

Business  
Council of  
Australia



SUBMISSION

# Response to the Productivity Commission's Draft Report on Data Availability and Use

DECEMBER 2016

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The Business Council of Australia is a forum for the chief executives of Australia's largest companies to promote economic and social progress in the national interest.

## About this submission

This is the Business Council's response to the Productivity Commission's Draft Report into Data Availability and Use.

## Executive summary

In our initial submission, the Business Council outlined a number of objectives for data-related policy, specifically, to:

- encourage investment and innovation in data by companies. Greater use of data generates benefits for consumers, including lower prices, access to benefits at no cost, more convenience, greater personalisation and reduced information asymmetry<sup>1</sup>
- allow consumers access to data about themselves, and some measure of control
- encourage greater release of data currently held by the public sector
- protect against the release of data, where greater availability invokes risks such as undermining national security or competition.

There is broad alignment between these policy objectives and those in the Commission's draft report. However, the recommendations put forward by the Commission are far reaching and would need careful design to avoid incurring unintended, perverse consequences. This submission seeks to guide the development of recommendations for the Commission's final report.

### **Comprehensive Right**

The Commission has recommended the creation of a Comprehensive Right<sup>2</sup>, which would essentially grant consumers:

1. the right to access and correct data about themselves
2. the right to request the transfer of data about themselves from a current service provider to a competitor
3. the right to opt out of data collected about themselves
4. the right to be informed about data shared with third parties.

The Commission's worthy objective for the Right is to ensure 'continued community acceptance and trust in the handling of personal data by governments and business'.

However, the creation of a Comprehensive Right would be a seismic change. If not done well, it risks unintended consequences – chilling investment and competition – that would negate possible benefits.

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<sup>1</sup> BCG, *The value of our digital identity*

<sup>2</sup> Draft Recommendation 9.2

Generally, the creation of rights will only be the most efficient solution if economic activity is being inefficiently impeded, either because consumers currently have insufficient confidence to transact or it is too costly for them to negotiate satisfactory arrangements with businesses.<sup>3</sup> The enthusiastic provision of data by consumers<sup>4</sup>, and the fact that businesses already make data available, suggests this is not currently the case.

A well-functioning data market where consumers negotiate exchange of data and benefits, backed up by a light-touch regulated minimum, would more effectively achieve the same objective. The Business Council continues to believe a market-based approach to superior to additional regulation.

However, if the Commission proceeds with recommending the creation of a Right, we have outlined several amendments to improve the design.

The most important amendment relates to the definition of ‘consumer data’<sup>5</sup>, which determines the scope of the Right.

The Commission has put forward an indicative definition that would capture all data where the subject is identifiable (or where they can be re-identified from de-identified data). We understand the Commission is inclined to leave further detailed work on the scope of the Right to companies (through implementation) and courts (through interpretation).

We have two concerns with this approach:

1. **The indicative definition is too vague.** Because the data market is in a nascent stage, it is difficult to determine what specific data would be captured. The distinction between identified and de-identified data is not as clear-cut as suggested in the report.

Policymakers should not outsource fundamental design and scope questions to the implementation process. The scope of data fundamentally determines the costs and benefits of the Right, and it is incumbent on the Commission to design a workable definition.

In the absence of clearer boundaries, companies would incur the risk of interpreting the law, and the risk and cost of testing the law through the courts (and making changes if courts interpret differently). The consequences of this uncertainty would be to discourage data-related investment and ultimately diminish benefits to consumers.

2. **The indicative definition is too broad.** The definition should not capture data beyond what is required to efficiently achieve the objective of community confidence. An overly broad scope risks higher implementation costs and unintended consequences.

A broad scope is most concerning in relation to value-added data (data that has been transformed, derived from other data, or otherwise enables a company to offer more to

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<sup>3</sup> S Pejovich, ‘Towards an Economic Theory of the Creation and Specification of Property Rights’, *Review of Social Economy*, vol 30, no 3, September 1972; A Robson & S Skaperdas, ‘Costly Enforcement of Property Rights and the Coase Theorem’, *Economic Theory*, vol 36, no 109, 2008.

<sup>4</sup> Figure 2 in the Commission’s Draft Report

<sup>5</sup> Draft Recommendation 9.1

its consumers).<sup>6</sup> Companies currently add value to data to gain a competitive edge, and this requires significant investment.

