



Submission to

Productivity Commission

Subject

Data Availability & Use

Draft Report

Date

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1. Introduction

The Interactive Games and Entertainment Association (**IGEA**) welcomes the opportunity to respond to the “Data Availability & Use” Inquiry (the **Inquiry**) being undertaken by the Productivity Commission (the **Commission**). In our submission, we provide an overview of IGEA and the video games industry in Australia, followed by specific responses to **Draft Recommendations 9.1 and 9.2** of the Draft Report.

2. Executive Summary

By way of executive summary, IGEA is of the view that:

1. Updated definition of Consumer Data (Draft Recommendation 9.1)

- a. If a Comprehensive Right over consumer data were introduced, a clear and easy to apply definition should be introduced into the *Acts Interpretation Act 1901* (Cth).
- b. The Commission should consider the full ramifications of extending the definition of “consumer data” to all files posted online by consumers and all data derived from consumers’ internet-connected activity. Examples in the games industry to keep in mind including user-generated content (**UGC**) and gameplay data as described below.

2. Comprehensive Right to Data (Draft Recommendation 9.2)

- a. The Commission should consider how powers to access and request corrections of data would operate on a practical level with the Commission’s broad notion of “consumer data”, especially including UGC and gameplay data.
- b. The Commission should clarify whether the right to opt out of a data collection process would exclude data that is transformed to a significant extent, such that it is demonstrably not able to be re-identified as being related to an individual.
- c. There should be exceptions in place to temper the operation of a right for individuals to opt out of a data collection process, but the Commission needs to clarify how it believes such exceptions should be framed. Clarity also needs to be provided on the “necessary for continued delivery of a product or service to the individual” exception.
- d. The Commission should ask itself how a power to allow consumers to request that data about themselves be copied to other data holders would practically operate in the games industry, especially with regards to UGC and gameplay data that is usually unusable outside of the specific game in which it was generated.

3. About IGEA

IGEA is the industry association representing the business and public policy interests of Australian and New Zealand companies in the interactive games industry. IGEA's members publish, market, develop and/or distribute interactive games and entertainment content and related hardware. The following list represents IGEA's current members:

- 18point2
- Activision Blizzard
- All Interactive Distribution
- Big Ant Studios
- Disney Interactive Studios
- Electronic Arts
- Five Star Games
- Fiveight
- Gamewizz Digital Entertainment
- Mindscape Asia Pacific
- Namco Bandai Entertainment
- Google
- Microsoft
- Nintendo
- Sony Computer Entertainment
- Take 2 Interactive
- Total Interactive
- Ubisoft
- VR Distribution
- Well Placed Cactus
- ZeniMax Australia

4. Overview of the Interactive Games Industry

By way of overview, and in order to demonstrate the levels of engagement with interactive games by the Australian population, we would first like to highlight the results of IGEA's Digital Australia 2016 Report (**DA16 Report**) released on 28 July 2015.¹ In particular, the Report found that:

- 98 percent of Australian homes with children under the age of 18 have a device for playing interactive games
- 68 percent of Australians play interactive games, with 78 percent of the game playing population aged 18 years or older
- Older Australians continue to make up the largest group of new players over the past four years. Australians aged 50 and over now make up 23 percent of the interactive game playing population - increasing their essential digital literacy for the digital economy
- The average age of those engaged in Australian interactive games has increased from 32 to 33 years old since 2013 and nearly half (47 percent) of this population is female

¹ IGEA, *Digital Australia Report 2016* (28 July 2015) <<http://www.igea.net/wp-content/uploads/2015/07/Digital-Australia-2016-DA16-Final.pdf>> [accessed 15 January 2016].

- As part of the normal media usage, the daily average time spent playing interactive games by Australians is 88 minutes
- 27 percent of players have tried making interactive games using software and 9 percent have studied or plan to study interactive games subjects

The DA16 Report also states that digital software sales in Australia's game market reached AU\$1.589 billion in 2015 (up by 27% compared to 2014), with physical software sales generating only \$579 million in 2015. Accordingly, digital software sales of games made up 73% of total software sales in Australia in 2015. Consumers are increasingly turning to digital goods as their preferred medium of purchase, particularly due to the relative ease of purchasing, accessing and enjoying such content.

