



23 December 2016

Mr Peter Harris AO  
Presiding Commissioner  
Data Availability and Use  
Productivity Commission  
GPO Box 1428  
CANBERRA ACT 2601

Dear Mr Harris

The Digital Industry Group Inc (DIGI) welcomes the opportunity to make a submission into the Productivity Commission's inquiry into Data Availability and Use 2016.

DIGI comprises representatives from Google, Facebook, Twitter, Microsoft and Yahoo. DIGI members collectively provide various digital services to Australians ranging from Internet search engines and other digital communications platforms.

These services and platforms facilitate new distribution, marketing and revenue generating channels for Australian businesses and content creators. They are also driving fundamental changes to the way that business is conducted and content is created and distributed.

DIGI thanks the Commission for the opportunity to make a submission. If there are any further questions or if additional information is required, please don't hesitate to contact me.

Kind regards

Nicole Buskiewicz  
Managing Director  
DIGI

## Executive summary

- DIGI supports the government's intention to have better and increased access to data, given the significant benefits to businesses and government.
- It's important to note that it is not data itself that's inherently valuable, but the way it is analysed and used.
- DIGI members are already doing a lot to provide access to their datasets, platforms and services, as well as access to the consumer's own data.
- We are concerned that the specifics of the comprehensive right for consumers both duplicate existing provisions in Australian privacy law and also go far beyond the requirements of analogous laws in other jurisdictions
- DIGI does not believe the case has been made for fundamental reforms with respect to the digital industry; a sectoral approach targeting problem industries like health and financial services would be better targeted and avoid unnecessary additional costs and regulation on all industries.

## Background: the digital industry's commitment to data access

DIGI shares the Productivity Commission's view that access to data can benefit individuals, business, and government alike through improved operational processes and productivity. The global nature of our services means that the Australian economy and households already benefit from the innovative use of data made by our member companies.

For example:

- Facebook's Safety Check tool uses location data, with individuals' consent, to identify if people are an area impacted by a disaster and let friends and family know if they are okay. This feature has been rolled out most recently in South Australia in response to flooding on 15 September 2016; in response to flooding in Forbes New South Wales on 26 September 26, 2016; and on the 3rd, 4th and 5th of November 2016 in response to a bushfires in New South Wales. More than 65,000 Australians marked themselves as safe using this Safety Check tool and more than 100,000 friends were invited to also mark themselves as safe.
- Facebook's object recognition technology, which helps visually impaired people “see” people and objects in photos, has been rolled out globally and has been available to help visually impaired people in Australia from the date of announcement<sup>1</sup>.
- Google makes search data available to the public through the Google Trends website<sup>2</sup> which lists trending searches in real time by category and location. You can also search for specific keywords and generate graphs identifying in almost real time showing the frequency with which those keywords are being entered into Google Search. You can

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<sup>1</sup> More details: <http://newsroom.fb.com/news/2016/04/using-artificial-intelligence-to-help-blind-people-see-facebook/>

<sup>2</sup> <https://www.google.com.au/trends/>

also elect to see a mathematically calculated forecast of how Google predicts those keywords will perform in the future. Google Trends is used by journalists to research stories and by academic researchers to inform their work, for example to determine whether chickenpox outbreaks are seasonal (like the common cold and flu<sup>3</sup>).

- Google Translate<sup>4</sup> was developed by discovering similarities between an existing web page and ones that have been manually translated. By doing this over large enough sets of sample pages, we were able to develop a machine translation engine that would be used to expand our Search product to multiple languages, to enable users to translate documents or Web pages from another language to their own, and more recently to chat in real time with someone who speaks a different language.
- Microsoft Translator is a statistical machine translation system designed to automatically translate text and speech between numerous supported languages. Translator may be incorporated into other Microsoft products and services, such as Office, SharePoint, and Bing. Third parties may also incorporate Translator into their own services and offerings.
- Microsoft Cognitive Services<sup>5</sup> is a collection of application programming interfaces (APIs) that enables developers to build intelligent apps by tapping into high-quality vision, speech, language, knowledge, and search technologies developed through decades of Microsoft research, much of which leverages publicly-available information and data found online.
- Since Twitter was founded in 2006, Twitter has created and maintained an open API<sup>6</sup> allowing external developers to develop technology which rely on Twitter's data. Offering data externally allows developers to create products, platforms, and interfaces without the need to expose the raw data. The major advantage of Twitter offering an open API is to promote external innovation and helps strengthen base technology, service, and data.
- Through Fabric, Twitter's development platform, Twitter has three software development kits that developers can use within their own apps:
  - Mopub, which helps developers build native ads;
  - Crashlytics, a debugging tool to aid stability and streamlines crash reports; and
  - Twitter, a distribution tool that allows developers to take advantage of twitter sign-ins, native Tweet embeds, and includes Digits, the new phone number-based login.
- Yahoo makes large datasets available to universities to aid in their research through Yahoo's Webscope Program<sup>7</sup>. Webscope makes anonymized Yahoo datasets available to researchers who are advancing the state of knowledge and understanding in web sciences.

