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17 October 2023

Consumer Policy Team
Building, Resources and Markets
Ministry of Business, Innovation and Employment
PO Box 1473
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Email to: consumerdataright@mbie.govt.nz

Dear Sir/Madam

Re: Unlocking Value from our Customer Data and Customer & Product Data Exposure Draft Bill

Background

I am writing to you regarding:

a) The Ministry of Business, Innovation & Employment (MBIE) Discussion Document entitled Unlocking Value from our Customer Data (referred to as 'the Discussion Document'), which outlines the next steps towards creating a Consumer Data Right (CDR) in New Zealand; and

b) The Customer and Product Data Exposure Draft Bill (referred to as 'the Draft Bill').

BusinessNZ previously submitted on MBIE's 2020 discussion document on this issue entitled *Options for Establishing a Consumer Data Right in New Zealand.*[1] As we outlined back then, given where the use of consumer data is heading globally, we believe there are economic opportunities for New Zealand if the introduction of a Consumer Data Right (CDR) is done effectively and efficiently, and most importantly, if it provides a pathway for innovation. Also, any future steps must consider the needs, concerns and opportunities for the broad business community.

[1] chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://businessnz.org.nz/wp-content/uploads/2022/09/201019-Consumer-Data-Rights.pdf

1. OVERARCHING THOUGHTS & COMMENTS

Discussion Document and Draft Bill

In recent years BusinessNZ has noticed that a few investigations have included, as part of the consultation process, a draft bill for comment. We have traditionally welcomed this additional step in the consultation process, given the often illogical disconnect between the recommendations of some discussion documents and the Bills that follow.

In terms of process, a draft bill should usually sit between a discussion document and the Bill that goes before Parliament. However, we would equally support a draft bill as a first port of call for the public to submit on, if the previous background work has included other processes such as a conference/summit, or a series of private discussions with individuals or groups that would be most affected by the proposed regulatory change.

In the case of the CDR process, we note that both a second Discussion Document and Draft Bill have been released for consultation, which fits well with the recommendations we made in our 2020 submission. This provides submitters with a direct connection between what key issues MBIE wish to receive feedback on as a follow-on from the 2020 discussion document, along with receiving granular comments on specific aspects of the draft legislation to ensure it is fit for purpose. Overall, we welcome these steps as a way in which meaningful consultation from the private sector can be attained.

Timing of Consultation

However, despite our views above, the consultation time period of the Discussion Document and Draft Bill for submitters is simply inadequate and in BusinessNZ's view undoes a lot of the good work by MBIE to ensure a proper consultative process. We note that the documents were released to the public on 22 June, with submissions due on 24 July. In comparison, MBIE provided submitters around double the amount of time when the 2020 CDR discussion document was released, a document which BusinessNZ took the opportunity to provide a substantive submission on. In the business community, a general rule of thumb is that six weeks are a minimum timeframe for submitters to be able to properly read through a discussion document, evaluate which points they wish to submit on, engage with others in the private sector (in particular associations that need to consult with members) and formulate a response.

We received a number of complaints from individual members about the inadequate timeframe for consultation, and despite BusinessNZ's attempt to get an extension for the business community (and wider submitters), we are disappointed that MBIE declined our request to provide an extension to any submitters.

While BusinessNZ and its members appreciated the establishment of a number of webinars to outline key aspects of the consultation and provide the ability to ask questions, this still does not make up for an inadequate time period for submitters to carefully consider what is being proposed and submit accordingly.

In addition, we are concerned that the timeframe for the Government to introduce legislation into Parliament seems rushed. As outlined in the Discussion Document, the anticipated timelines see quarters three and four of 2023 dedicated to policy approvals and drafting, with the introduction of a CDR Bill towards the end of 2023. Given it has been over a year and a half since MBIE last consulted on this issue through their previous discussion document, the process from the current Discussion Document/Draft Bill to legislation in the House will be less than six months. BusinessNZ sees no discernable reason why the introduction of the Bill in

Parliament cannot take place sometime into the first quarter of 2024 to ensure adequate timeframes are in place so that the Bill is fully fit for purpose. While submitters will obviously get the opportunity to submit on the Bill through the Select Committee process, BusinessNZ and its members have often found that getting meaningful changes at that late stage is increasingly difficult.

