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4 September 2024

Committee Secretariat
Economic Development, Science and Innovation Committee
Parliament Buildings
Wellington

Dear Committee Members

**ICNZ ON THE CUSTOMER AND PRODUCT DATA BILL**

1. Thank you for the opportunity to provide a submission on the Customer and Product Data Bill.
2. Te Kāhui Inihua o Aotearoa / The Insurance Council of New Zealand (**ICNZ**) represents general insurers. ICNZ members provide insurance products ranging from those usually purchased by consumers (such as home and contents insurance, travel insurance, and motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, cyber insurance, commercial property insurance, and directors and officers insurance).

**Overall comments**

3. ICNZ supports the intention behind the establishing a "consumer data right" (**CDR**), i.e. to give customers (both consumers and businesses) greater control over how their data is accessed and used and to promote increased innovation and competition.
4. The legislation creates a framework to establish a CDR but leaves much of the detail to regulations and standards. This makes it challenging to assess and comment on the likely impacts of the CDR regime as the relevant detail is not yet available. However, we have concerns about the potential implementation and ongoing compliance costs that may arise from the CDR regime and urge that these matters are given careful consideration when designing the Bill and subsequently when decisions are made about bringing sectors within the scope of the regime.
5. Industries will be brought into the CDR regime by designation. The Government has indicated that the first sectors to be designated will be banking and electricity and further steps have not yet been confirmed.

*General insurance industry considerations*

6. We are concerned that a CDR may not be well-suited to the general insurance industry. It is unclear to us what problem a CDR would solve in a general insurance context and there are concerns that the costs and disadvantages could outweigh the benefits. The information held by the insurance industry and the services it provides differ from the banking and electricity sectors in relation to both customer data and product data. Insurers' decision-making processes can for example be bespoke to the customer and the products can have complexities with a number of variables and options available (e.g. cover limits, excesses, optional benefits).

7. There is also a risk that a narrow focus on price comparison and the ability to switch in the way a CDR is designed will result in a 'race to the bottom' with customers focussing on price rather than the quality and suitability of the product. This is not an issue for banking or energy where the products are often the same and/or easily comparable.
8. In the general insurance context, there is a risk that due to the introduction of a CDR customers will not seek advice from their insurance provider or their independent insurance broker, instead relying on a digital platform or the advice of an accredited requestor who may have little knowledge or experience of insurance policies.
9. We note that accredited requestors will not necessarily financial institutions licensed by the Financial Markets Authority and so will not be subject to the same obligations to treat customers fairly.
10. The complexities or variabilities regarding general insurance products reinforce the importance of customers taking time to engage with the information provided themselves and/or relying on advice from their insurance provider or their independent insurance broker.
11. The role of intermediaries in the general insurance sector should also be considered including in respect of obtaining necessary consumer authorisations and the customer information they may hold. In the vast majority of cases businesses purchase their insurance via independent insurance brokers who carry out the 'search and switch' process on their behalf. Brokers also provide advice on the best product for their needs and price.

*Designation regulations*

12. Clause 98 sets out the matters that the Minister must have regard to before recommending that designation regulations be made. Clause 98 provides that:

> ***98 Minister must have regard to certain matters***
>
> *(1) Before recommending that designation regulations be made, the Minister must have regard to the following:*
>
> > *(a) the interests of customers, including Māori customers:*
> >
> > *(b) any likely costs and benefits for the person or class of persons that are proposed to become data holders:*
> >
> > *(c) whether the regulations promote the implementation of secure, standardised, and efficient regulated data services:*
> >
> > *(d) the likely benefits and risks associated with the proposed designation regulations in relation to—*
> >
> > > *(i) the security, privacy, confidentiality, or other sensitivity of customer data and product data; and*
> > >
> > > *(ii) any intellectual property rights that may exist in relation to customer data or product data.*
>
> *(2) In this section, intellectual property rights includes patents, designs, trade marks, copyrights, plant variety rights, know-how, confidential information, trade secrets, and similar rights.*

13. We consider that clause 98 should be amended so that the Minister must also have regard to the efficiency of relevant markets and promoting competition. These are factors that under the Australian CDR legislation the Minister must have regard to before designating a

sector.[1] We consider the inclusion of these factors would support the purposes of the New Zealand legislation which include to "*promote competition and innovation for the long-term benefit of customers"* (clause 3(1)(b)).

