

Addressed to:

*Consumer Data Right Project Team
Commerce, Consumers and Communications
Ministry of Business, Innovation & Employment
consumerdataright@mbie.govt.nz*

Dear Sir/Madam

The Australian and New Zealand chapter of Financial Data and Technology Association welcomes the opportunity to comment on the Ministry of Business, Innovation and Employment consultation on the Customer and Product Data Bill (consumer data right).

About FDATA ANZ

The Financial Data and Technology Association is the not-for-profit industry association leading the campaign for Open Finance and Open Data across many markets. We operate globally across jurisdictions with our focus in Australia and New Zealand dedicated to trans-tasman learning and future proofing the success of the CDR ecosystem.

In this submission we provide comments to the exposure draft and the discussion document that have implications to the rollout of CDR more generally. Along with some additional commentary that needs open and inclusive policy discussion. We are learning our way into a future that does not exist. Our approaches to creating a living framework must reflect the need for this uncertain, complex and dynamic reality.

This submission covers commentary on:

- Designing for consent
- Trust in CDR and its governance
- Facilitating CDR innovation
- Importance of SMEs

Designing for consent

Consent being expressed and informed is a very high bar. Express is an affirmative action which is easy enough but combined with 'informed' it becomes more challenging. If you are to test for metrics of consent in CX research you will need to test for:

1. Comprehension
2. Time to comprehension
3. Propensity to willingly share

This CX research method is used to establish a baseline on designs used to facilitate an informed decision on behalf of those giving consent. Developing guidelines and standards for the consumer experience should be put at the forefront of the framework in New Zealand. Learning the lessons from Australia where the data and technical standards led the way and CX was added after the fact.

Managing consent - lessons from Australia

Currently the rules prescribe that for each consent given the ADR must provide a dashboard to enable consent to be managed and revoked. This is crucial to consent being easily withdrawn. But as CDR moves beyond it's current uptake and data from many sectors is shared, we can easily anticipate a consumer having numerous dashboards. Unmanageable even for the digitally competent.

If the spirit of the CDR is to give consumers more meaningful control over their data, the current approach to consent management needs serious attention. Having a dashboard in the data holder and recipient ends of the relationship is untenable as CDR expands and general action initiation comes online. The impact of this was explored in the Phase 2 - Stream 2: CX Workstream on Consent Management and Revocation in 2019. A recommendation was provided in that research report to address this issue earlier rather than later. Action initiation is anticipated to draw in more participating ADRs as AAls into the ecosystem and further designations will increase the dashboards consumers will have.

As with many issues that exist with the current state of the CDR ecosystem delaying action risks systemic failure. With every new designation this all gets more complex. Combined with new access models, more recipient propositions will exacerbate the apathy that consumers already experience with control of their data in digital society and any agency they have in relationships with companies. Further cultivating digital resignation that already plagues modern digital life.

See N. Draper and J. Turow, 'The corporate cultivation of digital resignation', (2019) *New Media & Society* <https://journals.sagepub.com/doi/abs/10.1177/1461444819833331>

This is a fundamental flaw in the design in Australia that means alternatives need to be explored before sunk costs become an overwhelming force and resistance to change. New Zealand should take note of this lesson and ensure this is factored into fundamental architecture and design.

Consent management is not a new thing, personal data and information management systems have been around for over a decade. Adaptations and alternatives to consent have been outlined by others that have spent many years thinking and working through these types of problems. Technical reference points like the Kantara Consent Receipt Specification, Grant Management for OAuth 2.0 and Verifiable Credentials are also there to inform community discussion and decision making.

The design and technical constraints are solvable, but political will and the optimal policy setting and standards shaping process is needed.

Importantly if small businesses are consumers in the context of a Consumer Data Right, they will likewise need a central place to manage consents. In this sense consent data should be considered a dataset in its own right with the same portability functions as banking, energy or any other dataset.

The maximum duration of a consent request should be 12 months with due consideration for the agency of consumers to be able to modify this duration at will. Consequence clarification here is key and any dark patterns used to manipulate users factored into CX guidelines.

Challenges in research for CDR

FDATA ANZ believes that a persistent focus on the CX is a critical area for CDR adoption and ecosystem success.

More importantly, the challenge of CDR highlights the need for open innovation environments that blend CX, regulatory learning and standards development in a holistic way. Drawing on the brains trust of the diverse ecosystem and community that is coalescing around the CDR.

CX research is at times plagued with the problem of methods used to gather data and evidence to test hypotheses and work through assumptions. Much of CX research is primarily focused on gaining direct qualitative data across attitudinal and sometimes behavioural dimensions.