An overly broad definition would capture value-added data and provide it to competitors through the right to data transfer (in practice, having the same effect as mandated access to data by competitors). This runs the risk of chilling investment or competition, falling short of the Commission's own objective for data policy to 'preserve commercial incentives to collect, maintain and add value to data'.

We understand the Commission is inclined to think a very broad scope is necessary to build consumer trust, but there is no evidence presented that encouraging greater data release through regulation will be more effective than building consumer trust through voluntary exchange or negotiation.

We also acknowledge the Commission's desire to avoid being overly prescriptive to account for changes in technology. However, it is not possible to make regulation ever current and, in the meantime, the costs of over-capture are significant while the benefits are unforeseeable.

It would be more effective to regulate consumers' rights for an essential minimum of data that is proportional and meaningful. This would not reduce the amount of data available to consumers, but rather, would allow competitive tension to encourage businesses to supplement the minimum with additional data that adds value for their customers.

For these reasons, if the Commission proceeds with recommending a Comprehensive Right, it should include a clear, targeted and workable definition of consumer data.

Although different companies may have different views on how the definition could be drafted, the Business Council and our members agree that the essential elements are:

- value-added data is not subject to the right to transfer, to minimise the potential chilling effects on investment and competition
- the Right should apply to data for a limited time only, similar to current requirements for retention of information, to reduce the costs of implementing the Right while ensuring that current information remains available to consumers
- consumers are defined only as individuals who have a direct transactional relationship with the data holder, to ensure the scope remains manageable without diminishing consumers' access to data.

Because the creation of the Comprehensive Right is a major change, we encourage the Commission to consider how the Right could be staged in implementation and periodically reviewed.

### ***Competition***

In our submission to the issues paper, we raised concerns about any proposal to mandate data sharing by companies with competitors. These proposals would risk chilling

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<sup>6</sup> Note: this is not intended to be an exhaustive definition of 'value-added' data.

competition and undermining the incentives to invest in data. They would ultimately diminish benefits to consumers.

The Commission's draft report shared these concerns and avoided recommendations to mandate data sharing with competitors. We ask that the Commission re-state this view as a recommendation in the final report.

### ***National Interest Datasets***

The final recommendation that requires careful design is the proposed National Interest Datasets, as they relate to private sector datasets.<sup>7</sup>

Where there is a clear public benefit, private sector data should generally be available, or provided on a limited basis to regulators for markets to function efficiently. Companies already do this, through compliance and voluntary exchange.

However, the proposed design of the National Interest Datasets process is ambiguous, and does not provide guidance around what is meant by the 'national interest'.

We recommend two changes to the design of the National Interest Datasets process:

1. Establishing a clear set of criteria to establish what is meant by 'national interest', and set a tighter scope for private sector datasets that could be published through a National Interest Datasets process.
2. Improving the process for considering whether a specific dataset would meet the National Interest Datasets criteria, to ensure it can properly account for both the costs and benefits of release. This process should also be used to consider whether any private sector datasets currently held by governments or regulators are appropriate for broader release.

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<sup>7</sup> Draft Recommendation 9.4

## Recommendations

1. The Commission should put forward a definition of ‘consumer data’ underpinning the Comprehensive Right that is targeted, clear and workable.

The essential elements of a definition would be that:

- value-added data is not subject to the right to transfer
- the Right should apply to data for a limited time only, similar to current requirements for retention of information
- consumers are defined only as individuals who have a direct transactional relationship with the data holder.<sup>8</sup>

2. The Commission should adopt a range of other amendments designed to improve the operation of the Comprehensive Right:

- Obligations in privacy legislation should not duplicate or overlap with those in the Comprehensive Right.
  - Legal liability in instances of data transfer should be clarified, including potentially through minimum standards for recipients of transferred data.
  - An exemption from the Comprehensive Right should be created for personal data that relates to national security or law enforcement, or could cause personal harm if released.
3. The Commission’s final report should contain a specific recommendation that governments should not pursue policies to mandate data sharing with competitors, as per the discussion in the draft report.
  4. The Commission should establish a clear set of criteria to determine what is meant by the ‘national interest’, and a tighter scope for private sector datasets to be published as a National Interest Dataset.<sup>9</sup>
  5. The process for considering whether a specific private sector data set would meet the National Interest Datasets criteria should properly account for both the costs and benefits of release.<sup>10</sup>

