



# Data Availability and Use – Draft Report

Submission by the Australian Communications Consumer Action  
Network to the Productivity Commission

December 2016

## About ACCAN

The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards availability, accessibility and affordability of communications services for all Australians.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will represent the views of its broad and diverse membership base to policy makers, government and industry to get better outcomes for all communications consumers.

## Contact

Jeremy Riddle  
Policy Officer

PO Box 639,  
Broadway NSW, 2007

Email: [info@accan.org.au](mailto:info@accan.org.au)

Phone: (02) 9288 4000

Fax: (02) 9288 4019

Contact us through the [National Relay Service](#)

# 1. Executive Summary

ACCAN is broadly supportive of the Productivity Commission's draft report on Data Availability and Use, and the ways in which it proposes to empower consumers to have more control over data about them.

## 1.1. List of recommendations

**Recommendation 1:** Data breach notification should be mandatory before proposals to increase the availability of personal information are developed.

**Recommendation 2:** Consumers should have a statutory right to redress and compensation when data is misused or released without explicit informed consent.

**Recommendation 3:** Organisations are required to work with consumers to help them understand what their personal information is being used for and what the benefits are to them.

**Recommendation 4:** There is an in-depth investigation into consumer knowledge and understanding of data collection and privacy issues and a commitment to increase this understanding to enable genuinely informed consent.

**Recommendation 5:** the final report reflects and addresses the fact that consumer knowledge of contracts and privacy risks is inadequate.

**Recommendation 6:** Investigate deterrent measures for non-compliance with best practice de-identification guidelines.

**Recommendation 7:** the development of standards around data formats and definitions will require broad consultation with diverse community sectors

**Recommendation 8:** the development of information campaigns and resources will require broad consultation with diverse community sectors and privacy professionals.

**Recommendation 9:** charges cannot be levied by data holders on consumers who exercise the comprehensive right to data access.

**Recommendation 10:** the comprehensive credit reporting scheme remains voluntary.

# 1. Introduction

ACCAN would like to thank the Productivity Commission for the opportunity to comment on its Data Availability and Use Draft Report (the draft report).

We are particularly pleased that the Productivity Commission has initiated a discussion into how consumers can exercise greater control over data held about them, including a proposal to create a Comprehensive Right to Data Access for individuals.

By increasing the availability and use of data across the private and public sectors, and to individual consumers about themselves, there is potential to stimulate innovation and competitiveness in the marketplace. This could lead to increased choice and better decision-making for consumers, as well as increased transparency and accountability in Government.

ACCAN's comments on the draft report primarily concern the proposal to increase consumers' abilities to control their own personal data. As ACCAN is the peak body representing telecommunications consumers, these comments will primarily focus on how the proposals in the draft report will impact on consumers of telecommunications products and services.

Although ACCAN is pleased to see that the report takes a consumer-centric approach, this submission will briefly discuss and make recommendations concerning:

- The need for a mandatory data breach notification scheme and a right to redress for the misuse of personal information
- Issues of consent versus explicitly informed consent; consumer knowledge and understanding of standard contracts
- The transparency of security measures and de-identification standards and processes
- The accessibility and affordability of data shared under the proposed scheme
- Comprehensive credit reporting in the telecommunications industry.

## 1.1. Mandatory data breach notification and a statutory right to redress for consumers

In 2016 ACCAN submitted feedback to the Australian Attorney General's Department consultation on its Privacy Amendment (Notification of Serious Data Breaches) Bill 2015.<sup>1</sup> ACCAN broadly supported the introduction of such a scheme subject to a number of recommendations.

The effects of a data breach of personal information can be very serious, especially for vulnerable consumers. For example, those people who are escaping a domestic violence situation and need their personal information, identity, and location information to be kept confidential.

ACCAN submits that before any in-depth discussion of data sharing and increased data availability there is need for a mandatory (and adequate) data breach notification scheme. In addition, a

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<sup>1</sup> <https://accan.org.au/files/Submissions/ACCAN%20Submission%20Serious%20Data%20Breach%20Notification.pdf>

statutory right to redress and compensation should be created for when data is misused or released without explicit informed consent.

The introduction of a mandatory data breach notification scheme goes hand in hand with the draft report's goal of giving consumers more control over their personal information. A mandatory scheme allows consumers to take action to mitigate potential harms such as identity theft and financial loss, and gives them confidence that in the event of a breach they will be able to manage their own personal information. It would also hold organisations that collect and use personal information to a higher standard of data security measures as they face reputational and financial loss.

Recommendation 1: Data breach notification should be mandatory before proposals to increase the availability of personal information are developed. The Productivity Commission should work closely with the Attorney General's Department and relevant stakeholders.

