

9 December 2016

Data Availability and Use
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Sent online: <http://www.pc.gov.au/inquiries/current/data-access/make-submission#lodge>

Re: Data Availability and Use Draft Report

Dear Commissioner,

The Australian Dental Association (ADA) welcomes the opportunity to provide feedback on the Productivity Commission ('the Commission')'s Data Availability and Use Draft Report.

Our feedback is confined to the Draft Recommendations. The ADA supports the overall thrust of the Recommendations, and commends the Productivity Commission's efforts to outline a framework to improve the availability and use of public and private sector data while at the same time protecting privacy of individuals. The creation of adequate safeguards, alongside regulations that enable and encourage increased data use provides significant potential to advance the public interest in both the public policy arena and in the commercial sphere.

The ADA has the following points to raise in relation to specific Draft Recommendations:

- **Draft Recommendation 4.2:** Australian Government to retain right to access/purchase data that is in the public interest from private sector contractors

The ADA agrees with this Recommendation but urges the Productivity Commission to further recommend that the Australian Government require private companies contracted to process datasets be screened for unacceptable conflicts of interest and to ensure that adequate measures, such as 'Chinese walls' used in the financial sector, are put in place to ensure that misuse of all data, relating to health, is prevented.

- **Draft Recommendation 5.2:** No need for individual agreement to provide access to identifiable information for the purposes of health and medical research if in the public interest

Retention of privacy in respect of records must be retained. It should remain a fundamental right. If there is to be a "public interest" exception then this needs to be clearly defined. The ADA notes that the final report will outline a structure for the public interest definition, to support the Office of Australian Information Commissioner (OAIC) in developing its guidance. Stakeholders should be invited to provide feedback on this critical issue.

- **Draft Recommendation 6.2:** While private sector will determine sector-specific standards for data sharing, government could mandate this if progress does not occur, when in the public interest

The private sector will appropriately determine sector specific standards for data sharing between firms

under the proposed framework. Government is not required to develop such standards although are welcome to provide resources to assist industry efforts to do so. Alternatively, government can be a partner in encouraging or facilitating such collaboration.

- **Draft Recommendation 9.2:** A Comprehensive Right to access digitally held data about individuals

While the ADA supports a Comprehensive Right as described, it provides the following additional suggestions:

Require Critical Information Summaries

Regarding the best methods of disclosure to inform consumers about how a consumer's information is being used, the ADA suggests that Critical Information Summaries (CIS), which are used in the telecommunications industry with respect to services such as mobile phone contracts, be mandated. Although the ADA acknowledges that commercial uses of consumer information will evolve and change, CIS should mandate disclosure of those commercial uses that are the most common for that particular business; for example, on-selling data to marketing companies. Similarly, there should be regulatory provisions forbidding the further on-selling of information upon receipt by third parties to additional parties, to prevent an exponential proliferation effect whereby the consumer does not receive a benefit or compensation for the use of their data by other entities beyond the one they directly dealt with.

Ability to appeal automated decisions

The ADA also endorses the Comprehensive Right's ability to appeal automated decisions as outlined by the Overview of the Draft Report:

"Consumers would also have a right to be informed of disclosure of data by a data holder to third parties; and a right to appeal automated decisions, such as those based on statistical profiling. This access right would be enforceable in the same way that existing powers are — via complaint to the Office of the Australian Information Commissioner (OAIC) or the relevant industry ombudsman."

We trust this ability to appeal would be afforded to consumers with respect to their information provided in the private sector as well. Statistical models are imperfect and do not necessarily capture the entire context of an individual, consumer or user's circumstances – and so decisions, made by government agencies or private corporations – have the real risk of detrimentally impacting on consumers. In the health context, where an individual may differ from the statistical norm or average on one indicator, but otherwise is healthy from a clinical perspective, depending on the particular service and business model adopted by the organisation, the individual may stand to be unduly discriminated against. Naturally consumers should be provided easy to exercise appeal rights that are minimal in cost.

Discrimination and use of sensitive consumer and market information against the public interest should be curtailed

Discrimination of individual consumers

As the sophistication of data matching technologies and algorithms develop, seemingly innocuous correlations or relationships between individuals' behavior or preferences hitherto thought of having no commercial significance may, in future, be deemed to be relevant. One vivid example of this was revealed by ABC's *The Checkout* where Coles, a supermarket company that has a large market share in Australia, have been able to predict, with a high degree of accuracy, when women are pregnant based on their purchases - in some cases even before the woman is aware they are pregnant. Depending on the uses to which this information is provided, there may not be an immediate public benefit but instead a public detriment; the latter requiring regulation to bar such access or particular use of that data matching information in the first place. One area where the power of data analytics could be used against the public interest is in the current industry practice where insurers exclude people with a history of any mental illness from cover; often for life. Providing an avenue for appeal through the Comprehensive Right is only a partial solution and does not

directly address potential cases of discrimination that may be found to be 'statistically sound' or 'defensible' by the data analytics models and analysis used.

