



---

## **TELSTRA CORPORATION LIMITED**

### **Data Availability and Use: Submission on the Productivity Commission's Draft Report**

**Public version**

**December 2016**



---

## CONTENTS

<b>Executive summary</b>	<b>3</b>
<b>01 Introduction</b>	<b>4</b>
<b>02 Reforms must be aligned to best practice</b>	<b>5</b>
2.1. Appropriate definitions are essential	5
2.2. Reforms should be assessed against best practice regulatory principles	5
2.3. Overly broad definitions may change behaviours and incentives	8
2.4. A suggested way forward	10
<b>03 Supporting private sector investment and innovation</b>	<b>12</b>
3.1. Building trust is essential	12
3.2. Industry is well placed to determine sector-specific data sharing standards	13
3.3. Pricing of private sector data should be left to the private sector	13
3.4. National interest datasets will require a rigorous framework	13
3.5. Institutional arrangements should be as streamlined as possible	13
<b>ATTACHMENT A: Relevant best practice regulatory principles</b>	<b>14</b>
A.1 Overall net benefit and greatest net benefit	14
A.2 Rules established should be clear, simple and practical for all users and have a sound legal and empirical basis	14
A.3 Government action should be proportional to the issue being addressed	15



---

## Executive summary

Telstra's vision is to be a world-class technology company that empowers people to connect. An inherent part of achieving this vision is providing services that both generate and rely on data.

We support the proposed direction for data reforms in Australia, and by extension many of the recommendations within the Draft Report. We do, however, believe some refinement to the recommendations will be needed in order for potential benefits to be fully realised. In developing this response we have been guided by best practice regulatory principles because we recognise future reforms are likely to materialise as regulations.

Our main concern is ensuring that the central element of a reformed framework — namely the definition of consumer data — is aligned with best practice regulatory considerations. We consider that the definition which has been proposed is too broad, and will result in considerable uncertainty and high compliance costs. The potential encroachment on proprietary rights is also an issue, and the definition has the potential to diminish data collection incentives. Overall the proposed approach does not appear to align with best practice regulatory principles. In particular we note the following:

- As only one reform option is put forward it is not possible to gauge how the profile of costs and benefits varies with changes in the breadth of the consumer data definition. This, combined with the absence of a cost-benefit analysis means it is unclear if net benefits result from the proposal and whether or not the proposed approach maximises these. We believe a narrower definition could offer equivalent empowerment benefits to the current broad definition but at lower cost, and should be included as an option for consideration.
- Basing the definition of consumer data on “personal information as defined in the Privacy Act 1988” is potentially concerning, as this definition has been shown to lack clarity and practicality in certain circumstances. Best practice principles encourage the adoption of measures that are clear, simple and practical for all users — these criteria should be a focus for the final recommendations.
- Government action is meant to be proportional to the issue being addressed, but as noted above, the Commission has proposed a definition which could well be broader than what is required to support the objectives of increased data availability and use. Where interventions impact proprietary data this may alter the behaviour of data custodians and their willingness to invest in data collection and insight generation.

We suggest that the Commission consider a narrower and clearer definition of consumer data, based upon a given consumer's direct transactions with a private sector entity (i.e. transactional data). For example, the ‘transactions’ associated with a mobile phone contract include data use and call minutes, and these are primary attributes providers compete on. This approach would be simpler and more practical than the current proposal and could co-exist with more public sector open-data policies. The Final Report should compare the narrower option we have suggested to the proposed broad definition, and recommend the approach which offers the overall greatest net benefits.

Consistent with our strong customer focus, we are supportive of recommendations which will promote consumer empowerment such as the proposals for consumers to be able to transfer their data and standardisation of consumer data in a machine readable format. However, where recommendations create uncertainty or encroach proprietary rights we believe caution is required. The proposal relating to National Interest Datasets (NIDs), for example, has merit, but there needs to be a rigorous framework around any designation of private sector datasets and an ability to appeal such designations. An appeal mechanism would support accountability, safeguard against unwarranted encroachment on proprietary rights and avoid compromising ongoing private sector innovation and investment in value-generating data collection and analysis.