For further Australian video game market data in 2015, including additional data from IGEA's DA16 Report, please refer to **Appendix A** of this submission.

5. Framework for Australia’s Data Future

“[This is] the Commission’s recommended approach to improving the availability and use of public and private sector data in Australia”

IGEA would like to respond to the Commission’s recommended approach for improving the availability and use of public and private sector data in Australia, although our focus will be on private sector data as regulatory change in this space is the most relevant to our members. The following sections will focus on responding to **Draft Recommendations 9.1 and 9.2**, which sit under the first element of the Commission’s recommended approach (i.e. “Giving individuals power in data held on them”).

Updated Definition of “Consumer Data” (Draft Recommendation 9.1)

DRAFT RECOMMENDATION 9.1

The Australian Government should introduce a 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

Data that is transformed to a significant extent, such that it is demonstrably not able to be re-identified as being related to an individual, should not, for the purposes of defining and implementing any Comprehensive Right, be defined as consumer data.

The definition of ‘consumer data’ should be provided as part of a new Act regarding data sharing and release (Draft Recommendation 9.11). Given the need for this definition to have broad applicability, it should also be included within the Acts Interpretation Act 1901 (Cth). Consequential amendments to other Commonwealth legislation would ensure harmonisation across federal laws.

IGEA agrees with the Productivity Commission that, if a Comprehensive Right over consumer data were to be introduced, a very clear and easy to apply definition of “consumer data” must be enacted. Enacting any such Comprehensive Right would likely involve a fundamental shift in the way most businesses handle consumer data and personal information, so it is imperative that the concept of consumer data is crystal clear and that steps are taken to help ensure businesses are not so easily confused as to what the phrase means in practice. IGEA also agrees with the Commission’s recommendation (again, if a Comprehensive Right over consumer data were to be enacted) to introduce the definition of consumer data into the *Acts Interpretation Act 1901* (Cth). This would help

ensure wide and, more importantly, consistent application across all Acts and legislative instruments in Australia. It serves no practical purpose to have a phrase attracting drastically different meanings across various industries and pieces of legislation.

Focusing on the specific definition of consumer data as crafted by the Commission in its Draft Report, IGEA would first look to the Commission to very succinctly clarify what it intends the phrase “all files posted online by the consumer” to mean. Including this form of data into the definition of “consumer data” could be a very a slippery slope when it comes to the video games industry, as it would extend to all forms of “user generated content” (UGC). For example, most video game consoles allow users to “share” screenshots or video clips of their gameplay online with others, via platforms such as Twitter, Twitch and/or YouTube. This would mean that footage of a video game, the copyright of which (in most instances) resides in the publisher or developer of the game, would suddenly now be considered as “consumer data” under the purview of the Comprehensive Right to access. It is appreciated that the Commission’s recommendations do not extend to any form of ownership over such data, but nevertheless this is something IGEA would like the Commission to keep in mind.

The concept of UGC in the games industry is also much broader than simply the sharing of gameplay videos. There are many different forms of UGC, all of which the Commission needs to keep in mind when recommending that the definition of “consumer” data extends to all files posted online by a consumer. To provide a few examples, the games industry consists of large groups of players that like to create and use external modifications or “mods” for various games. Mods are typically uploaded to the internet, either to computers or to game consoles themselves (i.e. Xbox One and PlayStation 4), for other players online to download and enjoy. Mods can range from new items or weapons added to a game, changes to video game graphics or “textures”, music, audio, characters, quests, and many other kinds of files. There are also titles that incorporate elements of UGC within the game itself (i.e. with no need to add external files or assets), by allowing players to create and share their own playable content with other players online. Examples of such games include *LittleBigPlanet*, *Super Mario Maker*, and *Minecraft*. UGC in this sense can vary drastically, extending to player created levels, characters, items, multiplayer maps and gameplay mechanics. Importantly, in the majority of cases, most mods and UGC as described above are completely useless or unusable outside of the game they were created for. Accordingly, incorporating these kinds of UGC into the Comprehensive Right to access data could be tricky, and perhaps at times practically impossible, to comply with in practice.

