

5 September 2024

Economic Development, Science and Innovation Committee  
Parliament Buildings  
Wellington

Email: [edsi@parliament.govt.nz](mailto:edsi@parliament.govt.nz)

Dear Select Committee

## **Re: Customer and Product Data Bill**

### **Background**

I am writing to you regarding the Bill entitled *Customer and Product Data Bill* (referred to as 'the Bill').

BusinessNZ has previously submitted on the issue of consumer data rights on two occasions, the first being our response to MBIE's 2020 Discussion Document entitled '*Options for Establishing a Consumer Data Right in New Zealand*', followed by our 2023 response to MBIE's Discussion Document entitled *Unlocking Value from our Customer Data* and the *Customer and Product Data Exposure Draft Bill*.

As outlined in prior submissions, 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, we believe any future steps must consider the needs, concerns and opportunities for the broad business community.

We understand that BusinessNZ members, including those from the banking, electricity and telecommunications sectors, will provide detailed views on elements of the Bill and how the proposed legislation will specifically apply to them. Hence BusinessNZ wishes to focus mainly on the process going forward for the CDR, both in relation to those sectors that will be initially designated, and those that may be designated in the future.

## **Part 1: General Comments on the Bill**

### **Comparison of Exposure Draft Bill with Current Bill**

BusinessNZ has strongly supported the option of a Draft Bill for comment. This additional step in the consultation process can help minimise the often illogical disconnect between the recommendations of some discussion documents and the Bills that follow.

Given the Government released a second Discussion Document and Draft Bill for additional consultation before the introduction of the final Bill, this provided submitters with a direct connection between the key issues MBIE wished to receive feedback on as a follow-on from the 2020 discussion document, and also allowed for granular comments on specific aspects of the draft legislation to ensure it is fit for purpose.

With regard to feedback on a number of issues outlined in the Draft Bill, we note the Government has made some significant changes in response to that feedback. These have been noted in a summary document released by MBIE, which we believe will help ensure a considered and transparent process.

### **Process for Designated Sectors**

#### *Who's in – Who's out?*

In our previous submissions BusinessNZ 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.

We note that in the 2020 Discussion Document, in addition to banking, the electricity and insurance sectors were mentioned as potential 'first cabs off the rank' for a CDR. By the time of the 2023 consultation it appeared the banking sector would be the first designated sector.

Since 2023, the focus around initial designated sectors has changed again. The banking and electricity sectors have been officially mentioned by the Minister of Commerce and Consumer Affairs as the first designated sectors, along with the general policy statement of the Bill stating that, "*This will make it easier for them to shop around and switch providers for services such as banking, electricity and telecommunications*". While we commend the Government for a process that has included two discussion documents and an Exposure Draft Bill, the shifting sands around which sectors are potentially 'in or out' with regard to being a designated sector does create a degree of uncertainty for those mentioned. In turn, this has broader implications for those just outside of the initially designated sector(s) and what will be the future expectations of them.

### *Extension of the Consumer Data Right*

Beyond the initial inclusion of the banking and electricity sectors, the addition of other sectors needs to be well considered from a policy perspective.

There is no doubt that the passing of the Bill will create a pathway, currently unknown, regarding which sector or sectors will be included sometime in the future. Given both the telecommunications and insurance sectors have been mentioned either previously or currently, data holders in those sectors will likely have a Sword of Damocles hanging over their heads. The fact that their inclusion could ultimately end up being due to either policy or political reasons does not provide the level of certainty that most businesses expect.

We only have to look at the now-established Market Studies process that the Commerce Commission undertakes to realise that once in place, regulatory settings that provide an opportunity for ongoing sector targeting can lead to a case of “who’s next?”.

As the Bill currently stands, clause 98 of the Bill outlines the matters the Minister must have regard to in designating regulations. While the clause outlines a range of matters, from BusinessNZ’s perspective we are not convinced that they properly take into account the full range of factors for the Minister to make a considered and fully informed decision. While a CDR can provide positive outcomes for the economy as a whole, it also represents a sizeable intervention for a potential designated sector, so broadening its reach needs to be carefully thought through.

*Recommendation: That clause 98 of the Bill is expanded to take into account a broader range of factors so that the Minister can make a considered and fully-informed decision on designation regulations.*

### **Ministry for Regulation Viewpoint**

BusinessNZ believes undertaking good regulatory policy processes also means the involvement of the Ministry for Regulation and a likely Regulatory Standards Bill in considering the potential expansion of the CDR into other sectors.

While the policy process for including both the banking and electricity sectors may seem fairly straightforward at present, this may not be the case for the inclusion of other sectors in the near future. More specifically, the current settings of the Bill regarding future designation regulations may become a problem once a Regulatory Standards Act is introduced and the Ministry for Regulation is working at full capacity with a clearer understanding of their roles and relationship with other parts of Government. While the final make-up of a Regulatory Standards Bill is yet to be worked through, in broad terms it will require new (and eventually all) regulation to adhere to a set of principles and processes, thus leading to best-practice regulation.

## **Consumer Data Right Review**

In relation to the point above, if an evaluation of the CDR within the banking and electricity sectors shows that targets have been clearly met and have 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.

BusinessNZ believes it is critical that the Government first evaluates the success or otherwise of a CDR covering the banking and electricity sectors 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, particularly in Australia, it should not be assumed that once a regime is in operation, it should automatically be extended out to other sectors.

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.

BusinessNZ has no strong views regarding whether each designated sector has their own review, or whether some overall review incorporates both sectors. While separate reviews can provide focused analysis, flexibility and tailored recommendations, they can also have the potential for overlap, increased time/cost and a fragmented perspective.

