Submission to the Ministry of Business, Innovation and Employment on the draft Customer and Product Data Bill

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Kiwibank submission to the Ministry of Business, Innovation and Employment on the exposure draft of the Customer and Product Data Bill

Introduction

1. Kiwibank welcomes the opportunity to provide feedback to the Ministry of Business, Innovation and Employment (**MBIE**) on the exposure draft of the Customer and Product Data Bill (the **Bill**) and associated Discussion Document which proposes to introduce what is often referred to as a consumer data right (**CDR**) (or 'open banking', for banks) to New Zealand.

2. Kiwibank has also contributed to the New Zealand Banking Association (**NZBA**) submission. We do not therefore repeat in detail points made in that submission. In our own submission, we focus on points that we want to raise in addition to the industry submission or to further emphasise certain industry points.

3. Furthermore, given the short four-week consultation period and given also that the exposure draft Bill is very high level with much of the detail reserved for secondary legislation, Kiwibank's submission focuses only on key points currently identified. However, as also conveyed in the NZBA submission, we submit that MBIE should continue to work with interested industry groups and parties over the coming months given the significance and complexity of the proposed legislation. We would be happy to discuss any aspect of our submission with MBIE.

Key General Points

Important to keep under consideration whether CDR legislation will promote competition and innovation for the long-term benefit of banking customers

4. Kiwibank continues to contribute to the industry development of open banking initiatives. In principle, we support any initiatives that will make the industry more competitive. We are not opposed to the introduction of some form of a legislative CDR relating to banking provided it is evidenced that the legislation will promote competition and innovation and be of sufficient benefit to New Zealand consumers and businesses such that it outweighs the burden of delivering something that is by its nature costly and complex. This is particularly so in an ecosystem where scams and other financial crimes are becoming increasingly frequent and most likely will reduce the willingness for customers to share their intimate financial data with third parties.

5. Relevantly, the Commerce Commission's recently announced Market Study into personal banking services will likely consider the impact of a CDR in overseas markets.[1] Proceeding with the Bill now may therefore be premature given that we do not know what the Market Study will say about whether the CDR legislation would help bank competition, or whether other recommendations are made that would be more impactful and should be prioritised over the CDR. We submit that it would be appropriate to await the Commerce Commission's report (the Commission's report is required to be published by 20 August 2024) before MBIE progresses further with the Bill.

[1] Commerce Commission - Market study into personal banking services (comcom.govt.nz)

6. Kiwibank also asks that MBIE keep under consideration whether the Bill in its current form has sufficiently identified and dealt with the complex range of issues that are generated by the introduction of a CDR (for example, from defining consent, to building electronic systems to share data, to data quality, to ensuring that data is, crucially, protected when it is shared).

7. Relevantly, in Australia, as MBIE will be aware, a recent Statutory Review of its CDR in November 2022 identified numerous lessons to be learned.[2] For example, participant concerns around complex and overly prescriptive rules and standards were identified that have prevented focus on developing new products and services, and the Review recommended that consideration be given to where complexity may be reduced. There were also findings about a complex consent process and potential for consent fatigue among consumers. The Review also found that the size and complexity of the Australian CDR is a barrier to entry for smaller business participants and their participation in the CDR has been low. As identified below and in more detail in the NZBA submission, aspects of the Bill risk being overly complex (for example, its proposal to have direct-to-customer access, and the potential to cover a broad scope of data or actions). We are therefore concerned that the Bill may be in danger of not learning lessons from Australia's CDR Statutory Review. This is further cause to perhaps pause introduction of the Bill until these aspects are further worked through and resolved with industry.

Implementation should be staggered for banking

8. Kiwibank submits that, if a CDR does proceed, then MBIE should take a staggered, targeted, and proportionate approach to implementation (both in terms of which banks are required to become data holders and in terms of progressive iterative delivery i.e., simple use cases first). This, we submit, will help (i) the Bill achieve its purpose to promote competition and innovation for the long-term benefit of consumers; (ii) avoid overburdening participants given the potentially significant cost of set-up and compliance; and (iii) avoid the risk that, ultimately, if MBIE tries to do too much too soon, there may be errors or confusion with rollout which could damage customer trust when trust is crucial to the success of any CDR.