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<sup>3</sup> <http://abcnews.go.com/Health/researchers-google-find-chickenpox-seasons/story?id=39485440>

<sup>4</sup> <https://translate.google.com/>

<sup>5</sup> <https://www.microsoft.com/cognitive-services>

<sup>6</sup> <https://dev.twitter.com/overview/api>

<sup>7</sup> <http://webscope.sandbox.yahoo.com/>

DIGI also shares the Productivity Commission's view that consumers need to own their data and be able to access and control it. This is why all of the terms of service of our member companies expressly state that the people who use our services own their own data.

For example:

- Facebook's Terms of Service<sup>8</sup> expressly state “You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings.”
- Google's terms of service state “Some of our Services allow you to upload, submit, store, send or receive content You retain ownership of any intellectual property rights that you hold in that content. In short, what belongs to you stays yours.”
- Microsoft's Services Agreement<sup>9</sup> states “Many of our Services allow you to store or share Your Content or receive material from others. We don't claim ownership of Your Content. Your Content remains Your Content and you are responsible for it.”
- Twitter's Terms of Service<sup>10</sup> explicitly state “You retain your rights to any Content you submit, post or display on or through the Services. What's yours is yours — you own your Content (and your photos and videos are part of the Content).”
- Yahoo's Terms of Service state, “Yahoo does not claim ownership of Content you submit or make available for inclusion on the Yahoo Services.”

To empower people to exercise control of the information that they choose to share on our services, our member companies invest in building easy to use tools and in-product notifications to ensure that the people who use our services are able to make informed decisions about their data, at the point in time when they are best placed to make decisions about their data.

For example:

- On Facebook, the following are just some of the tools<sup>11</sup> available to people to manage their information:
  - Audience selector<sup>12</sup>: every time a person posts to Facebook they can select the audience for that post — public, friends or a custom audience.
  - Activity Log<sup>13</sup>: to easily review your activity on Facebook (such as the photos you share and the posts you like) and manage them
  - Ad Preferences<sup>14</sup>: a tool accessible from every ad on Facebook that explains why you're seeing a specific ad and lets you edit the interests that we use to show you ads.

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<sup>8</sup> <https://www.facebook.com/terms>

<sup>9</sup> <https://www.microsoft.com/en-us/servicesagreement/>

<sup>10</sup> <https://twitter.com/tos?lang=en>

<sup>11</sup> Further details are available in the Facebook Privacy Basics <https://www.facebook.com/about/basics/made>, a highly visual, step-by-step guide to the many privacy tools available on Facebook

<sup>12</sup> <https://www.facebook.com/about/basics/what-others-see-about-you/posts/>

<sup>13</sup> <https://www.facebook.com/help/437430672945092>

- o In-ad controls<sup>15</sup>: people can use the tools available on every ad that they see on Facebook to provide feedback about the ad and the future ads they wish to see.
- On Google, the following is a selection of controls available through the MyAccount website<sup>16</sup> which brings all of a Google user's privacy and security controls into one place:
  - o Review and update your Google activity controls<sup>17</sup> decide what types of data, such as videos that you've watched on YouTube or past searches, you would like saved with your account when you use Google services. You can also visit these controls<sup>18</sup> to manage whether certain activity is stored in a cookie or similar technology on your device when you use our services while signed out of your account.
  - o Review and control<sup>19</sup> types of information tied to your Google Account by using Google Dashboard.
  - o View and edit<sup>20</sup> preferences about the Google ads shown to you on Google and across the web, such as which categories might interest you, using Ads Settings. You can also visit that page to opt out of certain Google advertising services.
  - o Adjust<sup>21</sup> how the Profile associated with your Google Account appears to others.
  - o Control<sup>22</sup> who you share information with through your Google Account.
  - o Take information<sup>23</sup> associated with your Google Account out of many of our services.
  - o Choose<sup>24</sup> whether your Profile name and Profile photo appear in shared endorsements that appear in ads.
- On Microsoft
  - o You can view or edit your personal data online for many Microsoft products. You can also make choices about Microsoft's collection and use of your data. How you can access or control your personal data will depend on which products you use.
  - o You can always choose whether you wish to receive promotional email, SMS messages, telephone calls and postal mail from Microsoft. You can also opt out from receiving interest-based advertising from Microsoft by visiting our opt-out page<sup>25</sup>.
  - o Microsoft uses cookies (small text files placed on your device) and similar technologies to provide our websites and online services and help collect data.

