12 December 2016

Mr Peter Harris
Presiding Commissioner
Productivity Commission
Level 2, 15 Moore Street
Canberra ACT 2600

RE: Draft Report *Data Availability and Use*

Dear Commissioner,

Communications Alliance and the Australian Mobile Telecommunications Association (AMTA) (Associations) welcome the opportunity to provide a submission to the Productivity Commission (Commission) Draft Report *Data Availability and Use*.

The Associations welcome the Inquiry and the Draft Report as an important step in the process of transforming Australia's economy and to better seize the opportunities afforded by the digital age. Overall, the Associations are broadly supportive of the Commission's Draft Report and the over-arching aim to increase the availability and use of data in Australia.

However, we would like to make the following observations for consideration by the Commission in its Inquiry and development of the Final Report and any associated recommendations:

Definition of Consumer Data:

The approach taken by the Commission centres around the introduction of a new definition of Consumer Data (Recommendation 9.1). This definition commences with Personal Information as defined in the *Privacy Act 1988* but it appears that the definition of Consumer Data will be somewhat broader.

Whilst adopting the definition of Personal Information in the *Privacy Act 1988* is sensible in some regards, there is uncertainty around this definition as evidenced by the case currently before the Full Federal Court: *Telstra v Australian Information Commissioner* (the 'Ben Grubb case'). A clear and robust definition of Consumer Data will be pivotal to reforming data availability and increasing the rights of consumers. The lack of a clear definition will lead to undue costs being imposed on the telecommunications industry who will be forced to second-guess the information intended to be captured by the definition. Any uncertainty would also be likely to cause confusion and, ultimately, result in a lack of trust by consumers.

Therefore, it is imperative that the threshold as to where network, systems and device information moves from being information about a 'reasonably identifiable' individual to de-identified information is clear and practical. Whether or not the *Privacy Act 1988* can provide clarity in a practical way remains to be seen, and as such caution is required in linking the proposed Comprehensive Right to the definition of Personal Information in the *Privacy Act 1988*.

This issue is especially pertinent for communications providers as consumer use is continually interfacing with network architectures. The Associations contend that data generated in the course of network and traffic management and operations and data about the use of devices

in the course of the provision of a telecommunications service is proprietary information – and of no practical use to a consumer – and must not be confused with core 'transactional' data which is more likely to be of primary value to consumers under the broad reforms proposed. The cost of complying with future requirements to allow consumers to access and request transfer of their data, inclusive of this type of data, would outweigh the benefits foreseen by the Commission (such as facilitating competition and reducing barriers to market entry), given the benefits will mostly be achieved through transfer of 'transactional' data. It should also be noted that establishing the identity of the person requesting access or transfer may already pose substantial challenges. Consequently, this data ought to sit outside the definition of Consumer Data.

Further, whilst the Commission's Draft Report advises that the proposed *Data Sharing and Release Act* would only apply to digital data[1], the definition of Consumer Data would appear to also encompass non-digital data sources given the envisaged definition references the inclusion of the definition of Personal Data as per the *Privacy Act 1988,* which does not limit Personal Data to digital data. This must be taken into consideration in the drafting of the definition to avoid unintended consequences.

Transformation of Consumer Data:

The envisaged definition of Consumer Data as per Recommendation 9.1 excludes data transformed "to a significant extent, such that it is demonstrably not able to be re-identified as being related to an individual".[2]

This definition is very open-ended and lacking a time dimension. The issue of de-identification is a complicated one and there is, at present, no settled consensus on what successful de-identification entails. Given the incredibly fast-paced nature of technology around data analytics, encryption and cyber security in general, it is also possible that data that has been deemed unable to be re-identified today may well be re-identified tomorrow. This raises serious ongoing concerns for Australian businesses that will be bound by the legislation.

Against this background, we also note that there are multiple methods of transforming data to remove identifiable elements: de-identification, anonymisation and aggregation are all potential forms of data transformation. We are concerned that in practice there are, or will be, multiple methods of achieving each type of transformation, and strongly suggest that minimum standards be developed to guard against transformed data being linked back to a consumer.

We would also like to point out that the underlying technologies for de-identification, anonymisation etc. are highly complex and dynamic and that the Office of the Australian Information Commissioner would be required to acquire the relevant expertise in order to be able to meaningfully exercise the power to certify best practice de-identification processes as suggested by Recommendation 5.1. Other options, including other existing agencies and/or industry bodies, might provide a better avenue to achieve this objective.

Definition of data in relation to the Comprehensive Right:

The suggested definition of the Comprehensive Right appears to be entirely based on the definition of Consumer Data and, consequently, appears to use the same definition of data[3] for

[1] p. 14 Productivity Commission Draft Report *Data Availability and Use*, November 2016
[2] p. 34 Productivity Commission Draft Report *Data Availability and Use*, November 2016

each of the aspects of the Comprehensive Right, i.e. the definition of data is the same for the right to access data, request edits and be informed about disclosure as it is for the right to request the transfer of data to the consumer or a third party.