Based on our comments above, BusinessNZ's submission on the latest Discussion Document is commensurate to the time provided to submit.

2. SPECIFIC QUESTIONS

As mentioned above, BusinessNZ submitted on the 2020 discussion document and outlined a number of issues that MBIE needed to consider to ensure that a CDR is fit for purpose within New Zealand and provides the opportunity for innovative solutions. Of the 35 questions outlined in the current Discussion Document, we wish to take the opportunity to answer a selection of them, particularly those that have some relevance to the issues we raised in 2020.

How will the draft law interact with protections under the Privacy Act?

1. *Does the proposed approach for the interaction between the draft law and the Privacy Act achieve our objective of relying on Privacy Act protections where possible? Have we disapplied the right parts of the Privacy Act?*

Overall, BusinessNZ supports the approach whereby there is interaction between the draft law and the Privacy Act.

Consent settings: respecting and protecting customers' authority over their data

2. *Should there be a maximum duration for customer consent? What conditions should apply?*

For the purposes of practicality BusinessNZ would not recommend that the Government copy the United Kingdom's Open Banking system of initially having a consent expiry date of 90 days (which was subsequently changed to requiring customers to provide a yes/no confirmation of consent every 90 days). As pointed out in paragraph 64 of the Discussion Document, such short timeframes invariably lead to fatigue and frustration for consumers. At the very least, we would support Australia's regime that increased from 90 days to 12 months in response to user submissions.

However, we also wish to point out that if other submitters articulate the need for the time period to be longer than 12 months, or indeed that there should be no maximum duration for customer consent, BusinessNZ would also be open to this. Feedback from some of our members has noted that a maximum duration for customer consent can create disruption and friction for customers that rely on continuous data flow to run their business, as well as the potential to undermine productivity and create a negative customer experience of deleting or de-identifying data required to fulfil statutory record-keeping obligations. Furthermore, members have also pointed out to us that alternative options for data holders through an online dashboard and data holder reminders should go a long way towards alleviating the need for re-consent.

Recommendation: Minimum duration for customer consent be at least 12 months, although open to the option of no maximum duration for customer consent if appropriate measures are introduced that alleviate the need for re-consent.

3. *What settings for managing ongoing consent best align with data governance tikanga?*

See below.

4. *Do you agree with the proposed conditions for authorisation ending? If not, what would you change and why?*

No comment.

Future regulations about obtaining, withdrawing, or modifying of consent

5. *How well do the proposed requirements in the draft law and regulations align with data governance tikanga relating to control, consent and accountability?*
6. *What are your views on the proposed obligations on data holders and accredited requestors in relation to consent, control, and accountability? Should any of them be changed? Is there anything missing?*

BusinessNZ agrees that safeguards around consent should not create an inconvenient or burdensome customer experience that will discourage customers. The obligations required of data holders and accredited requestors need to strike the right balance to ensure that compliance measures are reasonable and proportionate.

On the face of it, the obligations outlined in paragraph 69 of the Discussion Document seem sensible and proportionate to their intent. However, BusinessNZ wishes to point out a potential conflict in the relationship between two of them, namely:

- Ending consent must not be harder than agreeing to consent; and
- If a customer wishes to withdraw their consent, the consequences (if any) of doing so must be outlined by the accredited requestor or data holder.

When taken in totality, one could argue that a customer ending consent may typically take on a more rigorous process than agreeing to consent if the accredited requestor or data holder has to outline the potential consequences of doing so. Although we would expect some leeway around what is defined as 'harder' between agreeing and ending consent, BusinessNZ believes a change to the obligation to read 'Ending consent must not be significantly harder than agreeing to consent' would provide greater clarity for those who have to meet such obligations.

