

12 December 2016

**Submission in response to
Productivity Commission Draft Report on Data Availability and Use**

Unfortunately, we are unable to give a comprehensive response to the many issues raised in the draft report in the short time frame allowed given other commitments. However, we wished to make a few short points at this time, and are available for further consultations if such are being held.

Positive aspects

There are many positive aspects of the Commission's draft report. In particular, we note the recognition that different types of data and different circumstances raise different levels of risk and the proposed right to appeal automated decisions.

Nomenclature of 'consumer data'

The draft report uses the term 'consumer data' in Draft Recommendation 9.1. While some of this data will pertain to individuals in their capacity as consumers, other data in this category could pertain to individuals in their capacity as Australian citizens, Australian residents or Australian visitors (for example). In particular, to the extent that 'consumer data' incorporates data held by government rather than the private sector, a different term may be more appropriate, for example 'data pertaining to an individual'.

Complexity of law reform

The draft report recommends a new *Data Sharing and Release Act*. This oversimplifies the task of law reform in this area given the complexity of existing legislative and regulatory frameworks. In particular, as the report notes, there are currently rules surrounding particular datasets and agencies in addition to legislation that applies more generally (such as the *Privacy Act*, the *Archives Act* and state counterparts). The addition of new legislation, unless carefully constructed, may compound the confusion as to which set of rules apply. Overriding existing legislation explicitly would only work if the new legislation took a risk-based approach (recognising differences in risk among datasets as is sometimes the case in existing law), and either (1) the new legislation accomplished similar broad objectives to the legislation being replaced, (2) the

new legislation only replaced part of existing legislation, or (3) a combination of both.

Willingness to share data

The draft report refers briefly to the potential problems of individuals who are not willing to share data. It raises this concern as a subset of broader fears concerning privacy and confidentiality and suggests that these are important but not an impediment. We suggest that unwillingness to share data is an increasingly important phenomenon to which the report should give more weight. On page 9, the report states that, in 2013, almost half of Australians took active steps to increase their anonymity online. Given changes in internet access and use in Australia since 2013, a 2013 statistic should be used with caution and ideally more recent data should be collected. In many cases, individuals are increasingly successful at minimising their data trail, particularly in the context of counterterrorism and serious organised crime. Further, the sentiment such steps indicate should be further addressed. In particular, the commission's claim that individuals are likely to be identified regardless as they do not understand the data trail they leave does not account for the fact that a significant proportion of Australians would *like* to minimise this data trail. The report suggests that increasing ownership over all data collected may minimise this sentiment, but in our view this is not necessarily correct. Ultimately, the report does not address either the fact that unwillingness to share data may be a rational act not necessarily driven by fear but by self-interest, or the likelihood that such practices are not only increasingly common but may increase in efficacy.

Public engagement

Consultations do not necessarily accomplish the same goals as broader public engagement and conversations that can help to identify risks and concerns and evaluate proposals for reform. We would hope that this could take place, if not before the final report then in the process of drafting and passing proposed legislation.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Lyria Bennett Moses'.

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