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<sup>14</sup> <http://newsroom.fb.com/news/2014/06/making-ads-better-and-giving-people-more-control-over-the-ads-they-see/>

<sup>15</sup> <https://www.facebook.com/about/ads>

<sup>16</sup> <https://myaccount.google.com/?pli=1>

<sup>17</sup> <https://myaccount.google.com/privacy?hl=en-GB#accounthistoryto>

<sup>18</sup> <https://myaccount.google.com/privacy?hl=en-GB#toolsyoucanusenow>

<sup>19</sup> <https://www.google.com/dashboard/?hl=en-GBcertain>

<sup>20</sup> <https://www.google.com/settings/ads/preferences?hl=en-GByour>

<sup>21</sup> <https://support.google.com/plus/answer/1355890?hl=en-GB>

<sup>22</sup> <https://support.google.com/plus/bin/static.py?hl=en-GB&page=guide.cs&guide=1257347>

<sup>23</sup> <https://www.dataliberation.org>

<sup>24</sup> <https://plus.google.com/settings/endorsements?hl=en-GB>

<sup>25</sup> <http://choice.microsoft.com/en-us/opt-out>

Cookies allow us, among other things, to store your preferences and settings; enable you to sign-in; provide interest-based advertising; combat fraud; and analyze how our websites and online services are performing. Microsoft apps use other identifiers, such as the advertising ID in Windows, for similar purposes.

- o You have a variety of tools to control cookies, web beacons and similar technologies, including browser controls to block and delete cookies and controls from some third-party analytics service providers to opt out of data collection through web beacons. Your browser and other choices may impact your experiences with our products.
- On Twitter, the following are just some of the tools available to users to manage their privacy and personal information:
  - o Protected Tweets: by default, Tweets are public. However, users are able to select the option to protect their Tweets in their settings, which means they will receive a request when new people want to follow them, and they will be able to approve or deny follow requests<sup>26</sup>.
  - o Location Settings<sup>27</sup>: in settings, users are able to turn Location Services on and off. However people can also choose to add their Location to specific Tweets as desired.
  - o Direct Messages<sup>28</sup>: people are able to have closed Direct Messages where someone must follow the user and then the user must follow them back in order to message each other.
  - o Advertising preferences<sup>29</sup>: people can turn off the ability for Twitter to tailor ads based on information from Twitter advertising partners and lets Twitter display ads about things users have shown interest in. Twitter also allows users to report Timeline ads as not being relevant to their interests and blocking the specific ad.
  - o Twitter Archive<sup>30</sup>: people are able to download their entire Twitter archive to allows users to browse a snapshot of their personal Twitter information, starting with their first Tweet.
- On Yahoo
  - o users can opt-out of interest based advertising, analysis of communications content<sup>31</sup> for advertising purposes, and the sharing of their information with partners for data matching and appends<sup>32</sup> using the Yahoo Ad Interest Manager<sup>33</sup>
  - o In Privacy Settings, Yahoo users who use Flickr can control who is able to see different parts of their profile, including email address, IM names, real name, and current city. Flickr users can also choose to make their photos accessible publicly

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<sup>26</sup> <https://support.twitter.com/articles/14016>

<sup>27</sup> <https://support.twitter.com/articles/122236>

<sup>28</sup> <https://support.twitter.com/articles/14606>

<sup>29</sup> <https://support.twitter.com/articles/20170405>

<sup>30</sup> <https://support.twitter.com/articles/20170405>

<sup>31</sup> <https://policies.yahoo.com/us/en/yahoo/privacy/products/mail/faq/index.htm>

<sup>32</sup> <https://policies.yahoo.com/us/en/yahoo/privacy/topics/appenddata/index.htm>

<sup>33</sup> <http://aim.yahoo.com/>

for anyone, restrict access to a limited number of other Flickr users, or keep photos private so only that user can access them. Users can also set their preferences to decide who can see the location of their photos or of individual photos, and may choose to hide their photos from search results on Flickr or on third party search sites. For more on Flickr privacy see <https://policies.yahoo.com/us/en/yahoo/privacy/products/flickr/index.htm>.