Recommendation: That 'Ending consent must not be harder than agreeing to consent' be changed to 'Ending consent must not be significantly harder than agreeing to consent.'

Care during exchange: standards

7. *Do you think the procedural requirements for making standards are appropriate? What else should be considered?*

BusinessNZ believes the active engagement and collaboration of the business community in setting standards is essential for developing robust and practical measures, especially when the intention of the future standards is to build on the industry-led work already underway.

Bearing in mind the importance of the business community when setting standards, we note that clause 88 of the exposure draft bill states the following:

88 Chief executive's consultation on proposed standards

(1) Before making a standard, the chief executive must consult the following:

(a) the persons, or representatives of the persons, that the chief executive considers will be substantially affected by the issue of the proposed standard, including hapū, iwi, and Māori organisations;

(b) the Privacy Commissioner;

(c) tikanga experts who have knowledge of te ao Māori approaches to data governance;

(d) the public.

As we will discuss in broader detail below, the weighting of consultation does not seem to be properly balanced. While one could argue that the opinions of those affected in the business community could be included in either (1)(a) or even (1)(d) of Clause 88 once consultation begins, one could equally argue that the specific mentioning of Maori in (1)(a) or (1)(c) is not required as they too could be considered as a generic reference within (1)(a) or (1)(d). We are concerned that the mention of very specific groups for consultation can have an undue influence on end outcomes, especially when one of the key groups that will be affected by the standards, namely the business community, is not specifically mentioned at all.

Further, we note that paragraph 81 of the Discussion Document states that, *"There may be occasions in which some considerations are in tension with others. In these cases, it will be appropriate for the various trade-offs to be expressly identified."* If these finely balanced considerations come down to being viewed from the wording of the Act, then it is possible one group could have more of a say than others.

Recommendation: That Clause 88 of the exposure draft bill be revised to either remove references to certain specific non-government groups, or include a specific mention of the need to consult with relevant representatives of the business community.

8. *Do you think the draft law is clear enough about how its storage and security requirements interact with the Privacy Act?*

No comment.

9. *From the perspective of other data holding sectors: which elements of the Payments NZ API Centre Standards are suitable for use in other sectors, and which could require significant modification?*
10. *What risks or issues should the government be aware of, when starting with banking for standard setting? For example, could the high security standards* ***of banking API's create barriers to entry?***

We understand that BusinessNZ members from the banking sector will provide detailed views on elements of the current API standards for banking that are suitable for use in other sectors. However, BusinessNZ would like to make a few general points associated with the overall CDR process going forward, some of which were also canvassed in our 2020 submission.

First, in relation to existing processes offshore, most of the major banks in New Zealand have been closely following developments in Australia given the CDR process there. As there are strong banking industry links between our two countries, we understand that the general view taken from the main banks involved in the process in Australia is that it has been very expensive to administer, and has not been a particularly smooth process with wider ongoing issues that need to be examined and rectified. While there was always the expectation of costs associated with such changes, these have generally been higher than could have been expected. New Zealand has an opportunity to learn from existing standards that have already gone through a rigorous policy process, to help ensure data standards in different sectors are as interoperable as possible.

Furthermore, we note that as part of their consultation process, MBIE have distributed to those attending their webinar the NatWest/National Australia Bank report, *Lessons Learned from Australia and the United Kingdom: The Consumer Data Right and Open Banking*. We believe the report provides an excellent overview of the shortcomings and future opportunities

of the CDR in Australia and the U.K. which New Zealand can learn from, given these countries have taken different journeys in implementing their frameworks. Since New Zealand could be considered a 'third mover' in this space, a focus on what has and has not worked for other countries should provide a clearer pathway for New Zealand's journey when developing its own framework.

Second, given there is an expectation that the banking sector will not be the only sector that will be covered by the Act, the issue of sequencing beyond the banking sector needs to be carefully thought through: namely which sector or sectors, if any, will be next?