---

## 01 Introduction

Telstra welcomes the opportunity to respond to the Productivity Commission's Draft Report on Data Availability and Use.

We recognise that enabling access to consumer data is an important source of potential consumer empowerment, and increased use of data across the economy — by private sector entities, researchers and other parties — potentially offers great economic benefits. It is fundamentally important that consumers are aware of their rights and have confidence and trust around how their data is collected and managed. We also recognise it is generally in the interests of data custodians to be open with consumers about how they manage and use consumer data.

Current regulatory frameworks place a greater onus on data custodians than consumers. While this is appropriate from the perspective of building consumer trust and confidence, it is also important that the design and implementation of these obligations are consistent with best practice regulatory principles as this helps to maximise the scope for beneficial outcomes and minimise overall compliance costs.

It is for these reasons that our submission is focussed on how the recommendations within the Draft Report align with best practice regulatory principles. Our comments here reflect our experiences as a regulated entity, including our experiences navigating the uncertainty which can result from frameworks which lack clarity and practicality, and our belief that proprietary rights around data where value has been created need to be respected.

We also comment on several areas that are especially pertinent to private sector data custodians — including data sharing standards and national interest datasets — because these parties have a key role in driving the investment and innovation which will help unlock the benefits of greater availability and use over the longer term.



---

## 02 Reforms must be aligned to best practice

Telstra believes there is considerable merit in the proposed direction for reform of data availability and use in Australia, and is supportive of many recommendations within the Draft Report. Based on our experiences though, we believe that the central elements of a reformed framework — namely the definition of consumer data and the associated consumer ‘right’ — must be aligned with best practice regulatory considerations and avoid diminishing incentives around the collection of data if any future reforms are to be successful in achieving economic benefits. If these considerations are to be met in the current setting it is likely some refinement to the Draft Report’s recommendations will be required.

### 2.1. Appropriate definitions are essential

The central elements of the Commission’s proposed new framework for data availability and use are the proposed definition of consumer data and the related recommendation for consumers to have a ‘comprehensive right’ to their consumer data. Because the reformed framework will stem largely from these two elements, it is particularly important that they are appropriately structured from the outset.

Telstra believes that the wording of the draft recommendation for the definition of consumer data (9.1) is too broad, and this carries through to the related ‘comprehensive right’ recommendation (9.2). This breadth has a range of potential adverse impacts for data custodians, especially private sector entities, including uncertainty, encroachment of their proprietary rights and diminished incentives for collection. These impacts will translate to significant costs for private sector entities, and it is not clear that there are benefits which justify these costs. We believe that a more narrowly-framed definition of consumer data should be considered, such as that within the UK’s midata framework, where the analogous ‘customer data’ is defined as information held in electronic form relating to transactions between the regulated (private sector) entity and the customer.<sup>1</sup> Herein we refer to this as ‘transaction data’.

### 2.2. Reforms should be assessed against best practice regulatory principles

We believe the proposed reforms, especially the proposed definition of consumer data, should be assessed against best practice regulatory principles. This section contains a preliminary assessment against three of these principles (detailed in Appendix A), namely:

- The presence of overall net benefit, and the adoption of greatest net benefit option;
- Regulations should be clear, simple and practical for all users and with a sound legal and empirical basis; and
- Government action should be proportional to the issue being addressed.

#### **Presence of overall net benefit, and adoption of greatest net benefit option**

While the Terms of Reference (TOR) include reference to “options” being examined we note that only a single option is presented within the Draft Report in terms of the proposed definition or comprehensive right. The discussion in Chapter 8 on “options for reform” is more about the general case for change and attributes of this, not different options per se. This is somewhat surprising because in other jurisdictions such as the UK (see Box 1) greater specificity has been adopted in expressing the scope of consumer data which is accessible for consumers. This shows other options are available for consideration.