14. Clause 99 obliges the Minister to consult on a proposed designation. It will be very important that there is comprehensive consultation on the designation regulations to ensure that the designation is workable and that the potential impact of the implementation and on-going compliance costs is understood. There should always be public consultation as part of this process.

15. Clause 99 provides the Minister must consult "*the persons, or representatives of the persons, that the Minister considers will be substantially affected by the proposed designation regulations*". For the avoidance of doubt, we consider that the clause should specifically require the Minister to consult those entities that will be "*data holders*" under the proposed designation.

16. Clause 100 sets out the matters that the designation regulations may cover including the classes of customer data and the classes of product data being designated. When a sector is designated, we consider that the CDR regime should only apply to the sector's core products. For example, when banking is designated, we would not expect the CDR to apply to non-banking products sold through banks, like KiwiSaver or insurance.[2]

17. We consider that any sector designation should only occur where it has been clearly established that doing so will materially improve customer outcomes overall. There should be a positive cost-benefit analysis (which includes the impact of implementation and ongoing compliance costs on data holders as well as any adverse outcomes or risks for customers). The costs involved in complying with the CDR are likely to be significant. These additional costs would ultimately be passed on to consumers and will divert resources from other innovations or improvements. Careful consideration must also be given to potential risks or adverse customer outcomes that could result from designation or from greater use of data. For example, certain vulnerable or disadvantaged groups who are unable to meaningfully engage with the digital economy and provide relevant data to providers may be further disadvantaged because such data is a requirement to access a better deal.

18. In analysing the likely costs and benefits of a new designation, regard should be had to the costs and benefits that have occurred under earlier designations of other sectors. We recommend that sufficient time should be given to allow each designation to 'bed in' before designating another sector. It will be important to learn lessons from each designated sector's experience before extending the regime to new sectors. This would appear to be a key benefit of the sector-by-sector approach that the CDR framework provides for.

19. Clause 100(2) outlines the classes of data that may be designated as "designated product data". This specifies what product data can be required to be shared . We understand this is aimed at addressing concerns about the range of information that might otherwise be required to be disclosed, such as commercially sensitive data or data that has been produced or enhanced by the application of proprietary analysis, however, given the breadth of what is specified, we consider these risks would remain.

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[1] Section 56AD Competition and Consumer Act 2010

[2] We note that in its recent Discussion Paper 'Open banking regulations and standards under the Customer and Product Data Bill' https://www.mbie.govt.nz/dmsdocument/29084-discussion-paper-open-banking-regulations-and-standards-under-the-customer-and-product-data-bill-pdf, MBIE proposes that initially the designated account types should be transactional, savings, credit card and lending accounts (para 57). This would be consistent with our expectation that the banking designation should be restricted to core banking products.

20. We note that for insurance products the underwriting criteria and pricing can be complex and are determined by algorithms utilising a range of factors that can generate a bespoke price for each customer. For example, the price for motor vehicle insurance will commonly be generated based on various aspects including personal factors (e.g. age, driving history, location), vehicle factors (e.g. type and age, how often and for what purpose the car is used), coverage level (e.g. comprehensive coverage or third-party), deductibles/excesses, repair and parts costs, any discounts applied etc. Given this, while it may be appropriate for clause 100(2) to allow product criteria and prices to be designated, the implications of whether this is done and if so how for specific sectors should be carefully considered before any designations are made.

21. It is important only appropriate classes of data are designated to avoid adverse impacts on the market or innovation. Insurers hold a wide range of data, including information obtained from third-party providers on a commercial basis and other commercially sensitive information.

*Australian experience*

22. The Government should also consider the lessons learnt in Australia from their CDR regime when considering designating a sector and to inform the cost-benefit analysis. In 2023 Australia's Department of the Treasury commissioned a Consumer Data Right Compliance Cost Review. The public version of the December 2023 Final Report was published on 9 August 2024. The Review found that:

"*At this stage, several years into the implementation phase of the CDR for the banking sector, and a shorter period for the energy sector, the costs of the CDR appear to have far exceeded original regulatory estimates. Industry participants have expressed significant concerns about the continued pace of change and the resulting costs. Although this review did not focus on quantifying benefits of the CDR, it was evident that many participants question the cost-benefit justification of ongoing changes to CDR rules and CDR data standards, based on the very low level of usage that they observe among their customer base.*"[3]

23. The Australian Review also noted concerns that under the Australian regime insufficient regard had been given to industry specific considerations.