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<sup>8</sup> Draft Recommendation 9.1

<sup>9</sup> Draft Recommendations 9.4, 9.7

<sup>10</sup> Draft Recommendations 9.4, 9.7

## Key issues

### Comprehensive Right

The Productivity Commission has recommended the creation of a Comprehensive Right<sup>11</sup>, which would essentially grant consumers four rights:

1. the right to access and correct data about themselves
2. the right to request the transfer of data about themselves from a current service provider to a competitor
3. the right to opt out of data collected about themselves
4. the right to be informed about data shared with third parties.

The Right would apply to data that falls under the Commission's proposed definition of 'consumer data':

- personal information, as defined in the *Privacy Act 1988*
- all files posted online by the consumer
- all data derived from consumers' online transactions or Internet-connected activity, where this data is identifiable or re-identifiable
- other data associated with transactions or activity that is relevant to the transfer of data to a nominated third party, where this data is identifiable or re-identifiable.

The Commission's objectives broadly align with the objectives in the Business Council submission:

- consumers should have access to data about themselves
- they should have some measure of control
- they need to perceive they are receiving a fair return for it
- they need to be confident it is not being used for inappropriate purposes.

However, we envisaged an alternate way of achieving these objectives.

Our last submission put forward a vision of how these objectives can be achieved through a well-functioning data market, where consumers are empowered to negotiate an appropriate benefit in return for exchange of their personal data. This would be combined with education and awareness for consumers, and minimal government intervention beyond what is required for the market to function.

The benefits of this model would be:

- clear incentives for increased investment in data-related goods and services, which generate benefits for consumers and the economy

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<sup>11</sup> Draft Recommendation 9.2

- consumers have choice about what data they provide, and they are empowered to negotiate the value they would like in return (for example, lower prices, free access to a service, or other rewards)
- sufficient incentives exist for companies to behave appropriately in using data, because they depend on the trust and confidence of their customers.

We maintain our view that a market-based approach is superior to a regulatory approach:

1. The creation of rights will only be the most efficient solution if: economic activity does not happen because it is too costly for negotiation to occur; or parties do not have sufficient confidence to transact. However, the Commission's report itself notes that consumers are willingly – even enthusiastically – providing data about themselves already.

This would suggest the current system is building sufficient consumer trust and confidence for economic activity. This occurs through companies providing data through voluntary exchange or negotiation, backed up by a regulated minimum, set through privacy legislation.

We do not agree with the view that this system will inevitably fail once there are isolated cases of breaches of trust.

2. A market-based approach also avoids the risk of chilling investment or competition. These are real risks that would materialise from a poorly designed Comprehensive Right.

However, if the Commission continues to prefer a regulatory approach, we have recommended some amendments that are designed to improve the workability of the Comprehensive Right.

### ***A targeted, clear and workable definition of consumer data***

The Commission should put forward a definition of 'consumer data' underpinning the Comprehensive Right that is targeted and clear.

The creation of a new right is a seismic change, and it is relatively unusual in our legal system. The design of the definition is fundamental and is the primary determinant for whether or not the Comprehensive Right will be effective or efficient.

Our understanding is that the Commission may be reluctant to undertake the detailed legal drafting of the definition. There may be a view that is preferable to leave the detailed consideration of what data is captured under the definition to companies (in their implementation) and courts (through their interpretation).

Although there is inevitably an element of implementation and interpretation in any new legislation, it would be concerning if the final definition was as vague and broad as the definition proposed in the draft report. It is incumbent on the Commission to undertake the detailed work required to specifically recommend the scope of the proposed Right.

The data market is in a nascent stage, and it is very difficult to determine what data would be captured by the Commission's proposed definition.

The distinction between identified and de-identified data is not clear-cut. It is already unclear what data may be captured under current, well-established legislation (see, for example, the Full Federal Court's consideration of the *Telstra v Australian Information Commissioner* case). Additional questions raised by the Commission's indicative definition include:

- Would data be captured if it is de-identified, but capable of being re-identified?
- Or if a dataholder suspects but cannot verify who is the subject?
- Or if it relates to a person's device, even if the device's data cannot be linked to the owner?