Much of the prescriptive approaches that have emerged over the last years are a result of the perceived need to protect consumers and pre-empting what is needed. Particularly when the data is outside the sphere of their meaningful control. In Australia, this was highlighted in the research done in the Phase 2 CX Stream 2 Report: Consumer Data Standards: Manage and revoke¹ in 2019 and additionally calling for an explicit Experimentation and Collaboration Framework.

In this work it was recommended that the governing bodies and the community explore the desirability, viability and feasibility of creating a colab style environment. This should operate as an innovation environment guiding the CDR in a learn by doing approach that helps CDR evolve as a living framework.

Trust in CDR and its governance

The trust that all stakeholders have in the Consumer Data Right ecosystem is predicated on designing the system to be trustworthy. The 7 drivers of trust² provide a useful framework for understanding how trust can be fostered in the development of CDR, the technologies and the governance of the ecosystem.

1. Intent - Public Interest: The intent and role of tech governance is to protect citizens from the negative impacts of technology whilst shepherding its use for social good. This is upheld through purpose, process, delivery and outcomes.
2. Competence: Delivery against expectation; effectively, reliably, consistently, responsively.
3. Respect: Seeing others as equals; listening to and taking seriously their concerns, views, and rights. Considering the impact of words & deeds on others.
4. Integrity: Operating honestly and being accountable, impartial and independent of vested interests.
5. Inclusion: Being collaborative, inclusive, involving diverse stakeholders.
6. Openness: being transparent and accessible in processes, communications, explanations and interactions
7. Fairness: Enshrining justice and equality in governance processes, application, enforcement, and outcomes.

¹ See 'Phase 2 CX Stream 2 Report: Consumer Data Standards: Manage and Revoke (<https://consumerdatastandards.gov.au/sites/consumerdatastandards.gov.au/files/uploads/2019/07/Phase-2-CX--Stream-2--Manage-and-revoke.pdf>)

² See the report from Fraunhofer and Society Inside on Trust in Tech and its Governance (https://www.tigtech.org/s/TigTech_Trust_and_Tech_Governance.pdf)

Then ultimately providing evidence of these drivers in practice across the CDR ecosystem.

Trustworthy Data Stewardship

To address the needs of Māori, iwi and hapū and that of the future development of CDR the work done exploring three legal mechanisms that could help facilitate responsible data stewardship by the Ada Lovelace Institute has valuable insights. This report, “Exploring legal mechanisms for data stewardship”³ produced by the Ada Lovelace Institute’s Legal Mechanisms for Data Stewardship working group, addresses the importance of managing and sharing data responsibly. Given the concerns over data misuse, it emphasises the need for transparency and secure data governance. It explores three legal mechanisms—data trusts, data cooperatives, and corporate and contractual mechanisms—for managing personal and non-personal data, mainly focusing on UK law, with mentions of EU legislation and civil law systems.

Data trusts empower individuals to define their data usage aspirations and appoint a trustee to pursue them. They’re most suitable when individuals or groups want to stipulate terms of data usage and create an institution to manage their data.

Data cooperatives are proposed for individuals who wish to pool their data resources and use them in the best interests of the cooperative’s members. These are best when peers or like-minded individuals aim to collectively manage their data against a company or institution.

Corporate and contractual mechanisms can be used when organisations aim to share data under mutually agreed terms and in a controlled manner. Independent data stewards can help foster a trust environment for stakeholders.

The report underscores the importance of purpose and benefits in choosing the right data governance mechanism, which should be considered in designing the Consumer Data Right.

Independent implementation body

A non governmental body should be considered to convene diverse stakeholders, augment consultation methods and facilitate the evolution of the CDR in New Zealand. In the Australian context this was missing and sunk cost and inertia has meant it’s harder to change governance.

³ See ‘Exploring legal mechanisms for data stewardship’ (<https://www.adalovelaceinstitute.org/report/legal-mechanisms-data-stewardship/>)

This was highlighted in the Statutory Review of the Consumer Data Right⁴ report and its formal consideration is being delayed.

To fill this vacuum in the governance a convening platform for stakeholders of these ecosystems should be a key consideration moving forward.

The Financial Data & Technology Association is restructuring its Australian and New Zealand chapter operations to establish the Open Data Implementation Alliance (ODIA). ODIA will be a not-for-profit organisation dedicated to driving responsible innovation, policy reform, and digital transformation in the realm of the Consumer Data Right reforms in the region. Its aims are to create a more open and trustworthy data sharing ecosystem that benefits businesses, consumers, and society as a whole. With a focus on the implementation of the Consumer Data Right (CDR) and cross-sector Open Data initiatives, ODIA will bring together diverse stakeholders to collaborate, research, and advocate for a fair and ethical Consumer Data Right landscape.