We also note that the Draft Report does not contain any estimates for the costs and benefits associated with the proposed recommendations. This hinders the ability to gain an overall view of the proposals.

---

<sup>1</sup> *Enterprise and Regulatory Reform Act 2013* (UK), [Section 6 Supply of customer data](#)



---

Because there are no alternative options presented, it is not possible to assess changes in the profile of costs and benefits with changes in the breadth of the consumer data definition.

While the costs and benefits of data-related reforms may be difficult to quantify fully, our assessment of earlier benefit estimates within other jurisdictions suggest these are concentrated around consumer empowerment and the improved operational efficiency of private sector data custodians, leveraging the data they have assembled from across their business.<sup>2</sup> Significantly, it is not clear that a broader definition of consumer data drives an increase in these benefits relative to a narrower definition:

- Consumer empowerment, as an area of economic benefit, results from consumers being able to use information on the goods or services they acquire from one producer — i.e. their transaction data — to get a better proposition from that or another provider, with benefits resulting from ‘switching’ or the threat of switching. As such, consumer empowerment rests on consumers being able to access their transaction data alone, as opposed to all data which is in some capacity related to them or the services they acquire from a given provider. In order to support consumer empowerment, we support the suggestion within recommendation 9.2 that data holders provide, where requested, consumer data in a machine readable format.
- With potential improved operational efficiencies, benefits in this area largely flow from the extent to which private sector firms leverage the data they have to innovate and improve their product offerings. A 2015 empirical study from New Zealand found that competitive pressures result in 56 per cent of the cost savings from improved operational efficiencies and investment decision making, resulting from better leveraging of firm-held data, accrue to consumers in the form of lower prices.<sup>3</sup> The scope for improving operational efficiencies, in general, does not appear to be related the definition of consumer data or its breadth — these efficiencies would seem to derive instead from a more data-aware culture combined with technology and managerial skill.

The observations above are particularly relevant for the Commission’s final recommendation on the definition of consumer data, and should accordingly be reflected in the Commission’s cost benefit analysis of different reform options. It is also noted that because costs must largely be recovered from consumers, the incidence of higher as opposed to lower costs will ultimately reduce the level of consumer benefits resulting from any reforms undertaken.

### **Clear, simple and practical for all users and with a sound legal and empirical basis**

The breadth of the proposed definition of consumer data raises concerns about clarity, simplicity, practicality and consistency with legal and empirical considerations.

Our concerns about clarity, simplicity and practicality stem largely from the suggestion that the definition of consumer data be based on “personal information as defined in the *Privacy Act 1988*” (p.346). As discussed in our submission to the Commission’s Issues Paper, Telstra is currently involved in an appeal to the Federal Court relating to the definition of ‘personal information’ as provided within the National

---

<sup>2</sup> Department for Business Innovation & Skills, Cabinet Office [Impact Assessment for midata](#) 2012 (UK) and Sapere Research Group and Covec, [Data Driven Innovation in New Zealand](#) 2015 (NZ)

<sup>3</sup> Sapere Research Group and Covec, [Data Driven Innovation in New Zealand](#) 2015, P. 11.



Privacy Principles (NPP's). 4.5 The central question in this appeal is whether or not 'personal information' (as per the NPPs) covers information such as 'network data'<sup>6</sup>.

We don't believe network data should be captured by the definition of 'personal information' because this data supports the operation of our network and the provision of services, and is not created with the intention of identifying individuals. The progression of this matter to the Federal Court illustrates that in certain circumstances there is limited clarity and little practicality associated with the definition of personal information within the Privacy Act 1988, which is something the Commission appears to agree with given it notes "The legal definition of personal information, as contained in the Privacy Act 1988 (Cth), gives rise to uncertainty" (p.192). This uncertainty should be cause for considerable caution in considering carrying the current definition forward as part of a reformed framework, noting it is likely to persist regardless of the Federal Court's decision.

