



Association for data-driven marketing & advertising

Data Availability and Use
Productivity Commission
GPO Box 1428
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12 December 2016

Response: Draft Report into Data Availability and Use

The Association for Data-driven Marketing & Advertising (ADMA) is pleased to submit its response to the ***Draft Report into Data Availability and Use*** (the “Report”).

ADMA is the principal industry body for data-driven marketing and advertising in Australia, and is part of a data-driven network of associations representing more than 1000 members with a subscriber base of 60,000 individuals, many of whom are on the already entrenched participants in the data revolution.

These members represent client-side marketers in Australian companies across Banking, Finance, Insurance, Healthcare, Transport & Logistics, Retail, Manufacturing, Media, FMCG, Automotive, Utilities, Travel & Tourism and Not-For-Profits spanning business types from SMEs to Enterprise.

Data-driven marketing and advertising includes any marketing communication which uses data-insights, including personal information, to engage with a consumer with a view to producing a tangible and measurable response.

ADMA actively supports a regulatory environment that is both balanced and flexible, and allows for innovation and expansion of the use of data, including open data.

Care needs to be taken to ensure that any new government initiatives strike an appropriate balance between protecting consumers and not being seen to interfere with legitimate business activities.

We welcome the opportunity to comment on the Draft Report on behalf of our members.

ADMA Response

The formulation of ADMA’s response reflects and supports that of our fellow data-driven association network member, Data Governance Australia.

In addition to the contribution at Board and executive levels, and a personal presentation by the CEO Jodie Sangster, to the Commissioners, a series of direct consultations (round tables) were undertaken with members during November 2016 in Sydney and Melbourne.

More than 100 members took direct part in formulating our response and while the process of gaining input and views of the participants was rigorous, the outcomes from these events assisted greatly in forming ADMA’s view.



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ADMA Code

In response to the Report, it is important to do so in the context of the existing ADMA Code. The Code's principles address the issues key to marketers working in data-driven businesses.

ADMA members are obliged to comply with the standards mapped out in the Code. In its design to be both robust and enforceable, the ADMA Code of Practice is overseen by the mechanism of an independent Code Authority, comprising a panel of six expert adjudicators, evenly balanced between consumer representatives and those of industry, led by an independent chair.

The Code is based on six key principles;

- Consumer first;
- Use data responsibly;
- Provide choice;
- Promote fairness;
- Encourage transparency;
- Be honest;
- Value safety

Again as part of its design, it functions as an instrument that drives best-practice industry standards for ADMA members.

Response to Productivity Commission Draft Report

Overall Position

Innovation is critical to Australia's future success as a developed, digitally literate nation; a future that does not rely solely on primary industries, mining or manufacturing. Further, innovation is vital in order to compete in a globalised marketplace, to ensure jobs security and continue growth in the economy.

ADMA supports the Productivity Commission's objectives in creating an innovative and competitive data landscape, however there are some concerns and challenges which are outlined below. Where appropriate we have offered alternative recommendations for the PC to recommend to the Government.

ADMA strongly believes that any approach to open data, whether for the public or private sector, should seek to provide Australia with a framework that will promote innovation and allow a data economy to flourish. To achieve this, sensible light touch government regulation accompanied by industry-driven self-regulation needs to be adopted to provide necessary benchmarks for organisations accessing and utilising data, to protect consumers and individuals without stifling future economic growth.

Australia is in a unique position to be able to take the global lead in open data and privacy rather than simply following other jurisdictions. This opportunity, in combination with developing the right infrastructure for information could place Australia as the leading light of data economies.

The recommendations proposed by the Productivity Commission may be considered as leaning towards more strident regulation. It should be clearly noted that the new European framework has recently been denounced by national leaders, Germany's Angela Merkel and Britain's Theresa May as too restrictive and stifling the potential of a data economy.

(Deutsche Welle website 2016 *Merkel calls for loosening of 'restrictive' German data protection laws*, viewed 12 Dec 2016, <http://www.dw.com/en/merkel-calls-for-loosening-of-restrictive-german-data-protection-laws/a-36431222?maca=en-Twitter-sharing>.)

ADMA recommends:

- A light touch government regulatory framework combined with a robust self-regulatory framework should be adopted to provide the necessary benchmarks and standards for private-sector data-sharing.



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Recommendations & Responses

Below are responses to issues identified in response to the Productivity Commission recommendations.