Similar worries also arise when considering the aspect of the Commission’s consumer data definition referring to “all data resulting from the use of the consumer’s...Internet-connected activity”. This is a

very broad concept. The vast majority of game-consoles have online capabilities built into them, and most games themselves also require a connection to the internet in some sort of capacity, even for games that are only single player games that do not feature any form of “multiplayer” component, whereby gamers can play with or against each other online. As a result, this definition would extend to any data that may be obtained from consumers simply playing a video game, which may loosely be described as “**gameplay data**”. Gameplay data is usually anonymised and can be collected to gauge in-game activity, how users play a game, behaviours and preferences, player statistics (i.e. leaderboard stats, hours played, high scores, quests completed, enemies killed, etc.), weapons or items used, preferred game difficulties, services or modes used, and many other aspects.

Generally, this style of gameplay data is either anonymous or unusable outside of the gaming context, and is frequently used by developers and other related companies to improve content for users, enhance game player engagement and increase player retention. Often this data can also help developers determine the existence of bugs or glitches in a game. To provide examples, if a developer detects that many players are obtaining an unusual amount of experience points in a certain area of a game, this may indicate the existence of a bug or glitch that should be removed or corrected by a patch. Additionally, if data indicates that many players stop playing a game all-together at a certain level or stage, this may suggest to a developer that the game’s difficulty is too high at this point, thereby warranting an adjustment via an update. Most internet-connectivity related data that is collected in the games industry is used to benefit the experience of gamers’. Incorporating this kind of data into the Comprehensive Right would be technically challenging and likely entail heavy compliance obligations and costs.

IGEA simply asks the Commission to keep in mind the above realities when revisiting the definition of consumer data for its final report. It is appreciated that the Commission has recognised the definition will need to take account of the extent of data transformation, whereby data is transformed by the holders of data to the point where it is no longer classifiable as consumer data. IGEA agrees with this, and again refers to the abovementioned concepts of UGC and internet-connectivity related data (such as gameplay data) as potential examples of such data transformation. In the Commission’s own words, these would likely be “instances where data is transformed to a point where it is no longer able to be re-identified as being about an individual within the entity’s systems, [and therefore] it should no longer be classifiable for the purposes of a Comprehensive Right as ‘consumer data’”.

Comprehensive Right to Data (Draft Recommendation 9.2)

DRAFT RECOMMENDATION 9.2

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.

Individuals should also have the right, at any time, to opt out of a data collection process, subject to a number of exceptions. Exceptions would include data collected or used as:

- a condition of continued delivery of a product or service to the individual
- necessary to satisfy legal obligations or legal claims
- necessary for a specific public interest purpose (including archival)
- part of a National Interest Dataset (as defined in Draft Recommendation 9.4).

The right to cease collection would not give individuals the capacity to prevent use of data collected on the individual up to the point of such cessation.

Access and edit powers

As noted by the Commission, the *Privacy Act 1988* (Cth) (**Privacy Act**) already provides consumers with the power to access data about themselves held by businesses.² This power is contained within Australian Privacy Principle 12,³ which states “If an APP entity [including a body corporate] holds personal information about an individual, the entity must, on request by the individual, give the individual access to the information”. Australian Privacy Principle 13 then provides individuals with the power to request edits to personal information.

However, IGEA notes that the abovementioned rights only extend to “personal information”, as defined by the Privacy Act, which means “information or an opinion about an identified individual, or

² Productivity Commission, above n 12, page 347.

³ *Privacy Act 1988* (Cth) sch 1.

an individual who is reasonably identifiable”.⁴ On the other hand, the Commission’s proposed “Comprehensive Right”, which will include similarly phrased access and correction powers, would extend to much more than simply “personal information”. The intention seems to be to extend these powers of access and correction to the Commission’s new definition of “consumer data”. This would consequently include all files posted online by a consumer, all data derived from a consumer’s online transactions or internet-connected activity, and other data associated with transactions or activity that is relevant to the transfer of data to a nominated third party, *in addition* to a consumer’s personal information. Therefore, the Commission’s statement that this recommendation “neither reduces nor increases existing access and correction powers” does not seem to be accurate. While the access and correction powers would operate in a similar way, they would extend to much more types of data than what is currently the case.