We note that in the 2020 discussion document that in addition to banking, the electricity and insurance sectors were mentioned as potential 'first cabs off the rank' for a CDR. However, at that time we pointed out that keeping an eye on other sectors and datasets involved in a CDR regime should not mean automatically approving the extension of sectorial regulations to the extent that eventually all sectors are caught up under them. We would prefer steps to be taken by the government and private sector working together so that further opportunities for innovation and economic growth can be realised. The key here is that any future developments should involve significant private sector input.

In determining this, we believe it is critical that the Government first evaluates the success or otherwise of a CDR covering the banking sector through standard cost/benefit measures, to determine whether any extension of the regime is justified in the first place. This could be via a predetermined but adequate timeframe to review the legislation and ascertain how successful it has been. As has been shown with offshore developments, it should not be assumed that once a regime is in operation, it should automatically be extended out to other sectors.

Recommendation: That the Government first evaluates the success or otherwise of a CDR covering the banking sector through standard cost/benefit measures to determine whether any extension of the regime is justified.

If an evaluation of the CDR within the banking sector shows that targets have been clearly met and has been deemed successful according to the metrics chosen, then it will be critical for the Government to listen to those industries that will potentially be included in the future. The Government also needs to note the different positions of sectors in their data journey, as well as the scope for sectors to learn from each other and from experiences offshore. From our perspective, the private sector should play a key role in the development of a CDR for any non-government sector. It is imperative that the Government look to create a place at the table for the private sector to outline ways in which they can contribute suggestions around how to collaborate, as well as address key concerns.

For this, BusinessNZ would expect a full and in-depth investigative policy process that seeks to ascertain what potential benefits and costs might arise from other sectors being caught within the regime, including clear guidelines around who would or would not be required to comply. A haphazard approach to this with limited timeframes unable to minimise costs and distortions will likely not result in achieving what the Government intends through the legislation.

Recommendation: That any future steps by the Government to include other sectors within the CDR regime involve a comprehensive and in-depth investigative policy process that seeks to ascertain what benefits and costs might arise for those sectors.

Third, as mentioned above, the interoperable and security standards that have been developed for banking will likely be an appropriate starting point for other types of sensitive data or transactions. However, we would also urge caution around a view that one sector will automatically provide a gold-plated standard for subsequent sectors that may be caught within

the regime in the future. Imposing a standardised approach based on a first entrant may not take account of the specific circumstances and characteristics of individual businesses, leading to inefficiencies and suboptimal outcomes due to different industries having unique needs and requirements. In addition, given the speed of technological advancement in certain areas relating to the collection and sharing of data, what might work now for other sectors may be very different in the future. In short, while the banking sector might be a useful starting point, we would expect the Government to balance ease of existing frameworks with what works best for other sectors.

Recommendation: That the Government ensures the specific needs and requirements of each sector that may be required to be included within the CDR regime is taken into account in future consultation.

Trust: accreditation of requestors

11. Should there be a class of accreditation for intermediaries? If so, what conditions should apply?

At a practical level, BusinessNZ does not believe a special class of accreditation should be introduced for intermediaries. As pointed out in the Discussion Document, given the New Zealand regime allows accredited requestors to share data with another entity if the customer consents to it, the creation of additional regulatory steps here would likely be unnecessary.

12. Should accredited requestors have to hold insurance? If so, what kind of insurance should an accredited requestor have to hold?

On principle, BusinessNZ does not believe insurance should be compulsory in any circumstance. Whether the insurance is for an individual, organisation or enterprise, it is up to each entity to make sufficient trade-offs regarding whether insurance is required or not, as they are obviously in the best position to know their personal circumstances or preferences. While insurance is important for managing risk, making it compulsory can have negative implications for individual freedom, affordability, market competition, and personal responsibility. Therefore, we do not support the view that accredited requestors should have to hold insurance.

However, BusinessNZ would support the provision of information that could assist accredited requestors that may assist in the decision-making process around insurance. Therefore, we would not object to the publication of guidelines that would set out whether/what insurance would be considered appropriate. Ultimately, the decision around insurance should be left to the accredited requestors to make.