In addition, all of our member companies invest heavily in protecting the privacy choices made by the people who use our services and maintaining the security of the information that people choose to share on our services. This investment is not merely to respect regulatory frameworks; we view it as essential to gaining and maintaining the trust of people who use our services. This trust is critical to our ability to succeed as businesses.

For example:

- Facebook privacy infrastructure runs over 80 trillion privacy checks per day to ensure that data is only shared with the audience chosen by the person who created it. In addition, third parties may only build applications that connect with Facebook that comply with our Platform Policies<sup>34</sup> and we apply rate limiting to prevent applications from scraping data from our services.
- The Google Play service conducts more than 200 million daily security scans of Android devices, in tandem with our Safe Browsing system<sup>35</sup>, for any signs of trouble.
- Microsoft uses encryption to safeguard customer data. When data moves over a network - between user devices and Microsoft datacenters or within datacenters themselves - Microsoft products and services use industry-standard secure transport protocols. To protect data at rest, Microsoft offers a range of built-in encryption capabilities.
- Twitter's Privacy Policy<sup>36</sup> covers how and when Twitter collects and protects user information across company websites, SMS, APIs, email notifications, applications, and other covered services, and details the platform's other extensive security checks through industry-standard security measures, like HTTPS technology.

Finally, DIGI notes the Commission's findings that there was not widespread evidence of individuals' concern about privacy and the use of their data (p.10). We are always working to ensure that people who use our services trust that we will protect the privacy and security of their data, and thus we are pleased to read that many Australians have confidence in digital services. At the same time, we will continue to build and refine privacy controls to ensure we are providing the right experience to our users. We hope that consumer confidence in digital services will only continue to grow over time.

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<sup>34</sup> <https://developers.facebook.com/policy/>

<sup>35</sup> <https://www.google.com/transparencyreport/safebrowsing/>

<sup>36</sup> <https://twitter.com/privacy?lang=en>

## Specific comments on the draft

Against this background, DIGI is concerned that the case for fundamental regulatory reforms proposed in the Draft Report has not been fully made out, particularly with respect to the digital industry.

### a. The new comprehensive right for consumers

We are concerned that the specifics of the comprehensive right for consumers both duplicate existing provisions in Australian privacy law and also go far beyond the requirements of analogous laws in other jurisdictions like Europe, which has robust privacy legislation on the books.

For example, the specific rights proposed that consumers can a) view information held about them and request corrections, and b) be informed of disclosure of data by a data holder to third parties are already provided for in Australian Privacy Principles 12 and 6 respectively. And as previously discussed at length, many digital service providers, including DIGI member, already provide consumers with the information that they've provided to the service, allow them to correct or delete this data, and present users with relevant and meaningful information about how their data is collected, used and shared.

Other proposals, such as the Commission's suggestion that individuals have a right to ask a data holder to "stop collecting information," regardless of the circumstance, appears to go beyond regulatory requirements in other jurisdictions like Europe. This is problematic as it creates a conflict-of-laws issue and puts companies that seek to offer services in both European and Australian markets at a disadvantage, further enhancing the cost to industry as a result of the proposed changes.

This submission has already outlined in great length how in regards to DIGI member services, consumers can already control the data they provide to our services, are able to access it and have a variety of tools available to them to manage their data in a meaningful way. The report states that there are "severe practical constraints in Australia at present on how to exercise [control and access to personal information] (p.17)", but does not elaborate on what these constraints are. We believe that there are no such constraints with respect to digital services. Anyone can log in to their Twitter or YouTube account and manage the information they have provided there, and use the tools to control how that data is used. In addition, the Draft Report states that no one "owns" data despite the fact that, in relation to digital services, the applicable terms make clear that consumers own the data they provide to the service.

The digital industry has also already outlined the benefits of the efficient and innovative use of data to Australian businesses and households. For example, the Draft Report recognises the opportunity and benefit that can be achieved through advertising-driven online service business models. In fact, PWC found in 2014 that Australia's ad-supported internet ecosystem generated significant economic activity, contributing \$17.1 billion directly to economic output (GDP) and



provided over 162,000 jobs. The Draft Report acknowledges the Pandora model of using self-reported customer data to improve the targeting of advertisements. This model is common across the digital industry, including for example our member companies Google, Facebook and Twitter, and provides further evidence that the digital industry is already managing data in a way that delivers benefits to the Australian economy.