IGEA accordingly asks the Commission to consider how these new powers would operate on a practical level with the broader notion of “consumer data”, particularly including the concepts of UGC and gameplay data as described above. In the video games industry, this data collected is essential and typically inseparable from many of the updates performed on games. This data would predominantly be of no use for consumers outside of the specific game context in which the data is generated. Providing access to this data will likely involve considerable technical challenges and may in fact be infeasible to implement. It is easily argued that by heavily diverting developer resources to comply with any such data access and correction powers, great detriment would be caused to innovation. Additionally, the support of current titles and the development of new games may also be undermined, and therefore, on balance, this approach may be more detrimental to consumers and unfairly burden developers of games. Accordingly, IGEA encourages the Commission to give greater thought and provide much more clarity on these areas in its Final Report.

The Commission has also recommended the introduction of a right for consumers to be informed of disclosure of data by a data holder to third parties. It is unclear if the Commission’s intention is to require businesses to inform consumers individually when their data is disclosed to third parties, or if this obligation is able to be satisfied by businesses including notices within their Terms and Conditions or via other means (i.e. websites). Additionally, would notification be required for every single new instance of data disclosure to a third party or would one general notice be adequate? Given the broadly

⁴ Ibid s 6.

worded nature of the right, there may need to be safeguards or counter-acting balances in place to ensure businesses aren't levied with overly onerous levels of compliance and regulatory burden.

Right to stop collection

IGEA agrees that any right to stop data collection should not include the option to have historical data deleted or use of it cease, as this would likely be very costly, impractical and perhaps impossible for some businesses to comply with, particularly for those who have heavily relied on the use and analysis of data in the past. In the games industry, information or data on past activity is frequently used to inform future activity, whether it be contributing to the development of a new video game or enhancing current game-related services (i.e. online multiplayer services, selling/distribution platforms, etc.). Any retrospective right to opt out of data collection may undermine the usefulness of back catalogues of data that are used to help improve future products and services.

However, IGEA asks the Commission to clarify whether the right to opt out of a data collection process would, similarly to the definition of "consumer data", exclude data that is transformed to a significant extent, such that it is demonstrably not able to be re-identified as being related to an individual. While IGEA assumes this is the case, draft recommendation 9.2 does not appear to reemphasise any such exception, but rather simply refers to "opt[ing] out of a data collection process". As described above, a lot of data collected in the games industry is anonymous and used to improve gaming experiences for users. Even though it would likely be the case that the collection of such data would be "necessary for [the] continued delivery of a product or service to the individual", and therefore captured by one of the exceptions to the rule proposed by the Commission, for the sake of clarity IGEA believes it is important for businesses to be provided with much more clarity about whether it is intended for the proposed right to stop data collection to take into account the extent of data transformation.

Relatedly, IGEA agrees that there should be several exceptions in place to temper the operation of a right for individuals to opt out of a collection process, but also asks the Commission to clarify how it believes any such exceptions should be framed within legislation. Would the exceptions be open-ended or isolated to a few specific situations? There may be a risk that the exceptions currently recommended by the Commission are not wide enough to manage the likely impact on businesses and how they manage data. In addition, what is exactly meant by the phrase "necessary for continued delivery of a product or service to the individual"? Would this exception only extend to circumstances in which the collection of data is absolutely necessary for the product or service to be offered in the first place? Or would it also extend to circumstances where data collection, while not strictly

necessary, plays a fundamental role in being able to improve the experience of consumers and offer a much better overall product or service? For example, with video games, data can be collected from players to help inform future updates or patches, enhance content and ongoing “live” services, and even improve the development of other video games by the developer. While such data collection may not be “necessary” in the sense that it is unconditionally required for a game to be functionally playable (although sometimes that may be the case) or for a game-service to be offered in the first place, it may indeed be considered as necessary to provide gamers the best possible products, services and overall experience. IGEA thus encourages the Commission to offer a more in-depth explanation as to how its proposed exceptions to the right to opt out of data collection would operate in practice.

Data Transfer

The Commission’s recommendation to empower individuals to request that data about themselves be copied from one data holder to another is perplexing, at least with regards to the games industry. Bearing in mind that the Commission believes all businesses should be subject to these new data transfer requirements, IGEA is unsure what practical use such a power would have for consumers purchasing games. The Commission recommends that requested data should be copied in a machine-readable form, such as a text file or numerical data. But how would this obligation operate practically with the concepts of UGC and gameplay data as described above? What use would consumers have in being able to obtain a text or numeric file version of their gameplay video clips or screenshots, in-game player generated content, in-game activity, player statistics and other related data?