Basing the definition of consumer data on clearly defined 'transaction data' would:

- be clearer, simpler and more practical than the Commission's proposed approach;
- entail lower compliance costs for entities with large customer bases such as Telstra; and
- avoid encroachment of proprietary rights, including where value has been added to data through analytics and data which is related to the provision of consumer goods and services.

We also have concerns about the legal basis of the proposed consumer data definition because its breadth does not reconcile with provisions of Section 13 of the *Telecommunications Act 1997*, under which we are prohibited from providing certain types of information unless a specific exception applies. How future provisions around consumer data will interact with pre-existing legislative obligations such as this one is unclear.

### **Government action should be proportional to the issue being addressed**

Telstra is supportive of moves to improve individual's access to their data and increase the use of data across the economy — by private sector entities, researchers and other parties. However, the proposed definition of consumer data is broader than what is required to support these objectives, giving rise to concerns about proportionality.

Within the Draft Report the Commission states:

*"Greater access would empower individuals to make more-informed decisions about the products and services they choose, help drive the development of new products and services and improve the efficiency of markets. It would also shine a light on the activities of government and thus help to improve its efficiency and accountability."* (p.46)

We believe that the outcomes described in the first sentence can be realised through the combination of providing individuals with access to their (clearly defined) transaction data and competitive tensions between firms seeking to leverage data from across their business to improve their service offerings. Outcomes in the second sentence can largely be realised through the adoption of open-data policies, combined with greater cultural awareness about the potential uses for, and value of, data.

<sup>4</sup> OAIC Media Release. <https://www.oaic.gov.au/media-and-speeches/statements/privacy-commissioner-lodges-appeal-to-federal-court-re-telstra-corporation-limited-v-privacy-commissioner> 11 February 2016.

<sup>5</sup> While the NPP's were replaced by the Australian Privacy Principles (APP's) in March 2014 'personal information' is the central concept for each set of principles, and is expressed in similar – but not identical – wording.

<sup>6</sup> Network data is a type of metadata, and in the current case includes the recorded activity occurring between a device and Telstra's telecommunications network in order to manage the mobility of that device through the network, and also establish, maintain or disconnect connections between the device and destinations it is seeking to communicate with.



---

The proportionality principle also extends to cost-benefit considerations. Specifically if the proposed definition of consumer data captures information which is costly and/or difficult to retrieve, this should be recognised. As noted in our initial submission, if mobile network data is deemed to be part of an individual's personal information we would have to re-architect our internal systems to link this to individuals in a manner which would allow us to manage any future requests. This would be very costly. The potential for us to incur these type of costs results directly from the breadth of the future consumer data definition, and is one reason why we believe more than one definitional option should be considered.

Where regulatory interventions are not proportional the result may be that data custodians attempt to alter behaviours in a way that avoids regulatory capture. This risk is discussed in section 2.3 below.

### **2.3. Overly broad definitions may change behaviours and incentives**

Within the Draft Report the Commission seeks further information about whether its proposed definition of consumer data will create “incentives for deliberate de-identification of data holdings to avoid providing access” (p.34). To the extent this is a risk — along with the possibility of firms ceasing to collect certain data — it is likely to stem from the breadth of the proposed definition for consumer data.

Draft recommendation 9.1 essentially proposes that *any* consumer-related data, unless it is de-identified, is ‘consumer data’ and should therefore be accessible (as per draft recommendation 9.2). This is a very broad definition, and as noted above appears to be broader than what is actually required to enhance consumer empowerment through improved data availability in general. As noted above, the UK's midata framework, which has similar consumer empowerment objectives, is based around access to ‘transaction data’ alone because this is recognised as being the primary source of benefits in terms of consumer empowerment and possible service-provider switching.

We are concerned that the proposed definition of consumer data precludes any concepts of proprietary data and/or private rights in this regard, which might co-exist with transaction data. We see proprietary data as including data where value has been added as a result of analytics and data which is related to the provision of goods and services to consumers via one of our networks. This latter type of data is of an operational nature, and while it is related to service provision it is not the basis upon which firms provide services to consumers — for this reason it should not be captured by the definition of consumer data.