Use of commercially sensitive health market data

Problematic access and use of commercially sensitive health market data by private health insurers (PHI), facilitated by the HICAPS claiming system, is one example where a whole health services market and sector can be negatively impacted if there is no appropriate regulatory response to limit such uses of sensitive data. PHI can access data about the charging practises of individual practitioners and practices who use the HICAPS system. PHIs, especially those that are vertically integrated and operate practices owned by them have the advantage of access to granular sensitive information of the pricing, clinical practices of their competitors (the practice where the PHI's member attended for treatment), the specific procedures performed and the identity of the patient who received these procedures. This places the PHI in a unique position of being privy to the actual prices of its competitors; knowing which services are being provided and the busyness of those practices. This enables them to have access to sensitive information and be able to act on this information to increase their competitiveness. It also enables the PHI to identify suitable members of theirs it can then 'steer' to the PHI owned dental clinics and/or to their contracted 'preferred' provider network - either by way of pricing signals, such as setting a particular level of rebate (and thus influencing) out-of-pocket expenses or contractually in the terms and conditions of policies. They are also privy to the busyness and volume of trade in competing practices and having this market data may enable them to identify suitable areas in which to open their own practices. Over time, PHI can build their database of fees rendered and service volumes from their competitors.

This conduct has a materially detrimental effect on competition in the market, as the PHIs, particularly large ones that occupy significant proportions of the private health insurance market, are privy to the commercially sensitive data of their competitor dentists. The PHI then has the ability and incentive to utilise this information to their advantage and to thereby skew the competitive process. The ADA's view is that technologies relating to electronic payment systems such as HICAPS, PHIs use market and consumer sensitive data in this manner distorts the market and is not ultimately in consumers' long term health or commercial interests.

Examples of regulations that limit the detrimental applications of data

It is for these reasons that the ADA urges the Productivity Commission to recommend that the Australian Government review all laws and policies that may be impacted by the increased trend and impact of 'big data' and data analytics. One example where, as a matter of public policy, there are legislative restrictions barring practices that could potentially use consumer data against the public interest are mandatory community rating in the private health insurance industry; which prohibits insurers from 'improperly discriminating' between people who are, or wish to be, insured under a complying health insurance policy. At the same time, risk equalisation, which is also legislatively mandated, provides a mechanism for transferring and sharing risks across insurers so that insurers with an older or less healthy membership are not financially disadvantaged.

Right to 'Opt-out' of data collection

The ADA also supports the explicit right for consumers to 'opt out' of a data collection process; noting that the Overview outlines that:

"In the private sector, opting out of data collection may well mean that a particular product or service is no longer available or no longer free to that consumer. But consumers must, in the ever-expanding world of data opportunities, be able to make that call for themselves."

The ADA would suggest that the Productivity Commission recommend further that guidelines or regulatory requirements be developed to require entities that provide such products involving data collection provide as an option the version of the product whereby data is not collected for the business/company's use; and that the price not be too prohibitive. The ADA would presume that such products without the data collection and business/company reporting function would be less costly than the version that had those additional features.

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- **Draft Recommendation 9.4:** Processes to nominate public and private datasets and National Interest Datasets

There should be more clarity on what would be considered to constitute a National Interest Dataset; and whether or not there is a role for stakeholders to participate in that assessment.

- **Draft Recommendation 9.9:** Prioritise public research funding for those institutions that make researchers data available to trusted researchers on conclusion of research projects

The ADA does not support this recommendation. Such funding should be prioritised based on when the research projects are published, rather than concluded, so that any further edits and corrections to findings of such reach are taken into account and there is no risk of having such discrepancies 'passed on' via premature release of this data. Also, this should not be the primary reason for prioritising funding which should be the potential value of the research, but a secondary reason.

While the ADA in this response has referred to some points raised in its June submission to the Productivity Commission's Issues Paper, there are other points that we request the Productivity Commission reconsider, namely:

- The importance of enabling de-identified data sharing between the private sector and the public sector to better inform policy making and implementation; and
- That the Australian Government take responsibility to increase data literacy as a means to help Australians see the value of the upcoming data availability and use framework outlined in this draft Report, as well as to empower consumers to better engage in the digital and data economy.

Should you require further comment regarding the ADA's feedback, please contact Robert Boyd-Boland at ceo@ada.org.au or 02 9906 4412.



Yours sincerely,

Dr Hugo Sachs
President