1. DEFINITIONS

The Productivity Commission Report introduces new terms which require clarification or further consideration. In particular:

a. Definition of Consumer Data:

Draft recommendation 9.1 The Productivity Commission has recommended that the Australian Government should introduce a new definition of consumer data that includes:

- Personal information, as defined in the *Privacy Act 1988* (Cth)
- All files posted online by the consumer
- All data derived from consumers' online transactions or Internet-connected activity
- Other data associated with transactions or activity that is relevant to the transfer of data to a nominated third party.

ADMA is concerned the introduction of a definition of consumer data is extremely broad and unclear, and includes online behaviour, all files posted, all derived data and transactional data.

This broad definition provides the following challenges;

- The potential for consumer confusion when Consumer Data operates in conjunction with the definition of Personal Information.
- In many instances the data that falls within the definition of 'consumer data' is not identifiable to an individual. Therefore, to add consumer rights to this data would result in organisations needing to collect more personal data in order to make this possible. This would have the opposite effect to that intended by the recommendations.
- The inclusion of derived data – i.e. data derived from consumers' online transactions or Internet-connected activity – strays into issues of intellectual property and company assets. Derived data has been developed by organisations through costly analysis. Such data is of high commercial value and would be considered Intellectual Property by any company.

ADMA recommends:

- The Productivity Commission approaches the introduction of a definition of consumer data with caution. There may be unintended consequences of consumer data being less than optimally defined.
- That the definition relates to data directly associated with the facts of the consumer and their actions. It should not extend into the territory of derived data.
- ADMA and its members are prepared to assist government by providing guidance on the clarity of definitions. This is significant, given that ADMA's main aim is to develop sensible outcomes for business whilst ensuring appropriate consumer protections.



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b. Definition of National Interest:

There are multiple references to 'national interest' in the PC recommendations, however it appears to be a grey area and would be beneficial if the Productivity Commission was able to provide a principles based framework of what may be considered as the 'national interest'.

ADMA recommends:

- That the Productivity Commission address the issue of 'national interest' principles to provide certainty to the business community.

2. GOVERNMENT DATA

a. Data Registers

Draft recommendation 3.1 The Productivity Commission recommends that all Australian Government agencies should create comprehensive, easy to access data registers (listing both data that is available and that which is not) by 1 October 2017 and publish these registers on data.gov.au.

ADMA agrees that this would be a beneficial outcome for both the public and the private sector, and that creating such a register would;

- (i) Add transparency to the datasets available,
- (ii) Encourage use of such datasets for business and innovation; and
- (iii) Provide a good foundation for a future data economy.

Achieving this aim would be a substantial step forward.

Accessibility

- For data registers to be useable, they need to be;
 - Accessible:** Easy to navigate, capable of being understood and with good structure. Taxonomy or categorisations must make sense along with definitions.
 - Searchable:** Capable of examination using standard terms, to find and discover the content sought.
 - Highly transparent:** Data that is clearly described and readily understood. Easily accessed with clear description of data and it's composition.
- **Definitions:** Need to be standardised and easy to understand.

ADMA recommends:

- The adoption of a standard protocol to sit within each individual government department. This will ensure that the relative data expertise stays close to the source.
- There be clarity around who has responsibility to administer the governing standards. The ADMA Code provides a good framework for this.



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b. Availability of Datasets

Draft recommendation 7.3 The Productivity Commission recommends that minimally processed public sector datasets should be made freely available or priced at marginal cost of release.

ADMA agrees with and welcomes the release of minimally processed non-sensitive data and that it should be freely available. This would put Australia with equal footing to other international jurisdictions and help drive innovation and the economy.

For datasets to be usable, the following needs to be considered:

- **Data quality:** where datasets are made available, there needs to be transparency around the data quality. This requires either that:
 - (i) There is a description of the data quality that covers the dimensions of data consistency, timeliness, accuracy, validity, completeness and uniqueness of data.
 - (ii) That there is a data quality standard that is promoted and adhered to.
- **Taxonomy:** there would need to be a standard taxonomy or classification to ensure data is searchable, along with clarity on who would take on responsibility for administering the standards. It is not preferable that responsibility for this categorisation lies solely with the National Data Custodian, as it will likely be overwhelmed with applications would be expected to cause unacceptable delays.

Greater access needs to be approached in the right way to ensure that the framework adopted encourages Australian businesses to utilise data sources to drive innovation by providing ease of access to quality data held by the government.