Proprietary data results from the intellectual, technological and financial investments many companies make in their businesses, with benefits resulting for their customers. Disclosure of this data, often generalised as being ‘value added’, is not necessary for markets to function properly or for the realisation of any significant positive public benefits. As noted by the Commission (p.322), data is also outside the scope of the National Access Regime created by part IIIA of the *Competition and Consumer Act 2010*. We note that in the UK such data was explicitly excluded from the scope of the midata access framework due to concerns about potential chilling effects, in that requirements to disclose such information would reduce incentives for the data to be collected in the first place. Based on these considerations, we strongly believe that the data resulting from investments we have made in support of our business should not be expropriated, or accessible via a reformed definition of consumer data or the proposed public interest dataset declaration powers.



### Box 1 Key elements of the impact assessment for the UK's 'midata' reforms

Within the UK data-reforms have involved the adoption of strong 'open-data' policies for public sector entities combined with an access policy for the customer data held by certain private sector entities, midata. midata began a voluntary programme in 2011 before legislative amendments in 2013 provided it with the backing of secondary legislation (i.e. regulation).

The Impact Assessment (IA) for midata is a point of reference for the proposed Australian reforms, being clearly linked to objectives of consumer empowerment and choice.<sup>7</sup> A key feature of the midata framework is its clarity about what is included and what is excluded in terms of data access/provision.

#### Problem and objective for intervention

Three problems are identified in the IA — asymmetry of information, lack of switching and consumer empowerment and the absence of standards. The objective of the intervention is to empower consumers through enabling access to their transaction data (increasing competition in turn) and to help consumers improve their consumption patterns — these outcomes are referred to as the empowerment effect and consumption effect within the IA.

#### The power

The power enacted by secondary legislation is very clear. Specifically it enables “consumers to have access to their own existing, transaction data only where:

- it is already held by the firm in machine readable form
- where the data contains an existing and clear personal identifier linking the data to the individual, such as a home address, email or account registration
- the data is held in certain core sectors e.g. energy supply, credit cards/current accounts and mobile phones
- the availability of data to customers will promote price transparency”

Further, “It specifically excludes:

- value-added data analysis by the business ('their data')
- mass requests by third parties (though consumers could specifically authorise the release of their data to an ICO recognised secure third party)
- fragmented data sets that are not linked by a simple common identifier
- micro businesses”

#### Benefits and costs

The IA explores various empowerment benefits (i.e. consumer cost savings, increased competition and innovation, new and expanding infomediary markets and less prescriptive regulation) and the consumption benefit. Estimated benefits were quantified via assumptions about consumers switching providers and obtaining savings, with these simplistically assumed to reach zero after 10 years. The analysis also suggested that one percentage point change in switching behaviour across the energy, banking and mobile phone sectors could generate aggregate benefits of over £100 million.

Costs were identified as being largely one-off IT system conversion costs (where the systems were unable to meet scheme provisions) and one-off consumer switching costs. Positive total net benefits for the banking, energy and post-pay mobile phone sectors were reported.

#### Risks

The IA notes that the consumer transaction data held by firms is valuable commercial information, and that the existence of a power compelling firms to release this data “may reduce their incentive to collect the information”. This is referred to as a potential “chilling effect”. The IA states that in order to minimise this risk the proposed power will require “the disclosure of ‘raw’ factual data only and not any of the subsequent analysis which businesses perform”.

<sup>7</sup> Department for Business Innovation & Skills, Cabinet Office [Impact Assessment for midata 2012](#)



---

If de-identification becomes the avenue by which data and datasets cannot be 'accessed' through the proposed consumer data definition, then increased de-identification activities could reasonably be expected to result. Noting many datasets are already de-identified it could be difficult to prove where any de-identification occurred on a deliberate case-by-case basis.