Recommendation 2: Consumers should have a statutory right to redress and compensation when data is misused or released without explicit informed consent (i.e. the Privacy Act is amended to include an actionable cause of action arising from a data breach).

## 1.2. Consent and explicitly informed consent; consumer knowledge

Increasing the availability of consumer data to consumers raises the issue of consent versus explicitly informed consent. In addition, when it comes to privacy and personal information there are large gaps in consumer knowledge which make informed consent and wise decision-making unlikely in many instances. The overall tone of the draft report tends to ignore this, for example stating that "the onus remains on individuals to make responsible choices about whom they provide personal information to in the first instance and for what purpose."<sup>2</sup>

### 1.2.1. Consent and explicitly informed consent

Australian Privacy Principle 3 states that an APP entity can only collect personal information that is reasonably necessary for its functions or its activities. Information collected by an entity must only be used or disclosed for the primary purpose for which it was collected, unless an exception applies.<sup>3</sup> The entity must also disclose the purposes for which the personal information is being collected, and the other entities that they usually share information with.<sup>4</sup>

When information is being shared and new datasets are being created, it becomes difficult for an individual to consent to, or for the collecting entity to provide, all purposes for which the

<sup>2</sup> Overview of the Data Availability and Use Draft Report, Productivity Commission, p 18.

<sup>3</sup> APP 3, *Privacy Act 1988 (Cth)*, Sch 1.

<sup>4</sup> APP 5, *Privacy Act 1988 (Cth)*, Sch 1 s 5.2.

information will be used and all organisations that the information will be provided to. Therefore, for a data sharing framework to be developed and to be successful, the concept and adequate level of consent needs to be well-defined. ACCAN submits that explicitly informed consent should be the standard, and should always be prerequisite to any use of data derived from personal information.

The notion of consent in many situations where a consumer is signing a contract ('consenting' to the collection and use of their personal information) is problematic as consent is often bundled. That is, to access the service or product a consumer only has two options: to consent to all terms and conditions; or not consent and be denied the product or service altogether. This could be seen as coercive and represents the imbalance of power inherent in many standard contracts.

To some extent the framework proposed by the draft report attempts to deal with the issue by providing an opt-out provision for consumers dealing with the private sector. However this is qualified by the idea that opting-out of data collection might mean that a particular product or service is no longer available or free. Again the onus is on the consumer to "be able to make that call for themselves". As above, such provisions could be described as coercive, and as explained below, it is naïve to assume that consumers possess the knowledge to "make that call for themselves".

### 1.2.2. Consumer knowledge and understanding

In addition to the fact that consent is often bundled and contracts leave consumers with little choice if they want to access a product or service, many consumers also lack knowledge about the privacy risks they are taking when they sign such contracts.

ACCAN recently commissioned and published research by Dr Paul Harrison that examines the extent to which consumers understand the information provided to them by telecommunications providers. That report states, amongst other things that:

- Having access to the right amount of information consumers are able to understand in the context of the agreement protects consumers from bad outcomes and improves decision making.
- Consumers do not adequately understand contracts when they read them.
- Consumers often skim or do not read contracts at point of purchase or sign-up as they often do not have choice if they want the product, the contracts are too long, full of jargon and legalese, and the level of detail is often irrelevant.

The research found that even though consumers are mostly confident in their abilities to understand telecommunications contracts, "only a very small proportion were able to demonstrate adequate understanding of the standard operations and potential problems arising from telecommunications agreements."<sup>5</sup>

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<sup>5</sup> Dr Paul Harrison, Laura Hill, Charles Gray, and ACCAN, 'Confident, but Confounded: Consumer Comprehension of Telecommunications Agreements (2016), [https://accan.org.au/files/Reports/Confident%20Confounded\\_accessible%20WEB\\_03.11.16.pdf](https://accan.org.au/files/Reports/Confident%20Confounded_accessible%20WEB_03.11.16.pdf) at 8.

In light of this, ACCAN considers it is neither fair nor wise to base a data availability framework on the assumption that individuals are able to make informed and responsible choices about their personal information.

In terms of the proposed comprehensive right to data access, currently accessing one's own data is a time consuming and bureaucratic process. More information is needed about how consumers will be able to exercise the comprehensive right in practice and how more control over data will be achieved.

Recommendation 3: Organisations are required to work with consumers to help them understand what their personal information is being used for and what the benefits are to them.

Recommendation 4: There is an in-depth investigation into consumer knowledge and understanding of data collection and privacy issues and a commitment to increase this understanding to enable genuinely informed consent.

Recommendation 5: The final report reflects and addresses the fact that consumer knowledge of contracts and privacy risks is inadequate.