It is important that any framework put in place does not introduce unnecessary red tape and bottlenecks that render the system ineffective.

ADMA would work with the relevant authorities to work through the options.

c. National Interest Datasets (NID)

Draft recommendation 9.4 The Productivity Commission recommends that the Australian Government, in consultation with state and territory governments, establish process whereby public and private datasets may be nominated and designated as National Interest Datasets (NIDs).

The concerns relating to private datasets is dealt with below under section 3a as this has broader implications for the private sector (see below).

In relation to NID's, it would be beneficial if there was a principles framework to provide better clarity around the intended process for determining whether a dataset may be considered to be in the 'national interest'.



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3. PRIVATE SECTOR IMPLICATIONS

a. National Interest Datasets:

Draft recommendation 9.4 The Productivity Commission recommends that private datasets may be nominated and designated as National Interest Datasets (NIDs).

Private sector datasets are a key asset of organisations. The availability of certain data sets provides significant competitive advantage and a value to the business.

Further, it would be beneficial if there was more clarity on what constitutes information that is 'in the national interest'. A principles based framework would be ideal.

The impacts of the very concerning issue of private data being deemed as 'public interest' are problematic.

- ADMA objects to the suggestion that governments simply declare a private data as a NID and thereby require it be made available without agreement or recompense. We note, at page 356 of the Report, the Commission is alive to this issue.
- There is currently no limitation on to whom data is made available.

ADMA recommends:

- A principles based framework be introduced to define the terms "in the national interest" and "public interest".
- Access to Private Sector data only be voluntary, subject to the appropriate legal and commercial terms and not as a mandatory or legislated requirement.
- That statutory reporting requirements not be treated as NIDs
- That access be provided on a permitted purpose basis
- That where the company agrees to share its dataset, recompense should be given.

b. Government contracts:

Draft recommendation 4.2 The Productivity Commission recommends that all Australian governments entering into contracts with the private sector, which involve the creation of datasets in the course of delivering public services, should assess the strategic significance and public interest value of the data prior to contracting. Where data is assessed to be valuable, governments should retain the right to access or purchase that data in machine readable form and apply any analysis that is within the public interest.

ADMA is concerned about the provision of rights of access for government to commercial enterprise data post-contract. This may discourage organisations from participating in the tender process and working with government. This has the opposite effect to the intention of the review.

ADMA recommends:

- That the arrangements for ongoing access to the data be treated as a commercial arrangement to be determined by the parties under contract.



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c. De-identification/ Re-identification:

Draft recommendation 5.1 The Productivity recommends that, in conjunction with the Australian Bureau of Statistics and other agencies with data de-identification expertise, the Office of the Australian Information Commissioner should develop and publish practical guidance on best practice de-identification processes.

ADMA recommends:

- ADMA strongly recommends against trying to regulate a process of de-identification. It is too restrictive and unsustainable. The process by which data can be re-identified will change as it becomes increasingly easy to marry disparate datasets. The focus should be on the use of re-identified data, ensuring it is used for appropriate purposes and with proper transparency. A set of guidelines or best practice steps may be of use. ADMA would be happy to assist in the development of these guidelines.
- ADMA strongly recommends that these guidelines be developed by industry as self-regulation to allow for a sensible and flexible approach.
- ADMA has created a specific De-identification/Re-identification Board Advisory Group.

d. Data Sharing:

The ability to share data, in both the public and private sectors, is important to foster innovation and economic growth. However, this is a complex subject area that requires appropriate consideration prior to standards and/or restrictions being put into place.

The Report found that there was public sector reluctance to share data across agencies due to a culture of risk aversion and policy issues.

ADMA strongly supports the Commission's draft recommendation 9.2 that data sharing between firms in the private sector be self-regulated.

ADMA submits that this approach will:

- Be driven by industry standards and enforcement;
- Allow detailed consideration of the issues and
- Promote the development of sensible benchmarks that will benefit both business and consumers through competition to moderate compliance.

ADMA recommends:

- The adoption of a self-regulatory Code of Practice. The Code would allow for corporate agility and flexibility to ensure organisations operate under robust data governance standards. This is vital for business to have clear guidelines and for consumers to have in-built protections.