#### 2.4. A suggested way forward

We believe that reforming Australia's data framework provides the opportunity to establish a clear and practical definition of 'consumer data' which will promote certainty, align with best practice regulatory considerations and be the foundation for future augmentation.

As outlined in this chapter we consider the definition of consumer data proposed within the Draft Report to be too broad, and believe questions exist about both its consistency with best practice regulatory principles and potential impact on the data collection behaviours and incentives of private sector data custodians.

As a possible way forward, we suggest that the Commission assess at least two real options for the definition of consumer data in its Final Report — one of these could be the broad access scenario as recommended in the Draft Report, with the second being a narrower 'transaction data' scenario for private sector data as is the case in the UK, coupled with more general 'open data' policies for the public sector.<sup>8</sup> We think that linking the definition of consumer data to the transactional activity of a consumer with an entity would be simpler and more practical than the current proposal, provided the definition was clear and related to the transactional attributes upon which firms compete for customers in a given market segment (i.e. data use and call minutes with mobile phones, monthly data allowances and download/upload speeds with broadband plans). Such an approach would also support the proposed consent and opt out recommendations within the Draft Report, and clearly allow data transfers to occur in a way that empowers consumers and facilitates benefits in this regard. We also note that compliance costs for firms with large customer bases such as Telstra would be significantly lower under the narrower definition. More broadly we also think a narrower option for the definition of consumer data would meet the various reform criteria outlined by the Commission in chapter 8 of the Draft Report, as briefly surmised in Table 1 overleaf.

If the Commission was to assess at least two real options for the definition of consumer data in its Final Report this would provide a clearer view of how costs and benefits vary with changes in the breadth of the consumer data definition, and offer clear guidance on the approach which offers the overall greatest net benefits. We would also encourage the Commission to be mindful of best practice regulatory principles, as discussed in this section, when it is determining the specific attributes of the options it wishes to consider in detail.

---

<sup>8</sup> Other options may also exist, with the key being elements of specificity around what is and is not included in the definition of consumer data.



Table 1 Assessing a 'transactional' consumer data definition against the Commission's reform criteria

Reform criteria identified by the Commission	Comment
1. Deliver net benefits to the community	Yes because consumers would be empowered through access to their transactional data, and the incentives for firms to collect data would not be adversely impacted. Privacy outcomes would be similar if not the same as the broader option, but administrative and compliance costs lower.
2. Increase the availability of data	Yes data availability would increase, and more efficient use of this enabled.
3. Increase the usefulness of data	Transactional data could be provided in a machine readable form and easily transferable. The adoption of sector specific standards would support interoperability.
4. Engender community trust and confidence in how data is used	Consumers would be empowered with respect to their own transactional data, and be in a position to realise benefits from this. This outcome, combined with greater transparency and openness from data custodians about how data is used and the existence of opt out options would promote trust and confidence.
5. Enable individuals to understand, access, use and benefit from their data	Consumer benefits in terms of improved accessibility primarily stem from access to transactional data. Widespread availability of transactional data will promote understanding, access, use and benefit realisation.
6. Preserve commercial incentives to collect and add value to data	Adopting a narrower definition of consumer data would avoid removing incentives and/or triggering behavioural changes among private sector data custodians, and accordingly result in greater net benefits compared to the adoption of a broader definition. Commercial in confidence data would not be available for access.
7. Promote transparency and accountability of governments	The adoption of open data policies by governments, in conjunction with increased access to consumer transaction data would promote transparency and accountability.
8. Address potential risks to privacy	Incentives for protecting privacy would exist under both a narrower and broader approach, but under the later broader, more centralised data repositories would be required and if these were attractive to hackers privacy risks could increase.
9. Establish adaptability in policy settings/processes to account for different data types, different data users and changes that innovation will bring	A narrower definition would promote clarity and certainty, and provide a robust platform for future adaptations as markets and technologies evolved. A broader definition would not necessarily achieve these outcomes, especially if it resulted in a lack of clarity and/or uncertainty about obligations faced.