9. Kiwibank submits that implementation of the Bill should be delivered at the right pace for the differing banks that exist in New Zealand. The logical distinction here, and preferred route, in our view, is between the banks determined by the Reserve Bank of New Zealand (**RBNZ**) to be domestic systemically important banks (**D-SIBs**) and the rest of the industry (**non-D-SIBs**).

10. Preferably, D-SIBs would be required to deliver a CDR (i.e., required to be data holders), but it would be voluntary for non-D-SIBs to become data holders (certainly initially). This would afford smaller banks the flexibility to decide whether and when is the right time to become a data holder. This approach has precedent. In the UK open banking was mandated for the largest 9 banks and is voluntary for others. It appears that the UK has been going through a five-year implementation phase since 2017.[3] The UK is currently looking at the future of open banking and plans to develop a new framework but, currently, this does not appear to mandate application beyond the largest nine banks.

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[2] Statutory Review of the Consumer Data Right - Report | Treasury.gov.au
[3] Update on Open Banking - GOV.UK (www.gov.uk)

11. If, however, MBIE does not favour a voluntary approach for non-D-SIBs, then Kiwibank would advocate the D-SIBs implementing first and the non-D-SIBs later in time (at least two years later). This type of approach also has precedent. In Australia, where a CDR is mandatory, the major four banks (ANZ, NAB, Westpac and CBA), owners of the New Zealand DSIBs, went first and the rest later (details on the phasing can be found in the links in the footnotes below).[4]

12. Kiwibank submits that, if only the D-SIBs are (at least initially) required to be data holders, this would still provide meaningful coverage of the banking sector ([redacted])[5] and, accordingly, would still support the purpose of the Bill in clause 3.

13. Staggering implementation with D-SIBs going first is also important for non-D-SIBs because they do not have equivalent means compared to the D-SIBs to implement a CDR (Kiwibank is on any measure much smaller than the D-SIBs). And the D-SIBs have the practical experience of their Australian parents adopting the equivalent regime in Australia to draw on. Staggering is therefore a more proportionate and pragmatic approach to take, particularly also given the large volume of other regulatory change that banks are currently being asked to deliver (for example, the Conduct of Financial Institutions Regime, climate-related disclosure requirements, and the Deposit Takers Act (with the Depositor Compensation Scheme (DCS) going live in late 2024)). A more aggressive timetable for implementation of a CDR for non-D-SIBs would, we submit, be difficult for banks like Kiwibank to deliver without the risk of it becoming a disproportionate burden on their resources. Importantly, it could also, in turn, conflict with the purpose in clause 3(1)(b) of the Bill "to promote competition and innovation for the long-term benefit of customers" – because, arguably, it may become harder for smaller banks to compete and innovate if they are required to implement a CDR at a disproportionate pace for them.

14. Taking a more proportionate approach to implementation would also be consistent with the Council of Financial Regulators' (**CoFR**) priority theme to ensure that regulation of the financial sector is effective and the cost of complying with regulation is proportionate to the outcomes sought. CoFR says that there should be a pragmatic approach towards implementation of regulation across regulated entities of various sizes.[6] As a CoFR member, MBIE will recognise the crucial role that proportionality plays in delivering change that works for the range of entities and persons that are impacted, rather than one-size fits all.

15. Kiwibank also supports staggering the introduction of data into scope. For example, commencing with simple customer/product data and expanding the scope beyond that over time and delaying the introduction of action initiation in the Bill. It is important, in our view, to allow for initial implementation to become established before ongoing standards development to avoid an ongoing and complex roadmap of regulatory CDR change. Taking a more measured approach will also likely result in less errors and, ultimately, bring greater customer trust.

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[4] Australian CDR website: Rollout | Consumer Data Right (cdr.gov.au); and infographic detailing the phasing in the banking sector: Phasing in the banking sector (cdr.gov.au).

[5] [redacted]

[6] Regulatory effectiveness | Kaunihera Kaiwhakarite Ahumoni - Council of Financial Regulators (cofr.govt.nz).

Mechanics of how CDR would work for banking must be carefully designed and scope clarified

16. Implementing a CDR for banking will involve a significant amount of new system design and build (for example, to gather, update, and manage consent). To get this right and to minimise complexity and cost, Kiwibank encourages MBIE to work closely with the banking industry, for example, on what data should/should not be in scope, the mechanics of authorisation (consent), electronic system operation, as well as reporting and record-keeping requirements (detailed submissions on these aspects have been made in NZBA's submission which we support). The right balance ultimately needs to be struck between designing a regime which is effective and protective without becoming too administratively burdensome and prescriptive such that it may stifle the competition and innovation that it seeks to encourage. This is particularly important for non-D-SIB banks that will have less resource than the larger banks to implement a CDR. We also refer MBIE again to Australia's CDR Statutory Review (see paragraph 7 of our submission above) and encourage MBIE to consider lessons that can be learned from that in designing New Zealand's CDR.