#### b. Definition of consumer data

A further challenge with the legislation proposed by the Commission is that it can rapidly become too specific to be useful. For example, in Recommendation 9.1 the Draft Report outlines the definition of “consumer data” in the proposed regulatory framework and refers to “all files posted online by a consumer”. It is not clear what types of online content that Australians choose to share online will qualify within this definition — is a Tweet, a YouTube video, a Periscope live stream 24-hour video file or one of the many disappearing messages that are now possible via services such as SnapChat and Instagram considered to be a file?

The Draft Report suggests that the definition of “consumer data” should exceed the scope of “personal information” as defined under the Privacy Act (Cth) 1988. However the latter definition is currently subject to review and potential expansion by the Federal Court in the Ben Grubbs and Telstra Corporation litigation. We suggest that this precedent will have a direct bearing on the definition of “consumer data”.

#### c. National Interest Datasets

As an industry we support improved access to public and government data. As such, we support the proposed measures to enable government data sets or data sets derived from publicly-funded research to be determined as National Interest Dataset for release and streamlined access. However, extending such a power to privately held data creates significant challenges. A specific industry or company will not enjoy certainty about whether or not any dataset they hold could potentially be declared to be in the national interest and required by regulation to make it available. This uncertainty will reduce the ability of the private sector to deliver data-driven benefits and innovation in Australia, and create a significant risk factor in data-based investments.

The Draft Report also concludes that data linkage within the private sector is constrained. However, this conclusion does not seem to fully appreciate that data held by a particular company may not be able to be useful to another company. For example, even if YouTube were required to make available the video data that it holds about Australians, this information could not be usefully used by Microsoft given the very different nature of their services. Similarly, without the same friend network, release of the Facebook Safety Check data would not aid a search company such as Google. The Draft Report's proposals that this can be solved by data standards does not fully appreciate that the services provided by the private sector, even within one industry such as the digital industry, are so different that they are not capable of being repurposed.

#### d. Government right to access and analyse data generated through private contracts

By way of further example, Draft Recommendation 4.2 states that where the Australian government enters in to contracts with the private sector and data is generated, the government should retain the right to access the data and apply any analysis that is within the public interest. We wish to remind the Commission that the government already retains the ability to do so. For example, when government agencies create a Facebook Page, they receive Page Insights data once they have more than twenty fans which provides them with information about their Page and its fans and their engagement with their posts<sup>37</sup>.

Additionally, when a government agency or official uses a Twitter account, they have access to their Twitter account analytics that details their impression and engagement data, as well as follower information<sup>38</sup>. Similarly, Government agencies that are using Google Analytics on their websites already own all of this data and insights. The value that is being provided to agencies under this arrangement is not access to raw data, but insights derived from a range of datasets combined into a service. Constraints on digital services' abilities to provide these insights, also limits the value and benefit that we can provide to our users. Consequently, we do not believe that the Draft Report has made the case as to why regulation on this point is necessary, particularly with respect to digital services.

#### e. New Data Sharing and Release Act

The proposed new Data Sharing and Release Act and other reforms contemplated in the Commission's Draft Report treat both the public and private sector equally, and also treat all industries equally. The Draft Report makes reference to risk aversion and other risks as holding back the greater use of data in Australia. However, DIGI believes that closer examination will demonstrate that many of these limiting factors are found more frequently within public sector agencies rather than private sector organisations. Indeed, one of the Draft Report's findings was that there is an ingrained resistance among public sector agencies to share or release data

Also, the Commission frequently provides examples in the Draft Report of the private sector data where more efficient and innovative use can be beneficial, in the case of the credit reporting industry, health & insurance, banking, electricity etc. DIGI is concerned that by treating all sectors as equal, the proposed new regulations will add cost and uncertainty across all of the private sector, including the digital industry, without a clear rationale for this additional regulation given the digital industry is already providing transparency, control and efficiency in relation to the use of data.

For companies that provide global services, the additional regulatory cost and uncertainty could have the unintended consequence of creating disincentives for companies to provide their services in Australia. The uncertainty and cost will likely increase given there are as many as six

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<sup>37</sup> More details: <https://www.facebook.com/business/learn/facebook-page-insights-basics>

<sup>38</sup> <https://support.twitter.com/articles/20171990>

regulators proposed to oversee and implement the regulatory framework contemplated by the Draft Report.

DIGI welcomes the Productivity Commission's consideration of the issue of data access and availability and its recognition of the economic and social benefits that more efficient use of data can deliver in Australia. As an industry, we are already providing data-driven innovation to Australian businesses and households and welcome the opportunity to continue to do so. We believe that a lighter touch regulatory solution may be best placed to achieve this than is proposed in the Draft Report and would be happy to provide any additional information that may assist the Commission in its work on these important issues.