and seek feedback on the issues raised by the Privacy Commissioner, including boundary overlaps. I am comfortable with this

² Department of Internal Affairs, *Digital inclusion and wellbeing in New Zealand* (2019).

approach and consider that consultation on an exposure draft is the best way to address these issues.

Communications

48. I propose to release the draft bill and discussion document in June or July 2023 for up to a six-week public consultation and I propose to issue a media statement on its release. The draft bill and discussion document will be published on MBIE's website, and an update sent to stakeholders.
49. In addition to the full discussion document, summary material will be produced for different audiences, e.g. consumers. Officials will also be holding online and in-person workshops for a range of audiences.

Proactive Release

50. This paper will be published on MBIE's web site, subject to withholdings as appropriate under the Official Information Act 1982.

Recommendations

The Minister of Commerce and Consumer Affairs recommends that Cabinet:

1. **note** that on 30 June 2021, the Cabinet Economic Development Committee (DEV) agreed to establish a consumer data right (CDR) legislative framework;

[DEV-21-MIN-0145]

2. **note** that the CDR will give customers the ability to share data held about them by businesses (data holders) with trusted third parties (accredited recipients) using common standards and interfaces;
3. **note** that the CDR will be implemented gradually, whereby sectors of the economy can be 'designated' through Order in Council on the recommendation of the Minister of Commerce and Consumer Affairs;
4. **note** that on 27 July 2022, DEV:
 - 4.1. agreed that the Commerce Commission be responsible for the CDR enforcement function;
 - 4.2. invited the Minister of Commerce and Consumer Affairs to report back on estimated financial implications by October 2022;
 - 4.3. noted that the release of an exposure draft of the CDR bill will be considered following Cabinet's consideration of the report referred to in paragraph 4.2 above;

[DEV-22-MIN-0151]

CDR enforcement agency

5. **note** that since the July 2022 decisions, weaknesses have been identified in corresponding enforcement arrangements in Australia, and that additional testing has indicated that more streamlined allocation of enforcement functions is needed;
6. **agree** to rescind the decision referred to in paragraph 4.1, and instead agree that the Ministry of Business, Innovation and Employment be responsible for the CDR enforcement function (non-privacy matters);

Regulation making power in exposure draft bill

7. **note** that when, in future, bank payments are brought into the CDR scheme, specific remedies will be needed for non-compliance with a payment request, and similar requirements are likely, in future sectors, to be designated;
8. **agree** that the exposure draft include a power for new regulations to be made which, with appropriate safeguards, prescribe steps that a person must take to avoid, remedy or mitigate any actual or likely adverse effects arising from a contravention of the Act or secondary legislation (e.g. a duty on a data holder to reimburse a customer for penalty fees or interest they incur as a result of late payment);

Financial implications

9. **note** that the indicative ongoing costs of the CDR to government are approximately **Confidential advice to Government** a year for banking and continued expansion into new sectors (before any cost recovery via fees or levies);
10. **note** the Customer and Product Data Bill provides for cost recovery through fees and levies;
11. **note** consultation on the exposure draft bill is likely to result in policy, detailed design or operational changes which may have cost implications, and overall costs will vary depending on the desired approach to the CDR;
12. **note** **Confidential advice to Government**
13. **note** that Budget funding will be required to progress the CDR beyond passage of primary legislation;

Legislative implications

14. **agree** to give effect to the above proposals through the Customer and Product Data Bill;
15. **agree** to release of the draft Customer and Product Data Bill and accompanying discussion document, subject to any minor or technical amendments, for up to a six-week public consultation in June or July 2023;
16. **authorise** the Minister for Commerce and Consumer Affairs to approve minor changes and corrections to the accompanying discussion document attached to this submission prior to publication;

17. **note** that summary material will be produced for different audiences (e.g. consumers) based on the discussion document, and officials will be holding online and in-person workshops for a range of audiences;
18. **note** that the Customer and Product Data Bill currently holds a priority category Confidential advice to Government on the 2023 Legislation Programme;
19. **note** that, as per the Prime Minister's priorities letter for the Commerce and Consumer Affairs portfolio, the Minister of Commerce and Consumer Affairs intends to introduce the Customer and Product Data Bill before the end of 2023.

Authorised for lodgement

Hon Dr Duncan Webb

Minister of Commerce and Consumer Affairs