Moving to a new definition that has no body of case law (and no international examples to compare with) creates even more uncertainty for companies who are subject to the Comprehensive Right. The uncertainty means that companies assume the risk of interpreting the law, and hence the risk and cost of testing the law through the courts (and potentially rectifying systems if the court takes a different interpretation).

The effect of this uncertainty would be to discourage investment in data-related goods and services. This ultimately delays or diminishes benefits to consumers.

As well as having a clear definition, it is important that the definition is workable and targeted. It would be more effective to regulate a proportional and meaningful minimum for consumers, and allow competitive tension to encourage businesses to supplement the minimum with additional data that adds value for their customers.

An overly broad definition would raise two primary concerns:

1. It risks unintended consequences.

Companies may generate significant value from the data given to them by consumers: for example, they may undertake analysis of consumer patterns in order to provide specific benefits to that consumer. As indicated in our draft submission, this value-added data can be transformative and innovative, and require substantial investment from the dataholder.

If value-added data is transferred to a competitor, it risks undermining the competitive advantage a company would receive from that data and allow free riding by competitors on the dataholder's initial investment. This would undermine the incentives for companies to add value to the data, or to structure their business in an inefficient way. Either way, this denies consumers the benefits of data.

Providing value-added data to competitors would, in fact, have virtually the same effect as other proposals to mandate data sharing between competitors. It would have the same practical impact as proposals for which the Commission says elsewhere in the report 'the policy case is weak'.

2. An overly broad definition generates significantly higher implementation costs, because the systems required to comply would be more complex.

There is no evidence that consumers would require *all* of the data that could possibly be linked to them. Providing value-added data to competitors would not reduce switching costs for consumers, or provide them with convenience or other benefits. There should be a clear public policy case for any data included in the Comprehensive Right.

We recommend applying the best practice regulatory principle of proportionality. The Right should be designed so that requests are only processed if the purpose and costs are reasonable.

Finally, the Commission should also prepare a precise definition of what is intended by a 'consumer'.

It should refer to individuals that have a transactional relationship with the data collector.

We recommend that any definition should not include:

- individuals who may be subject to observed or inferred data but do not have a transactional relationship with the data collector. If any person can make a request under the Comprehensive Right regardless of whether they have a transactional relationship, it can cause data holders enormous cost, with little public benefit.
- devices. As per the previous discussion on identifiability of personal information, it should exclude data generated by devices that cannot be reasonably verified as being linked to an individual.
- businesses. A consumer should refer to an individual. Notwithstanding some legislative definitions of consumers that include small businesses, a broader definition would go beyond the objectives of trust that the Commission have identified, and would vastly increase the cost of data management, since small businesses are comprised of multiple people.

### **Recommendation 1:**

The Commission should put forward a definition of 'consumer data' underpinning the Comprehensive Right that is targeted and clear.

Any definition should:

- ensure value-added data is not subject to the right to transfer
- the Right should apply to data for a limited time only, similar to current requirements for retention of information
- define consumers only as individuals who have a direct transactional relationship with the data holder.

### **Other amendments**

A range of other, more minor amendments could significantly improve the operation of the Comprehensive Right:

1. Many aspects of the Comprehensive Right would replicate or overlap with existing provisions of the *Privacy Act 1988*, for example, the right to access or correct data about an individual.

If both sets of rights existing concurrently in different pieces of legislation, there would be significant complexity in how they would interact.

We recommend streamlining the requirements in privacy legislation to minimise the compliance burden without impacting the provisions available to consumers.

2. Business Council members who hold data on consumers take very seriously the need to provide absolute security and privacy for that data. If the right to data transfer is implemented, there is no guarantee that competitors who are transferred consumer data will have the same level of concern.

This opens the risk of privacy or security breaches. It is not realistic to assume that consumers will understand or accept the risk for themselves. Consumers may intuitively see the original dataholder as responsible, even though they have no ability to enforce privacy or security in their competitors.

The Commission's final report should clarify legal liability in instances of data transfer. One option for minimising the risk could be through minimum standards for recipients of transferred data.

3. There will be some instances where it is clearly unacceptable for a consumer to have access to data, or request that collection cease.

For example, if a consumer has been flagged as suspicious and has had data provided to authorities for national security or law enforcement purposes, it is not appropriate to provide them access to that knowledge.