### 1.3. Transparency in security measures and risks

In order to gain and maintain consumer trust in a data sharing framework, and to build consumer knowledge about the risks associated with it, there needs to be maximum transparency in the security measures in place, including those relating to the de-identification of personal information.

De-identified data runs the risk of being re-identified, and re-identification could have serious and life-threatening implications for victims of domestic violence and other vulnerable groups. Recent events involving data breaches and re-identification of Red Cross data,<sup>6</sup> for example, have reduced consumer confidence and trust.

ACCAN is pleased to see the draft recommendation that the ABS and other agencies work with the OAIC to develop and publish practical guidance on best practice de-identification processes. However, whether such guidance will be effective without being enforceable should be explored, particularly in the absence of disincentives for non-compliance (pecuniary or otherwise).

However, it is important to develop a commonly understood definition of what de-identification means in order to build consumer trust. A former state Privacy Commissioner recently referred to a case where personal information was not adequately de-identified when being shared between agencies, putting consumers at risk. She stressed the importance of having a common understanding

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<sup>6</sup> <http://www.smh.com.au/federal-politics/political-news/red-cross-data-leak-personal-data-of-550000-blood-donors-made-public-20161028-gscwms.html>

of what “getting it [de-identification] right means” between Government, regulators, businesses, and technology professionals.<sup>7</sup>

The need for a clear, strong, and common definition of best practice de-identification is made more relevant in the context of recent Government moves to introduce laws to criminalise the re-identification of datasets released by the Commonwealth.<sup>8</sup>

Recommendation 6: Investigate deterrent measures for non-compliance with best practice de-identification guidelines.

## 1.4. Accessibility and affordability of consumer data

ACCAN agrees with the draft report’s proposal that standards around data formats and definitions will be necessary, and that it will be best for each sector (i.e. telecommunications, financial services, banking) to develop its own standards, rather than Government. ACCAN also supports the suggestion that the comprehensive right for consumers will need discussion and information campaigns to help people to use it to the full extent.

It is important that the development of these standards takes into account the diverse range of consumers that will be accessing their data. The development of any information campaign and of standards around data formats and definitions should involve wide consultation with – amongst others – disability advocates, consumer groups, and culturally and linguistically diverse (CALD) groups to ensure resources and datasets are accessible to all members of society. Privacy professionals should be engaged throughout to ensure consumers are made more aware of potential privacy implications. There may also be a role for Standards Australia to develop and oversee high level accessibility standards that apply across all sectors.

In its discussion of the comprehensive right to data access, the draft report also suggests that the ACCC will monitor any charges imposed by data holders for accessing, editing, copying and transferring data. Allowing consumers to easily access, edit, and correct data about them has direct benefits for business, government, individuals, and the marketplace. It therefore seems odd that data holders should be able to charge a fee at all. The ability to levy a charge makes the comprehensive right somewhat less ‘comprehensive’.

Recommendation 7: The development of standards around data formats and definitions will require broad consultation with diverse community sectors.

Recommendation 8: The development of information campaigns and resources will require broad consultation with diverse community sectors and privacy professionals.

<sup>7</sup> <http://www.zdnet.com/article/nsw-data-analytics-centre-privacy-guidelines-under-fire-from-private-sector/>

<sup>8</sup> <https://www.attorneygeneral.gov.au/MediaReleases/Pages/2016/ThirdQuarter/Amendment-to-the-Privacy-Act-to-further-protect-de-identified-data.aspx>



Recommendation 9: Charges should not be levied by data holders on consumers who exercise the comprehensive right to data access.

## 1.5. Comprehensive credit reporting

As a peak body representing telecommunications consumers ACCAN opposes any mandatory credit reporting scheme. Such a scheme is riskier for telecommunications consumers as responsible lending requirements do not apply to telecommunications providers as they do to other financial institutions. Mandatory credit reporting would see relatively small debts end up on a permanent file.

Mandatory credit reporting and the application of responsible lending requirements would be undesirable for both telecommunications providers and consumers. For providers, implementing the responsible lending requirements would increase costs and the bureaucracy associated with selling relatively low value products. For consumers, mandatory responsible lending requirements would likely mean having to provide more documentation to access products and services. In addition, low-income consumers may be further excluded.

In addition, current credit assessment practices at point of sale in the telecommunications industry are inconsistent. This means the risk of erroneous data being recorded about consumers is higher than in the finance industry. The risk of consumers being sold products they cannot afford and are more likely to default on is also higher. As such, mandatory credit reporting would see debts that should not have arisen in the first place having a more lasting and negative impact on consumers. If industry wants expanded powers for information sharing, particularly of credit reporting information, then it must take responsibility for more robust credit assessment processes from the outset.

Recommendation 10: The comprehensive credit reporting scheme remains voluntary.