"*There is a perception that the CDR rules are designed with a banking-industry focus. Participants in the energy sector have cited aspects of the core CDR rules that do not apply in the same way in the energy sector, for example, joint bank accounts. The non-bank lending sector has also argued in their public submissions that it should not be subject to the banking sector standards.*

*While there are likely synergies across ADIs and non-bank lenders, each industry needs to be considered separately to avoid unnecessary costs and unintended impacts on consumers in that industry.*

*Energy retailers point to the redundant expense in implementing CDR for their large corporate customers, which have other existing means of accessing data*."[4]

*Regulations and standards*

24. Further detail about the CDR regime will be set out in regulations and standards. For example, clause 31 provides that a data holder must comply with the requirements

[3] Consumer Data Right Compliance Costs Review, Report for the Department of the Treasury, December 2023, p2 https://treasury.gov.au/sites/default/files/2024-08/p2024-512569-report.pdf
[4] Consumer Data Right Compliance Costs Review, p16

specified in regulations or standards in connection for requests, providing services, and making information available. Those regulations or standards may prescribe requirements relating to, among other things, the format and description of data, the manner in which requests for regulated data services are received and responded to (for example, a requirement to use an application programming interface (API)) and data quality.

25. It is likely that these more detailed requirements will have significant impacts on the costs that will be borne by data holders. For example, data will not currently be held in the same format across different insurance companies. It will therefore be critical that there is effective consultation and appropriate cost-benefit analysis before detailed regulations and standards are made.

26. Sectors will require significant notice before being designated. Companies will be investing in IT as business as usual. It would be unfortunate if companies were to come to regret investments being made in IT now, because they were unaware of future CDR requirements.

27. The work required to prepare to implement the CDR could be very significant – not just in terms of cost, but the time and resource required to ensure compliance. Designated sectors will require a long lead-in time to prepare to enable effective management of risks and costs and quality solutions for customers.

28. While the policy intent is for the CDR to benefit customers through access to better information about products and new and innovative services, policymakers should have regard to customers who lack digital literacy or access to technology or the data that might be utilised more under a CDR regime. There is the risk that these customers will not benefit from CDR, the disadvantages they experience may be further entrenched, or new disadvantages created.

*Privacy Act related considerations*

29. We also have the following comments on the Bill's interaction with the Privacy Act 2020.

30. The Bill does not address disclosure of data outside of New Zealand and how this may align with Information Privacy Principle 12.

31. From a practical perspective, we think there needs be greater clarity on the interaction between the Ministry of Business, Innovation and Employment (as regulator of the CDR regime) and the Privacy Commissioner if a matter (e.g. management of a breach or a complaint) involves both personal information and non-personal information (e.g. if the matter includes information about a customer that is not an individual).

**Comments on specific clauses**

32. **Clause 11 (Territorial scope):** We support the territorial scope of the legislation. It is important that the CDR regime applies equally to entities carrying on business in New Zealand regardless of whether they have a physical presence in the country. If that is not the case, it could allow a competitive advantage to offshore entities.

33. **Clause 16 (Data holder may or must refuse request for data in certain circumstances):** Clause 16 sets out the circumstances where the data holder may or must refuse to provide any data requested. We consider that the circumstances set out in clause 16 should align with those set out in clause 20 (Data holder may or must refuse to perform actions in certain circumstances). We also consider that the data holder should be able to refuse a request for data where is inconsistent with another law. Therefore, in addition to the circumstances listed in clause 16, the data holder should be able to refuse a request if:

    - disclosure of the data would be inconsistent with another law

- the data holder reasonably believes that disclosure of the data would create a significant likelihood of serious financial harm to any person. (See clause 20(1)(b) which allows a data holder to refuse to perform an action in this circumstance.)
- the data holder reasonably believes that the request was made (wholly or in part) as a consequence of deception. (See clause 20(1)(c) which allows a data holder to refuse to perform an action in this circumstance.)