---

## 03 Supporting private sector investment and innovation

Generally, with the exception of the proposed definition for consumer data discussed in Chapter 2, we consider the recommendations within the Draft Report reflect the private sector's broad experience and commercial interests in the areas of data. This is welcomed because the private sector is at the forefront of making decisions and investments in areas such as product development, technology adoption and productivity enhancements in order to provide new and innovative goods and services to consumers.

This chapter provides brief comments on several of the recommendations that are pertinent to private sector data custodians including openness with consumers, data transfers, data sharing standards, the pricing of private sector datasets and national interest datasets. Comment is also made on the importance of streamlining any future institutional arrangements which may accompany a reformed data framework so compliance burdens are minimised.

### 3.1. Building trust is essential

In order to build confidence and trust among consumers it will be important that data custodians — especially private sector entities — are open and upfront about how they use, or intend to use, consumer data. Telstra has developed internal processes supported by dedicated resources to support ongoing and open communication with our customers about how we use consumer data and their rights in relation to this.

For example, our privacy statement is readily available online and includes sections such as 'How we use your information', and we also publish a separate 'online privacy' statement informing consumers about how we manage advertising, marketing and research/analytics activity in different digital environments and how they can opt-out of these activities. We are also required under the Australian Privacy Principles to provide customers with access to the personal information we hold about them, and to take reasonable steps to ensure the personal information is accurate, up to date and complete.

We believe that being clear with our consumers on how we use their data helps to build confidence and trust in Telstra. These actions also encourage the adoption of similar behaviour among industry competitors and in this way the various dimensions of the proposed 'comprehensive right' can be realised in a competitive market without heavy-handed regulatory interventions. We do, however, support the proposal to standardise consumer data provision in a machine readable format and we also support consumers being able to transfer their data. Because transactional data directly relates to the services they acquire, the transferability of this will drive contestability between competing service providers, delivering benefits in turn to the consumer.

On the matter of retaining consumer data, it is suggested that the Commission align its recommendations to the retention periods which arise in the context of data retention legislation and the Telecommunications Consumer Protections (TCP) Code. We also reiterate our earlier submission in noting that the breadth of retention requirements will be a driver of the associated compliance costs and broader, centralised data repositories could be attractive targets for hackers and criminals despite the adoption of protective measures creating new security risks for custodians to manage. We believe these are further considerations which support a narrower as opposed to broader definition of consumer data.



---

### 3.2. Industry is well placed to determine sector-specific data sharing standards

Telstra supports the proposal in recommendation 6.2 for industry to have responsibility for determining sector-specific standards for data sharing between firms. We believe that these standards should focus on the technical standards which will be required to facilitate data transfers of clearly defined consumer transactional data. As is the case with other industry standards we believe industry bodies should have the ability to develop sector-specific data sharing standards on behalf of their sector, with this role potentially extending to the provision of advice on appropriate data governance protocols.

We also note that the breadth of the definition of consumer data will influence the cost of collecting, processing and transferring, as additional IT and system investments may be required, meaning greater breadth is likely to result in greater costs.

### 3.3. Pricing of private sector data should be left to the private sector

We agree with the Commission's observation that there are limited instances where a public interest case can be made for government involvement in the pricing of private sector data — decisions on the pricing of this data, where it is made available, should be left to the relevant private sector entities.

### 3.4. National interest datasets will require a rigorous framework

We are generally supportive of the proposals relating to National Interest Datasets (NIDs) but believe a more rigorous framework is required around the designation of a private sector datasets.

The Draft Report states:

*“... the designation of a dataset as a National Interest Dataset would take precedence over existing and future restrictions to access, which apply to all data contained in the dataset. This would include legislative and other program specific requirements that data be used only for the purposes for which it was collected; ...” (p.353)*

This is a broad power and while it suggested that designation occur via a disallowable instrument (recommendation 9.4), and the national Data Custodian be able to negotiate with relevant parties, these measures afford private sector data custodians little to no protection from the designation power, which could potentially amount to an expropriation of proprietary rights. For this reason we submit that the framework must include an appeal provision to ensure there is accountability for designations which are made and permit the overturning of these if underlying public interest considerations are not met and/or adverse impacts in the form of market share, competitive position and/or reputation result.