The Commission speaks of the right enabling consumers to copy their data between service providers as an integral part of facilitating competition, but to reiterate the point, most of this UGC and gameplay data will be of absolutely no use for the consumer outside of the specific game context in which it was generated. This kind of data can only really be used by game developers to detect bugs, create updates, and improve content and experiences for users. Returning such data collected in games would involve considerable technical challenges and entail meticulously tracking and logging every single player’s action, likely for little-to-no consumer benefit. There is then the question of why consumers would ever find the need to transfer such data to other identified service providers. This does not seem like a power that game players would ever want to exercise, yet businesses would be required to prepare for the potential to so comply. IGEA therefore asks the Commission to consider how a power to direct data holders to copy data in machine-readable form would practically work with this kind of data in the games industry, let alone to think of the specific benefit that this power would afford to game consumers.

6. Conclusion

IGEA would like to thank the Productivity Commission for the opportunity to respond to its Draft Report for the Data Availability and Use Inquiry. We hope that this submission has been useful and look forward to all opportunities in the future to provide further comments on the regulation of privacy and data in Australia.

APPENDIX A – AUSTRALIAN MARKET DATA

The IGEA's commissioned research from NPD Group Australia showed that, in 2015:⁵

- Video games industry growth has been led by the console sector, with current generation (Microsoft Xbox One, Nintendo Wii U and Sony PlayStation 4) consoles increasing in sales volume compared to 2014 by 9 per cent
- Console software was the best performing category, experiencing 13 per cent growth in revenue over last year
- Strong platform sales had a flow on effect to other areas, as the console accessories market grew in value by 12.2 per cent over 2014 data
- Over half (59 per cent) of game units sold were classified as G, PG or M

Further industry key highlights by independent research firm Telsyte evidenced:⁶

- Digital is now greater than half of the total games market, accounting for 56 per cent of sales
- Digital extras, which include season passes, map packs and game expansions, boomed with 53 per cent growth in 2015
- Games publishers are increasingly adopting the in-game purchase business model which is greatly contributing to the growth of digital extras market
- Physical products in the games market remain important with consumers indicating a preference for physical copies when purchasing as a gift or as a collectable or where there might be technical limitations such as download speeds or data caps

⁵ Research based on The NPD Group Australia, Time period 2014 and 2015 calendar year, and Telsyte, cited at IGEA, "Australian video game industry strides towards \$3 billion", *Media Release*, 2 March 2016, at <http://www.igea.net/2016/03/australian-video-game-industry-strides-towards-3-billion/> (accessed 2 March 2016).

⁶ Ibid.