34. **Clause 20 (Data holder may or must refuse to perform actions in certain circumstances):** Clause 20 sets out the circumstances where the data holder may or must refuse to perform an action. See our comments above recommending that the grounds for refusal in clauses 16 and 20 should be aligned. In addition to the circumstances listed, the data holder should be able to refuse to perform an action:
    - where complying with the request would be inconsistent with another law
    - where complying with the request would create a significant likelihood of serious harassment of an individual. (See clause 16(1)(b) which allows a data holder to refuse a request for data in this circumstance.)
35. **Clause 34 (Requirements for accredited requestors in regulations and standards):** Clause 34 allows for regulations or standards to set out requirements for dealing with data – including requirements to de-identify data. The regulations or standards should include a definition of de-identified data and the methods that should be used to manage risks associated with this process (as de-identification may not altogether remove the risk that an individual can be re-identified).
36. **Clause 37 (Ending authorisation):** Clause 37 sets out when a customer's authorisation may end. Clause 37 provides:

    *An authorisation ends on the earliest of the following:*

    *(a) the expiry of the maximum period for an authorisation specified by the regulations (if any):*

    *(b) the occurrence of an event specified by the regulations (if any) (for example, when the customer closes an account with a data holder):*

    *(c) the time (if any) specified by the customer (or a secondary user on their behalf).*
37. If the general insurance sector were designated, consideration should be given to how the authorisation regime should apply in the general insurance context where the majority of policies are annual policies (but can be renewed) and noting that customers can have different products (e.g. home and motor insurance) with different renewal dates.
38. **Clause 39 (Customer or secondary user must be able to control authorisation):** Clause 39(3) provides:

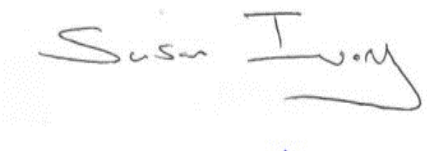
    *(3) The data holder or accredited requestor must ensure that the systems are able to give immediate effect to a withdrawal of an authorisation.*

    We consider the words "*with immediate effect*" should be amended to "*as soon as practicable*" for practical purposes. Where a data holder receives notification outside normal business hours that an authorisation has been withdrawn, it may not always be possible to action that withdrawal with immediate effect.
39. **Clause 50 (Data holder or accredited requestor must be member of dispute resolution scheme (if scheme has been prescribed)):** Clause 50 provides that data holders and accredited requestors must be members of a prescribed dispute resolution scheme if a scheme has been prescribed by regulations. We support of the use of existing schemes

such as the dispute resolution schemes approved under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 as envisaged by the legislation. We note however that this will be a new area for dispute resolution schemes and they may need to develop their technical expertise to deal with CDR complaints.

40. **Clause 56 (Effect of proceedings):** We note that the High Court has the ability under clause 56(2) to make an interim order preventing the use of the powers under clause 54 to supply information or produce documents. It appears that there is a high threshold to be met before an order can be made. The High Court may make an interim order only if it is satisfied "*the applicant would suffer substantial harm from the exercise or discharge of the power or obligation*" (clause 56(2)(b)). Noting that the effect of an interim order is merely to pause the exercise of the clause 54 powers temporarily until there is a final decision made on the proceedings brought by the applicant, we recommend that a lower threshold of harm is provided for.
41. **Clause 112 (Annual reporting by data holders):** Clause 112 sets out annual reporting requirements for data holders. We support the timings contained in that clause, i.e. that the data holder must report before 31 October for the preceding 12-month period ending on 30 June. Clause 112 provides that the report must set out a summary of complaints made and information prescribed by regulations. We interpret this to mean and would support this requirement being an overview of the complaints received within a specific period, rather than a specific account or summary of each individual complaint.
42. We strongly urge that reporting requirements are set to the minimum amount of information required to administer the regime so as to minimise compliance costs and time requirements for entities. Annual reporting will impose additional compliance costs on data holders and accredited requestors and should only be imposed if the benefits are clear and outweigh the costs.
43. Thank you again for the opportunity to make this submission. Please contact me (susan@icnz.org.nz), if you require any further information about this submission.

Yours sincerely



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