Recommendation: That insurance for accredited requestors should not be compulsory but guidance regarding insurance in the form of a publication by the Government should proceed.

13. What accreditation criteria are most important to support the participation of ***Māori in the regime?***

BusinessNZ strongly supports the view in the Discussion Document that accredited requestors should not be required to meet cultural capability thresholds as a criterion for accreditation. While we agree that demonstrating culturally appropriate approaches could be a point of difference in the market, we are concerned about the subjective nature of such capability criterion, along with other compliance requirements for accreditation that may create too many barriers regarding participation of requestors.

Recommendation: That it should not be compulsory for accredited requestors to meet cultural capability thresholds as a criterion for accreditation.

14. Do you have any other feedback on accreditation or other requirements on accredited requestors?

No comment.

Unlocking value for all

15. Please provide feedback on:

- *the potential relationships between the Bill safeguards and tikanga, and Te Tiriti/the Treaty*
- *the types of use-cases for customer data or action initiation which are of* ***particular interest to iwi/Māori***
- *any specific aspirations for use and handling of customer and product data within* ***iwi/hapū/Māori organisations, Te Whata etc, which could benefit from the draft*** *law.*

BusinessNZ believes the discussion around unlocking value for all portrays a significant imbalance across ethnicities. The Discussion Document and Draft Bill currently puts a strong emphasis on the effect on the Maori population. However, if we are to examine this strategy through say the population lens of the next 10+ years, it will be apparent that the full make-up of New Zealand's ethnicity needs to be factored in.

Based on StatisticsNZ's data on the ethnic share of New Zealand's population through to 2043, those who classify themselves as European will still make up around 2/3rds of all New Zealanders through to 2043. However, those who classify themselves as Asian will make up around one-quarter of all New Zealanders by 2038, compared with one-fifth for Maori. In addition, Pacific Peoples will make up 10 percent by the same time period[2]. The Discussion Document contains almost no specific mention of CDR considerations for New Zealand's growing Pasifika or Asian population.

Therefore, we are concerned that an over-emphasis on a CDR for just one ethnicity could be to the detriment of the CDR regime as a whole. Government resources are finite, so we would expect every taxpayer dollar spent towards providing a robust and effective CDR should have a policy framework that shows clear net benefits to the country as a whole, rather than one that seeks significant input from one group over others.

Overall, we believe an undue focus on just one ethnicity can create an inward-looking, rather than an outward-looking stance when seeking to ensure a CDR regime that unlocks the value of data for people and their businesses. Therefore, we believe a better balance across all New Zealanders is required for the CDR going forward.

Recommendation: That the CDR is examined from the perspective of opportunities for all New Zealanders.

16. What are specific use cases which should be designed for, or encouraged for, business (including small businesses)?

BusinessNZ agrees with the point raised in paragraph 123 of the Discussion Document that the draft law holds significant potential for businesses, and that unlocking transaction and account records saves time and effort, as well as the potential to generate new insights.

Across BusinessNZ's broad membership, but particularly by smaller businesses, views are being increasingly expressed about compliance costs disproportionate to their benefits. Small

[2] StatisticsNZ 'Ethnic share of New Zealand population – median projection 2018 – 2043'.

businesses understand the need for regulation, but with limited resources are finding it harder to meet all their compliance obligations. Small businesses need a regulatory environment that encourages business growth, with compliance costs that are relevant, understandable, and well signalled, to enable adequate forward planning.

With correct implementation of a CDR as outlined in the Discussion Document - through which the cost and process of lending is reduced, along with compliance and efficiency gains - there is the opportunity for small businesses to gain from the implementation of a CDR.

Indeed, as discussed above, the NatWest/NAB report into the Australian and U.K. CDR regime highlights the fact that if done correctly, a CDR regime that is underpinned by a well thought though process can provide tangible benefits to SMEs. The U.K. experience of integrating open banking with cloud accounting platforms has seen a significant proportion of SMEs enjoying a much better understanding of their financial position, as well as efficiency and productivity gains, including real-time insights into cashflow and business performance.