ODIA will implement a transdisciplinary methodology, leveraging creative tension and effective stakeholder engagement to address complex challenges in the implementation and cross sectoral expansion of Consumer Data Right frameworks in the ANZ region. Striving to foster a self-organising learning environment that encourages knowledge sharing, collaboration, and continuous improvement.

This independent body and the theory of change it entails will be suited to help future proof the success of these reforms and the ensuing digital transformation across the New Zealand economy. It importantly creates a platform to enhance cross jurisdictional shared learning between Australia and New Zealand.

Facilitating Innovation

The optimal roles for government and non government stakeholders in shaping the Consumer Data Right ecosystem need to be seriously considered. In Australia the prescriptive role the government took has led to an unhealthy codependence where non government stakeholders wait for the government to impose a mandate and then react to it.

While there are many different versions to open banking and data sharing ecosystems they generally fall into three approaches⁵.

⁴ See <https://treasury.gov.au/sites/default/files/2022-09/p2022-314513-report.pdf>

⁵ See pp 6-7: N Jevglevskaia and RP Buckley, 'The Consumer Data Right: How to Realise This World-Leading Reform' 45(4) (2022) University of New South Wales Law Journal 1589–1622

- Prescriptive: with designated authorities regulating the ways and means of data sharing and supervising the implementation progress.
- Facilitative: providing legally non-binding guidance and standards on data disclosure and transfer
- Market-driven: with no explicit rules or guidance on sharing customer data



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Prescriptive



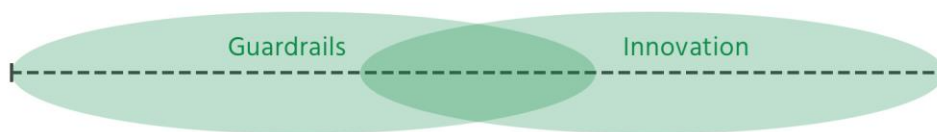
Frameworks are provided along with legally non-binding guidance and standards on data disclosure and transfer.

Facilitative



No explicit rules or guidance on sharing customer data with industry required to self organise to figure it out.

Market-driven



While guardrails need to be developed they should be developed in ways in design-build-test-learn cycles that ensure fit-for-purpose policy, regulations and standards.

Avoiding the pitfalls of having an overly prescriptive CDR framework in New Zealand should be a key priority.

The transformations needed to see the success of the Consumer Data Right reforms in New Zealand and Australia require significant systems change. It requires well coordinated collaboration between diverse stakeholders across the public and private sectors and civil society. Importantly the context in Aotearoa New Zealand means data governance tikanga is a fundamental consideration.

Building on the excellent work led by Payments NZ and the API centre a less prescriptive approach to standards setting should be pursued. In public and private partnership and with organisation like ODIA.

Importance of small and medium enterprises

SMEs play a vital role in our economic and societal success. Small businesses generate 28% of New Zealand's GDP and employ over 600,000 people. In principle, businesses, alongside consumers, should be able to benefit and take advantage of CDR. This can be for things like applying for (re)financing, reconciling their accounts, managing their cash flow or optimising their capital and operating expenditures. The impact reports on Open Banking in the UK show that a large portion of adoption over the past year has been driven by SMEs with cloud accounting⁶. Something for decision makers in Aoteroa New Zealand to seriously look at.

Recently the Australian Government announced the Version 5 updates to the CDR legislative instrument which includes more fit for purpose rules to help businesses consumers utilise the existing framework. New Zealand should factor in the participation of SME consumers from the outset and learn for the Australian experience as best as possible.

⁶ See (<https://openbanking.foleon.com/live-publications/the-open-banking-impact-report-march-2023/>) and (<https://openbanking.foleon.com/live-publications/the-open-banking-impact-report-june-2022/>)

Final note:

FDATA supports and encourages a CDR that gives consumers and small businesses meaningful control over their data, provides for more informed choices, catalyses industry innovation and supports competition in the New Zealand economy.

The Consumer Data Right is a pivotal opportunity to promote digital transformation, enhance New Zealand's economy and improve the lives of everyday New Zealanders for generations to come. We commend the Government and industry's continued efforts to do their best and deliver a fit-for-purpose, trustworthy and outcome-focused Consumer Data Right.

Please do not hesitate to contact me should you have any questions or would like to discuss FDATA support on delivering on these recommendations.

Warm regards,



Mathew Mytka
Interim Chair | ANZ Regional Members Council
Financial Data and Technology Association | Australia & New Zealand
Mobile: Privacy of natural persons
Email: mathew.mytka@fdata.global | Web: fdata.global