*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.*

## **Acknowledging Differences Between Sectors**

In addition to the points raised above, one could argue that having the banking and electricity sectors as initially designated sectors also provides a degree of ease with which to ensure the Act reaches its intended purpose. As BusinessNZ has mentioned in previous submissions, 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 or two sectors 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 first entrants may not take into account 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 and electricity sectors 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 a designated sector is taken into account in future consultation.*

### **Costs and Timing of Implementation**

All businesses holding customer data (i.e. data holders) that are within a designated sector will be required to provide data to the customer and, with the customer's authorisation, to accredited third parties. While this may sound relatively easy, the fact that businesses use a range of different systems for data storage and sharing - including sharing/providing data to external parties in a stable format - could mean significant costs incurred in terms of resourcing and money.

A recent example of this at a much smaller scale has been the introduction of E-Invoicing, which BusinessNZ strongly supports as a direct exchange of data between any two accounting systems, that makes doing business smoother, faster and safer. While a significant proportion of BusinessNZ's larger members have dedicated themselves to implementing E-Invoicing, the timeframes required to ensure they are fully compliant and can action E-Invoicing can be lengthy.

As mentioned above, the Government should not look at each sector through the same lens around the cost and timing of implementation. Instead, it needs to be aware of the common procedures and practices of each sector and how this can have a material effect on sharing/providing data to external parties.

### **Specific Issues Relating to the Electricity Sector**

The integration of CDR in the electricity sector is supported, as outlined in our previous submissions. But as noted earlier, its implementation could risk becoming a significant cost to businesses in the electricity sector. The sector has already taken several initiatives in terms of making consumption data available to both individuals and businesses. Efforts have been made by electricity retailers to invest in systems to allow customers to understand their electricity consumption patterns and make such data available free of charge to consumers to download and provide to third parties.

It is important the government fully understands the work that has already been undertaken by industry players and the electricity market regulator before proposing any preferred approaches that directly impact the electricity sector through CDR. Changes must acknowledge and supplement work already underway, ensuring there are opportunities to improve existing electricity sector processes and enable increased innovation.

One example of work currently underway is the Electricity Authority's decision to release for tender a price comparison website as part of its efforts to improve information available to the market and increase competition.

The extent to which CDR will acknowledge existing rules and work already underway is unknown. We recognise that such detail will be largely designated to the drafting of relevant regulations. The drafting of regulations must provide clarity about how the new regime will interact with the 2010 Electricity Industry Participation Code. Clauses 11.32E to 11.32EG already cover similar consumer authorisations of an agent to request information from electricity retailers on behalf of the customer, including the actions and processes that retailers must follow upon receipt of requests and to confirm authorisations.

The regulations must also detail the need for any designation of 'data holder' to consider the impact on competition. We support all retailers and metering providers being designated as data holders. This would help avoid any arbitrary scale thresholds that could distort competition.

## **Part 2: Remaining Issues with the Bill**

During consultation with the BusinessNZ and Business Energy Council (BEC) membership, several specific issues relating to the Bill were raised, which we would like to comment on.

### **Section 9: Product Data**

Members have noted that the definition of product data in Section 9 of the Bill is extremely broad as it means data that relates to a data holder's products. We understand that this definition may be deliberately broad as the data holder's designated regulations will specify the categories of product data that are relevant to a particular industry.

Furthermore, Sections 22 and 100(2) of the Bill outline guardrails for when a company can refuse to provide product data and what can be defined as product data. However, it is unclear as to whether product data can include any information that is not ordinarily available to the public.

BusinessNZ recommends that the Government clarifies that product data should not include data not ordinarily available to the public in all cases – or at the very least, that product data should not include a data holder's proprietary information, confidential information or trade secrets.

We believe this will reduce the risk of a data holder being asked to share product data that allows third parties to reverse-engineer products that are proprietary or contain trade secrets. We do not believe that the Government intends to ask data holders to share product data that will undermine the ingenuity and research and development that data holders have invested in proprietary products. Therefore, increased clarification here should mitigate these concerns.

*Recommendation: That the government clarifies that product data should not include data not ordinarily available to the public in all cases. Notwithstanding this, at the very least product data should not include a data holder's proprietary information, confidential information or trade secrets. Sections 22 and 100(2) outline guardrails for when a company can refuse to provide product data and what can be defined as product data.*

## **Section 27 - Electronic System**

Some members have questioned whether it is necessary to require data holders to build electronic systems to share data with customers or accredited requestors. Building an electronic system to handle such requests could be unduly burdensome for many data holders. We note that IPP 6 of the Privacy Act does not require any organisations to create electronic systems to provide individuals with access to personal information - organisations can use their discretion to create internal processes to meet and comply with IPP 6. In short, we believe the current regulatory settings in the Bill represent regulatory overreach.

Instead, the Privacy Act should set the bar relating to how a person should access customer data, given that personal information and sensitive data is governed by the Privacy Act and does not require an electronic system.

*Recommendation: That the sections directly relating to electronic systems within Part 2 of the Bill be removed so that data holders can use their discretion in creating their own processes that comply with their obligations under the Bill.*

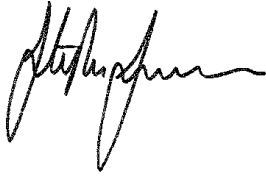
## **Section 53 - CPD Storage and Security Requirements**

BusinessNZ members have questioned whether Section 53 is necessary. The Privacy Act will apply to any personal information held by data holders regardless of this provision. Given the Bill is not intended to change broader legal settings regarding collection, storage or security of personal information, this provision may therefore cause confusion as to MBIE's and the government's intent.

*Recommendation: That Section 53 be removed.*

Thank you for the opportunity to comment.

Kind regards,

A handwritten signature in black ink, appearing to read 'Steve Summers', with a long horizontal flourish extending to the right.

Steve Summers  
**Economist**  
BusinessNZ