BusinessNZ believes it is important that the Government look at the CDR regime through a small business lens to identify practical ways in which the regime not only assists in reducing everyday compliance costs, but also seeks to provide ways in which efficiency and productivity can be improved. How the CDR regime affects SMEs may also differ depending on what sectors are included in the future. Therefore, ensuring small businesses are given due consideration at each stage is important when assessing the potential for cross-sectoral innovation and compliance reduction opportunities.

Recommendation: That all stages of development for the CDR regime include the potential effects of compliance, efficiency and productivity on small businesses.

17. *What settings in the draft law or regulations should be included to support accessibility and inclusion?*
18. *In what ways could regulated entities and other data-driven product and service providers be supported to be accessible and inclusive?*

No comment.

Ethical use of data and action initiation

19. *What are your views on the proposed options for ethical requirements for accreditation? Do you agree about requirements to get express consent for de-identification of designated customer data?*
20. *Are there other ways that ethical use of data and action initiation could be guided or required?*

Ethics is subjective because it depends on individual perspectives, cultural values, and personal beliefs. Therefore, any views towards some form of rigid 'requirement' should not be considered. While the Discussion Document outlines a variety of guidance and principles that already exist in New Zealand with ethical data in mind, we believe that it is important the regime does not get caught up in semantics leading to confusion for the businesses involved. Instead, a simple, well-understood approach is the better way forward. This could include the option in Australia that accredited persons simply act 'efficiently, honestly and fairly' when initiating CDR actions.

If it is considered necessary to include additional safeguards for the ethical use of customer data, the Discussion Document outlines two options for feedback, namely:

1) Ethical requirements as a condition of accreditation, or
2) Requirement to get express consent from customers for de-identification of designated customer data.

While BusinessNZ has no strong view on which option should proceed, for such options to be considered we would want to see a clear and unequivocal case across the majority of submitters why either should be required in the first place. We note that paragraph 145 of the Discussion Document picks up on the trade-off between the benefit of safeguards versus the participation requirements on holders and requestors being too high or costly. BusinessNZ agrees. Given the Government will need to be cognisant of the finely balanced position between benefit and cost, there is a high likelihood of the Government ending up walking a tightrope for much of the establishment phase of a CDR. To get the balance right, there needs to be a high threshold regarding the inclusion of safeguards, to ensure the benefits of a CDR are properly unlocked.

Recommendation: That the Government ensures a high threshold regarding the inclusion of safeguards is maintained throughout the development of a CDR.

Preliminary provisions

21. What is your feedback on the purpose statement?
22. Do you agree with the territorial application? If not, what would you change and why?

No comment.

Regulated data services

23. Do you think it is appropriate that the draft law does not allow a data holder to decline a valid request?
24. How do automated data services currently address considerations for refusing access to data, such as on grounds in sections 49 and 57(b) of the Privacy Act?

No comment.

Protections

25. Are the proposed record keeping requirements in the draft law well targeted to enabling monitoring and enforcement? Are there more efficient or effective record keeping requirements to this end?
26. What are your views on the potential data policy requirements? Is there anything you would add or remove?

No comment.

Regulatory and enforcement matters

27. Are there any additional information gathering powers that MBIE will require to investigate and prosecute a breach?

BusinessNZ believes an increasing proportion of new and revised regulations have a strong technological aspect to them. As alluded to above, given the speed at which technological options continue to advance forward, there is every possibility that such dramatic shifts could have a significant impact on the future CDR landscape, including the broad structures within Government that regulate and enforce it. If such sizeable shifts eventuate, the Government will be faced with meeting the demands of a changing digital landscape in a context where the public policy process for change may lag far behind that initiated by the private sector.

Therefore, BusinessNZ would want to see a statutory review of the CDR Act within 5 years' time of its enactment to ensure the legislation remains fit for purpose, plus where required aspects of the regime could be fixed, added, or removed if need be. Such a review should be wide-ranging, including whether MBIE having the dual role of compliance and policy agency has been successful or otherwise.