AUSTRALIA
**TOTAL
INDUSTRY
VALUE**
UP 15%
**\$2.832
BILLION**

**TRADITIONAL
RETAIL**
NPD DATA*
UP 2%
**\$1.243
BILLION**

**DIGITAL
SALES**
TELSYTE DIGITAL
MARKET MONITOR**
UP 27%
**\$1.589
BILLION**

CONSOLE SOFTWARE UP 13%
**\$579
MILLION**



**CURRENT GEN
HARDWARE** UP
**9%
UNITS**



**CONSOLE
ACCESSORIES** UP 12%
**\$166
MILLION**



MOBILE UP 24%
**\$870
MILLION**



**DIGITAL
DOWNLOADS** UP 33%
**\$603
MILLION**



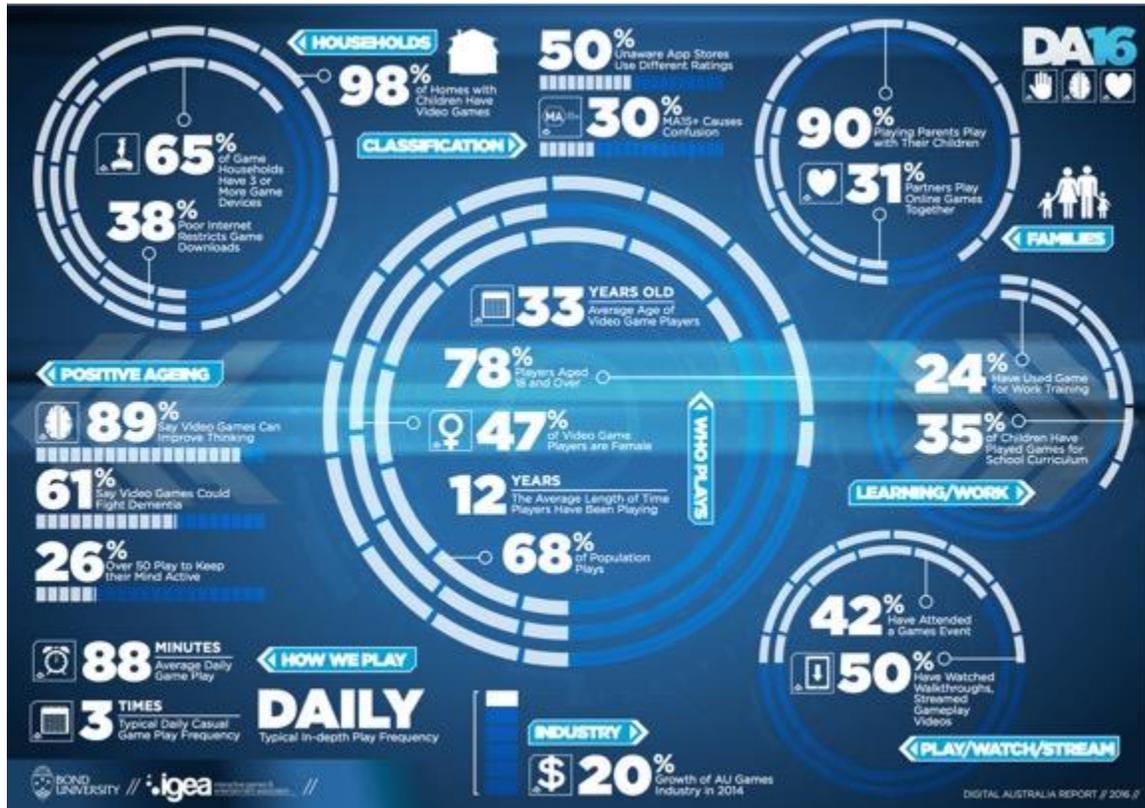
SUBSCRIPTIONS UP 29%
**\$116
MILLION**



npd Telsyte
Igea commissioned research from:
*The NPD Group Australia
Time period: January 5 2014 - January 6 2015

**Telsyte - Igea Digital Market Monitor, Q1 - Q4 2014

Key Findings: Digital Australia 2016



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// Key Findings //

Games Households

- 98% of homes with children have computer games.
- 65% of game households have three or more game devices.
- 38% choose not to download games due to data limits.

Who Plays

- 68% of Australians play video games.
- 47% of video game players are female.
- 33 years old is the average age of video game players.
- 78% of players are aged 18 years or older.
- 39% of those aged 65 and over play video games.
- 12 years is the average length of time adult players have been playing.

How We Play

- 88 Minutes is the average daily total of all game play.
- 10 Minutes, three times a day is typical for casual game play.
- 1 Hour, daily is typical for in-depth game play.

Why We Play

- To keep the mind active is the main reason older adults play.
- To have fun is the primary reason PC and console players play.
- To pass time is the main reason mobile players play.

Families and Play

- 90% of playing parents play with their children.
- 31% play online games with partners.
- 57% of adults are "Always present" for purchase of games for children.
- 66% are familiar with parental controls on game systems.

Classification and Media Concerns

- 30% indicate MA 15+ causes most confusion.
- 28% indicate M causes most confusion.
- 50% are unaware that app stores have different rating systems.
- 41% say ratings have "a lot of influence" on games purchased for children.

Game Play Culture

- 50% have watched walkthroughs or streamed gameplay videos.
- 42% have attended a games event.

Games and Benefits

- 89% say video games can improve thinking skills - health.
- 79% say video games can improve coordination and dexterity - health.
- 76% say video games increase mental stimulation - positive ageing.
- 61% say video games could fight dementia - positive ageing.

Learning and Work

- 24% have used video games at work for training.
- 35% say their children have used video games for school curriculum.

Game Business

- 20% is the amount of growth in the Australian game industry in 2014.

Methodology

Digital Australia 2016 (DA16) is a study of 1274 Australian households and 3398 individuals of all ages in those households. Participants were drawn randomly from the Nielsen Your Voice Panel in May 2015; research was designed and conducted at Bond University. The margin of error is ±2.7%.