17. The Bill leaves a significant amount of the detail to be prescribed in secondary legislation (e.g., designation of who is a data holder; what is designated customer data; what is designated product data; what is a designated action). Sufficient time and consideration (including consultation) must be allowed for the development of secondary legislation with the industry. This is particularly given that it is so important to get the scope of the Bill right at the outset.

18. Indeed, Kiwibank also submits that MBIE should seek to build into the Bill upfront a narrowing of the scope of the customer and product data which may potentially be designated so that data which clearly goes beyond what should be intended in any CDR is carved out. For example, we would particularly support the exclusion of commercially sensitive and derived data which may include intellectual property from becoming designated product data. We also support excluding from scope records of customer calls and conversations from becoming designated customer data. Setting some such principles upfront could, in our view, make clear what are the fundamental parameters for the scope of the Bill and smooth the way of the secondary legislation.

Alignment where possible with any relevant existing and/or upcoming legislation and other industry standards

19. In its Discussion Document, MBIE helpfully recognises linkages with other legislation. It is important, in Kiwibank's view, that alignment of legislation is pursued wherever possible to reduce the burden of implementation on participants. For example, Kiwibank submits that MBIE should engage with the RBNZ and the banking industry so that, where possible, the design of a CDR for banking aligns with any relevant aspects of the design of the Single Customer View (**SCV**) standards for the DCS in the Deposit Takers Act so that, to the extent possible, banks can make one system change that can accommodate both SCV/DCS and CDR requirements. We note that paragraph 44 on page 22 of the Discussion Document says that MBIE will "continue working to align with other work, including Single Customer View requirements being developed under the Deposit Takers Bill…".

20. It is also important that MBIE clarify urgently whether the CDR for banking will be staggered for non-D-SIBs and also to what extent it will adopt the API Centre's open banking standards. These issues are important to clarify so that banks can quickly understand whether and how the Bill may apply to them and what impact that may have on other work they are involved with.

Specific Points

21. **Māori perspective**: We are happy to engage further with MBIE on this aspect of the design of the Bill. As an initial high level observation, we submit that it will be important that the Bill does not dilute the existing protections that banks like Kiwibank already give to customer data which is also important for satisfying Māori data governance needs. Aspects of the Bill which we currently envisage being of particular importance to get right from a Māori data governance and data sovereignty perspective include the mechanics of consent (and importance of express and informed consent) as well as clarity and protections around what happens to data once it has been shared.

22. **Accredited Requestor accreditation**: Kiwibank fully supports accreditation of requestors, this is critical to ensuring that data is properly protected when shared, both for consumers and for data holders. The threshold for risk in this respect should be carefully set, if it is set too low and issues arise, this could undermine consumer trust in the CDR when trust is fundamental to the uptake and therefore success of the CDR. However, Kiwibank also considers that, for registered banks, MBIE should explore whether there can be a simplified accreditation process, given that these entities are already subject to significant regulatory requirements. For example, we query whether banks need to carry out fit and proper person certification. In paragraph 101 on page 31 of the Discussion Document, MBIE says that if the applicant can show they have passed an equivalent test under another Act, there should be a fast-track available, and so MBIE do appear open to simplification, which we support.

23. **Direct-to-customer access**: as covered in detail in NZBA's submission, direct-to-customer access should be removed from the Bill. Introducing direct-to-customer access would be overly complex, increase security risks for the electronic system and, we submit, is not necessary (as explained in the NZBA submission, where customers wish to access their customer data or initiate actions, as opposed to taking action in connection with products or services offered by accredited requestors, they can do so through existing online and in-app banking services).

24. **Real time reporting**: Paragraph 201 of the Discussion Document discusses the potential for functionality that facilitates real-time reporting to the enforcement agency. This would be facilitated by clause 26. At this stage, Kiwibank cannot see the benefit of real time reporting, this may add undue risk and complexity particularly when weighed against the cost of the capability and data holders should be given time to provide the information.