Recommendation: A full review of the CDR Act takes place within 5 years' time to ensure the legislation remains fit for purpose.

Administrative matters

28. *Are the matters listed in clause 60 of the draft law the right balance of matters for the Minister to consider before recommending designation?*
29. *What is your feedback on the proposed approach to meeting Te Tiriti o Waitangi/Treaty of Waitangi obligations in relation to decision-making by Ministers and officials?*

See comments above.

30. *What should the closed register for data holders and accredited requestors contain to be of most use to participants?*

Although the Discussion Document does not ask any specific questions relating to Government fees and levies, paragraph 193 of the Discussion Document points out that the draft law will enable the imposition of levies, as well as some cost recovery through accreditation fees.

BusinessNZ does not support the introduction of levies or accreditation fees for the CDR. Ultimately, the CDR is a Government-imposed regime, stemming from its belief that existing sector-led data portability initiatives in New Zealand are not providing the full range of positive outcomes for consumers as yet.

Also, as outlined in paragraph 194, *"significant investment will likely be required from data and potentially also accredited requestors in order to participate."* While consultation on these matters is expected to take place in due course, we believe the combination of an imposed regime in direct competition to private sector options, along with ongoing compliance costs for business, means the introduction of government fees and levies should not proceed.

Recommendation: The imposition of levies as well as some cost recovery through accreditation fees does not proceed.

31. *Which additional information in the closed register should be machine-readable?*
32. *Is a yearly reporting date of 31 October for the period ending 30 June suitable? What alternative annual reporting period could be more practical?*

While a reporting date of 31 October for the period ending on 30 June each year would help separate it from financial year and tax reporting deadlines, it may still coincide with other reporting measures that medium-large businesses in particular have to undertake. For example, MBIE's proposed Business Payments Practices Regime (BPPR), whose reporting date or dates are not yet confirmed at the time of writing this submission, indicates the mounting reporting requirements on many businesses.

Overall, BusinessNZ believes MBIE needs to look at the potential total reporting requirements of those businesses typically affected by the CDR, to not only take into account the views of other submitters on this, but also to obtain a clear understanding of the current and likely reporting requirements that will be put on these businesses.

Recommendation: That MBIE takes into account other non-financial reporting requirements for businesses that are required to report for the CDR.

33. Should there be a requirement for data holders to provide real-time reporting on the performance of their CDR APIs? Why or why not?

BusinessNZ does not have an issue with the possibility of real-time reporting, rather than point-in-time reporting. However, two issues should be worked through before a real-time option is given greater priority. First, will the benefits of real-time reporting be greater than a point-in-time option? This includes not only for the customers and enforcement agency, but also those that have to comply. Second, like most considerations in this space, the devil will be in the detail of what real-time reporting would actually mean for those affected.

Recommendation: MBIE outlines a clear and overwhelming net benefit for real-time reporting before is it considered any further.

34. What is your feedback on the proposal to cap customer redress which could be made available under the regulations, in case of breach?

No comment.

Complaints and disputes

35. In cases where a data holder or requestor is not already required to be member of a dispute resolution scheme, do you agree that disputes between customers and data holders and/or accredited requestors should be dealt with through existing industry dispute resolution schemes, with the Disputes Tribunal as a backstop? Why or why not?

No comment.

Powers, penalties and liability

We note that there were no formal questions asked by MBIE regarding the proposed powers, penalties and liability that were outlined in paragraphs 220-223 of the Discussion Document. As we pointed out in 2020, any enforcement provisions, including penalties, need to be well thought through and proportionate to any offence that has taken place.

A first task would be to examine breaches that have occurred over recent years and their nature. For instance, while some may be malicious or criminal, others may be solely due to human error, which in offshore studies have shown to comprise at least a third of breaches. If the number of data privacy breaches in New Zealand is found to be relatively small, this should be taken into account regarding the reach of liability, enforcement and redress.