The designation framework should also have regard for additional costs which may be incurred by the data custodian as a result of the proposed power being exercised.

### 3.5. Institutional arrangements should be as streamlined as possible

Consistent with best practice regulatory principles, we encourage the consideration of streamlined institutional arrangements to maximise efficiency, minimise regulatory responsibilities and overhead, and to ensure compliance is manageable.



---

## ATTACHMENT A: Relevant best practice regulatory principles

Within Australia numerous governments, government bodies and government departments have published reports on the topic of best practice regulation in recent times including the Department of Prime Minister and Cabinet (DPMC), COAG and the Department of Communications (DOC).<sup>9</sup>

As many of the recommendations within the Draft Report reforms — should they be adopted — are likely to materialise as regulations there is a need for the Commission to ensure its final recommendations are developed, and considered, within the context of best practice regulatory principles. The principles set out in this section are drawn from the reports identified above, and are highly relevant to the current inquiry area.

### A.1 Overall net benefit and greatest net benefit

Benefit-cost analysis, and the presence of an overall net benefit is the cornerstone of all best practice regulatory principles and analyses. Significantly, emphasis is also placed on selecting — for a given problem — the solution which will deliver the greatest net benefit. Implicit within this second point is the fact that there will typically be more than one option for addressing a given problem, and costs and benefits could vary between these.

The DPMC guidelines in particular offer extensive guidance on considering multiple policy options and assessing the likely net benefit of each option. Best practice net benefit assessments have separate regard for business impacts, community organisation impacts and individual impacts.

Separate to the Australian reports noted above, both the European Commission and the OECD emphasise the need for rigorous cost benefit analysis to ensure regulation is appropriately targeted and does not create unanticipated costs.<sup>10</sup>

### A.2 Rules established should be clear, simple and practical for all users and have a sound legal and empirical basis

This principle is drawn from the DOC guidelines, but similar sentiments are also evident within the COAG guidelines which suggests regulatory instruments “should be drafted in plain language to improve clarity and simplicity, reduce uncertainty” (COAG, p. 5).

Ensuring that rules (i.e. regulations) are clear and practical is not only important for informing future compliance obligations, but it also helps support the quantification of associated costs and benefits. If rules (i.e. regulations) are not clear it is likely to be difficult to infer specifically what they require, and therefore difficult to quantify associated benefits and costs. Practicality is also an important consideration, as slight variations in the nature of regulatory requirements may significantly affect overall practicality and therefore the compliance burden.

---

<sup>9</sup> For example: [The Australian Government Guide to Regulation](#) (DPMC, 2014); [Best Practice Regulation: A Guide for Ministerial Councils](#) (COAG, 2007); [Deregulation in the Communications Portfolio](#) (DOC 2013).

<sup>10</sup> [Better Regulation Guidelines](#) European Commission, 2015; [Recommendation of the Council on Regulatory Policy and Governance](#) OECD, 2012 (p. 4-5).



---

It is also important for rules (i.e. regulations) to have a sound legal basis, which extends in practice to having clarity and also consistency with other legislative or regulatory measures. Attaining 'consistency with other regulations and policies' is another, related, principle within the DOC guidelines.

### **A.3 Government action should be proportional to the issue being addressed**

The notion of proportionality in a regulatory setting is essentially a design issue, and closely linked to the identification and consideration of different options for addressing a given problem.

The COAG guidelines provide a succinct outline of this principle:

*“Proportionality involves ensuring that government action does not ‘overreach’, or extend beyond addressing a specific problem or achieving the identified objective. The scope or nature of government action should be commensurate with the magnitude of a problem, its impacts, or the level of risk without action. The principle of proportionality applies equally to the implementation of regulation, including the development of frameworks for ensuring compliance.”*