4. INCREASED RIGHTS FOR CONSUMERS – THE COMPREHENSIVE RIGHT

Draft Recommendation 9.2 The Productivity Commission recommends that Individuals should have a Comprehensive Right to access digitally held data about themselves. This access right would give the individual a right to:

- Continuing shared access with the data holder
- Access the data provided directly by the individual, collected in the course of other actions (and including administrative datasets), or created by others, for example through re-identification
- Request edits or corrections for reasons of accuracy
- Be informed about the intention to disclose or sell data about them to third parties
- Appeal automated decisions
- Direct data holders to copy data in machine-readable form, either to the individual or to a nominated third party.

ADMA considers that there are benefits to reviewing consumer protections required around collection and use of data. In principle, some of the increased rights for consumers around data access and transparency as related to 'personal data' are already outlined in the Privacy Act.

Some examples of the implications are:

- a. Challenges arise when combining the new increased consumer rights with the proposed definition of consumer data, in particular;
 - **Access to data:** This is a challenge where the individual is not identifiable in the relevant dataset.
 - **Third party disclosure of data:** The requirement to inform or notify the individual if data is going to be shared is impossible where the individual is not identifiable in the relevant dataset. For example, given the sheer volume of data moved by social media channels, the requirement to inform individuals about third party disclosure could result in endless notifications which is impractical and will diminish business productivity.
 - **Derived data:** Its proposed to also provide consumers access to derived data (i.e. insight data). This is a serious issue as 'derived data' is a construct of a business, an amalgamation of data sources, insights, analysis and importantly, significant investment by business.
- b. What is meant by the continued 'shared access' is currently unclear. The Productivity Commission, during a recent enquiry, suggested that this would provide individuals the ability to transfer data between commercial entities. It is important for the Productivity Commission to understand that organisations invest heavily in their data as a means of providing both customer insight - to be more relevant and to create a competitive edge. Undermining this by allowing an individual to trade data with a third party for commercial purposes will have a substantial impact on business, its willingness to invest in data and the innovative nature of organisations in driving insights for consumer benefit.



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ADMA recommends:

- That the definition of Consumer Data be reconsidered given the breadth of the new Right and the potential ability for third parties to access proprietary insights and analysis as the outputs of significant data investment by companies.
- Further consultation be undertaken to truly understand the implications of extending consumer rights into the new data areas.
- That specific scenario testing be undertaken to understand how the Comprehensive Right would apply in practice to identify:
 - (i) Whether the Comprehensive Right actually works in practice,
 - (ii) Unintended consequences for consumers and business; and
 - (iii) Whether such right would be future proof.
- That government proceed carefully to ensure that business is not hamstrung by the costs and time issues of compliance.

5. ENFORCEMENT

ADMA asserts that any enforcement regime needs to strike a balance between the need for oversight, the ability to enforce the law and ensuring that both consumers and business remain protected.

a. National Data Custodian

Draft recommendation 9.5 The Productivity Commission recommends that the Australian Government should establish an Office of the National Data Custodian, as a new function within the Government to have overall responsibility for the implementation of data management policy.

With the establishment of the NDC, ADMA is keen to ensure that the Government avoids a 'clearance house' approach will likely lead to a bottleneck.

This has been the position in Canada, which resulted in very little data access due to both government departments and organisations being deterred by the length of time and red tape applied in trying to access data.

b. Trusted users

Draft recommendation 9.7 The Productivity Commission recommends that trusted users should be accredited by the National Data Custodian for access to those National Interest Datasets (NIDs) that are not publicly released.

ADMA supports this proposition and considers it is a sensible approach. However, more clarity is required around the process for determining a trusted user and where responsibility lies for ensuring that trusted users adhere to the standards imposed upon them.

c. Existing regulators

There is a lack of clarity around the role that each regulator - ACCC, OAIC, ASIC - would play. Certainty is paramount for business, therefore removing any ambiguity and providing clarity on the scope of each regulator within a data governance legal framework is vital.

6. CONCLUSION

Government must adopt a data framework that promotes innovation. One that does not make compliance an excessively onerous and costly exercise for business and something that ultimately consumers will be forced to fund.

Summary:

The opportunity is here for the introduction of positive regulatory landscape that understands the need for business to use and move data to create an innovation-positive environment, that leads to economic growth and ultimately benefits for consumers.

ADMA strongly supports the increased availability of certain datasets. However, care must be taken to ensure the positive impact and not introduce undue and unnecessary restrictions on business.

ADMA is committed to its leadership of data-driven business through its support for innovation and the need for frameworks that lead to clear guidelines and an enforceable Code of Practice. Bringing change that adds value will enable Australian businesses to compete on a global scale, create jobs and grow the economy.

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