Further, while the full weight of enforcement should be placed on those who intentionally cause malicious or criminal attacks, we believe a carrot, rather than a stick approach, is required for human error. This necessitates a collaborative, educative approach by the Government to ensure businesses are aware of breach boundaries and potential fishhooks.

Last, for many businesses, once a breach has taken place (intentionally or through human error), the damage to its reputation can be significant. The implications of this should not be underestimated, as its true cost over time can be far more than any one-off financial penalty.

In terms of the liability tiers and penalties outlined, BusinessNZ is pleased to see that they are all expressed as "up to $X" rather than a fixed dollar amount, which could lead to an excessive penalty in comparison to the potential scale of the offense. However, the potential level of penalties mentioned in the Draft Bill do seem excessive compared with the penalties in the Privacy Act as updated in 2020. For the Privacy Act, fines for criminal offenses are up to a maximum of $10,000, compared with the current CDR Draft Bill's penalties of up to $1,000,000 plus imprisonment of up to 5 years for individuals. For body corporates, it can get as high as

a $5,000,000 fine. If the CDR and Privacy legislation are to work together in symbiosis to create an environment that best meets the purpose of a CDR in New Zealand, then the extreme differences in penalties and liability should be rectified.

Recommendation: That the level of penalties/fines for breaches of the CDR is revised so they are better in line with those in the Privacy Act.

Other Matters Within the Bill

While a number of BusinessNZ members will be submitting themselves, we received further feedback from its wide membership regarding certain specific aspects of the draft Bill that MBIE should consider to ensure the legislation is as workable as possible. This feedback included:

- For those businesses operating across Australia-New Zealand, a stronger alignment with certain aspects of the Australian rules and regulations may be preferable. This could include the definition of product data (Section 9 of the draft law) with Australia, as well as "materially enhanced information".

- In section 11 of the Draft Bill, increased clarification that designated product data, designated customer data and designated actions can only include data or actions insofar as they relate to products or services (a) consumed in New Zealand, or (b) supplied to customers based in New Zealand.

- Greater clarification that the Privacy Act only applies to 'personal information' in relation to the customer data requested in accordance with Sections 14 to 15 of the Draft Bill.

- In section 23 of the Draft Bill, a better-defined scope for "outsourced provider" would be preferable that is reflective of those with duties under the draft law (i.e., those with the necessary access, visibility or ability to comply with the draft law).

- To ensure an entity cannot be considered as a data holder or outsourced provider if that entity is holding data solely as a service provider (i.e., is not the entity that controls that data), an introduction of a provision in the Draft Bill equivalent to Section 11 of the Privacy Act 2020 (Privacy Act) may be preferable.

- Some members strongly recommended the removal of the reference in Section 48 "CPD storage and security requirements" in the Draft Bill as these topics are already covered by the Privacy Act.

Thank you for the opportunity to submit, and we look forward to further discussions.

Kind regards,

Kirk Hope
Chief Executive
BusinessNZ

Appendix One - Background information on BusinessNZ

BusinessNZ is New Zealand's largest business advocacy body, representing:

- Regional business groups EMA, Business Central, Canterbury Employers' Chamber of Commerce, and Employers Otago Southland
- Major Companies Group of New Zealand's largest businesses
- Gold Group of medium sized businesses
- Affiliated Industries Group of national industry associations
- ExportNZ representing New Zealand exporting enterprises
- ManufacturingNZ representing New Zealand manufacturing enterprises
- Sustainable Business Council of enterprises leading sustainable business practice
- BusinessNZ Energy Council of enterprises leading sustainable energy production and use
- Buy NZ Made representing producers, retailers and consumers of New Zealand-made goods

BusinessNZ is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy and services for enterprise, BusinessNZ contributes to Government, tripartite working parties and international bodies including the International Labour Organisation (ILO), the International Organisation of Employers (IOE) and the Business and Industry Advisory Council (BIAC) to the Organisation for Economic Cooperation and Development (OECD).