Very often data holders will add significant value to data which goes beyond mere compilation and aggregation but might fall short of the threshold of not being re-identifiable. In this scenario, the definition of Consumer Data (incl. the re-identification threshold) and use of that definition in the Comprehensive Right, including the consumer right to transfer such data to competitors, work together to create serious disincentives to innovation and value creation through proprietary data analytics and manipulation. It appears unjustified to 'appropriate' the intellectual property that a data holder might have created simply because the created value relates to an individual. It may equally create incentives to transform data so that it meets the re-identification threshold to escape the burden associated with granting access to data and, importantly, the consumer's right to transfer data.

Consequently (and also in light of the required cost-benefit analyses which we will discuss below), we request that value-added data, including network, traffic management and operations data, be excluded from the definition of Consumer Data as such data no longer constitutes transactional data.

National Interest Datasets:

Recommendation 9.4 proposes that datasets of national interest may require access to private sector data. If the private sector were to be required to provide its data in accordance with this recommendation, this should be done on a cost-recovery basis to take into account the resources required to prepare the data and provide it on an ongoing basis, including where it must be de-identified or manipulated to remove commercially sensitive details and prepare it for public consumption.

Consideration of best practice regulatory principles:

Any new regulation ought to be subject to best practice regulatory principles. In the context of the Inquiry, we believe that the key principles[4] for effective and appropriate regulation are:

1. It should serve clearly identified public policy goals, and be effective in achieving those goals;
2. It should establish rules that are clear, simple and practical for all users and that have a sound legal and empirical basis; and
3. It should produce benefits that outweigh the costs, including those imposed on industry (compliance), government (enforcement) and consumers (reduced innovation, fewer services, and higher prices).

Whilst the public policy goals for increasing the availability and use of data are reasonably articulated in the Draft Report, the other best practice principles have not received much

[3] Note that Recommendation 9.2 does not actually use the term Consumer Data. However, based on the Draft Report and Recommendation 9.1 we have assumed that the intent was to use the definition of Consumer Data throughout the concept of the Comprehensive Right.
[4] Also refer to p. 5 of the Department of Communications Policy Background Paper *Deregulation in the Communications Portfolio*, November 2013

consideration. There appears to be a particular interface between these principles and the breadth of the definition of Consumer Data and the associated rights of access and transfer. For example, is the definition of the rights clear, is the requirement for provision proportionate (i.e. can the data in question actually be used by anyone else other than the data holder) and are the overall benefits greater than the attendant costs (including regarding situations/data where the use case is unclear or non-existent)?

The Draft Report notes that "the capacity for individuals, as consumers, to copy their data between service providers is an integral part of facilitating competition in markets and reducing barriers to market entry."[5] However, if the (actual or perceived) enhancement of competition is the underlying justification or objective of the Comprehensive Right, then it is imperative to rigorously assess the costs and benefits associated with that right. Unfortunately, it appears that the Draft Report has neglected such a cost-benefit analysis.

For example, the Draft Report appears to make the assumption that the usefulness of a copy of the Consumer Data (which can range between 'of no use to the individual at all' to 'extremely useful to the individual') overall outweighs the attendant costs for data holders for making the data available in the required format and timeframes, for Government enforcement of compliance and dispute settlement, and for consumers themselves through potential loss of innovation or reduced service offerings and competition.

In this context, we also note that the costs and benefits of the Comprehensive Right may vary considerably across different industries and, therefore, ought to be assessed accordingly rather than using a rather 'crude' economy-wide approach. These costs, and the effect of such costs, will also vary depending on the size of the organisation that holds the data. In particular, small businesses and start-ups might find the costs of compliance prohibitive.

We note that generally speaking, it is fair to assume that the costs of transfer would be substantial, and are likely to be huge or even prohibitive should API-based availability be mandated.

Telecommunications Act 1997:

Part 13, section 276, of the *Telecommunications Act 1997* prohibits the disclosure or use of any telecommunications information. In the context of the Draft Report, Part 13 affords very limited or almost no scope for the use of telecommunications data as envisaged by the Commission. (Note that it also places the burden of proof on any person or entity releasing information to demonstrate that the release was authorised under Part 13 and jail terms for unauthorised releases apply.) Consequently, Part 13 of the *Telecommunications Act 1997* and potentially other telecommunications-specific legislation would need to be amended considerably to accommodate the concept of the Comprehensive Right as envisaged by the Commission.

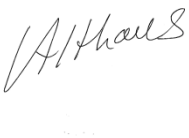
We note also that given the current obligations in the *Privacy Act 1988*, the effect of the Data Retention Regime in defining most metadata as Personal Information and, therefore, subject to the *Privacy Act 1988*, combined with the obligations in the *Telecommunications Interception and Access Act 1979* in relation to interception and access to stored communications, it appears that Part 13 duplicates a number of obligations (noting that some functions in Part 13, e.g. regarding reporting, are not duplicated). In light of the Draft Report, it might be timely to revisit the need for Part 13 of the *Telecommunications Act 1997*.

[5] p. 348 Productivity Commission Draft Report *Data Availability and Use*, November 2016

We look forward to further engaging with the Commission on this important matter.

Please contact Christiane Gillespie-Jones at c.gillespiejones@commsalliance.com.au or ourselves if you have questions in relation to this submission.

Yours sincerely,



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