Similarly, in specific instances, the release of data could cause personal harm (especially when locational data is concerned).

There will undoubtedly be a range of niche scenarios that arise through the implementation of a Comprehensive Right that are hard to predict.

The best method for navigating these situations is to draft an exception that companies can rely on to deny the provision or transfer of data, where the request relates to national security or law enforcement, or the company suspects could cause personal harm.

Additionally, the Commission has described the Comprehensive Right as a joint right, because it allows data holders to continue to use datasets as long as it does not limit a consumer's Comprehensive Right. However, the current design of the Comprehensive Right does not contain any rights for data holders. Unless the Commission extends a

different bundle of rights to data holders, the Comprehensive Right would be better described as a *non-exclusive* right, rather than a joint right.

Finally, we strongly support the Comprehensive Right being underpinned by market-based pricing.

### **Recommendation 2:**

The Commission should adopt a range of other amendments designed to improve the operation of the Comprehensive Right:

- Obligations in privacy legislation should not duplicate or overlap with those in the Comprehensive Right.
- Legal liability in instances of data transfer should be clarified, including potentially through minimum standards for recipients of transferred data.
- An exemption from the Comprehensive Right should be created for personal data that relates to national security or law enforcement, or could cause personal harm if released.

## **Competition**

As outlined in our submission to the draft report, it is essential that data regulation does not undermine the primacy of legitimate commercial negotiations as the avenue by which companies share proprietary data with each other.

To that end, we strongly support the following discussion by the Commission:

'The case for a general shift in policy towards intervening to ensure one business has the same access to data as another business – which has featured in some submissions – however seems weak...

There is no evidence of resource misallocation; and competition regulators do not appear to lack the ability to examine conduct that may substantially lessen competition, should such an eventuality arise.'

It is especially important that access to private sector data by third parties – especially competitors – is not mandated. Any regulation with this objective would have a number of possible impacts, including:

- discouraging investment in data-related goods and services by allowing free riding on a company's existing investment
- adding inefficiency and cost to the dataholder, by subsidising competitors.

Any impacts would only diminish or deny the benefits of data to consumers.

There is no evidence that such intervention is required to encourage competitive markets, since a greater number of substitutes and lower barriers to entry may actually make data less likely to entrench market power than other assets.

In many overseas jurisdictions, competitors have successfully convinced policymakers that mandating access to data by competitors somehow supports the competitive process, rather than distorting it by rewarding rent-seeking. Policymakers in Australia should be alert to such arguments, and recognise that there is currently no strong case for mandating access by competitors.

The technology used to facilitate access by competitors – whether through an Application Program Interface or other technology – is not material. Regardless of the technology, these proposals risk incurring adverse impacts on investment, competition and consumers.

### **Recommendation 3:**

The Productivity Commission's final report should avoid any recommendations to mandate data sharing with competitors, as per the discussion in the draft report.

### **Availability of private sector data for public interest reasons**

The Commission has recommended the establishment of a process to make both public and private datasets publicly available for public interest reasons, called National Interest Datasets.

The Business Council submission to the issues paper recognised that some datasets should be made broadly available to the public, because broad availability generates the highest net benefits.

Many of these datasets are found in the public sector. We broadly support the Productivity Commission's push for greater publication of these datasets, especially those in the health sector, although we caution that excessively complicated governance arrangements would be counterproductive in encouraging innovation.

In relation to private sector datasets that meet the same criteria, 'many companies already make this available. Companies are best placed to identify instances where private sector data would hold public benefits that outweigh the costs (financial, administrative, opportunity or reputational) of making it available'.<sup>12</sup>

We have two concerns with the proposed process of National Interest Datasets.

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<sup>12</sup> Business Council of Australia, *Submission to the Productivity Commission Issues Paper on Data Availability and Access*

1. There are no criteria proposed to indicate the scope of private sector datasets that may qualify as a National Interest Dataset. It is not clear what the Commission proposes is in the 'national interest'.

A lack of criteria would generate uncertainty and require companies to assume the risk in implementing the framework. In other legislation, the requirement to make judgements on the 'national interest', such as foreign investment legislation, can generate unpredictability and uncertainty. As outlined previously, too much uncertainty discourages data-related investment.

A possible set of criteria could include:

- the dataset is unimproved, that is, the dataholder is not currently adding value to it
- the dataset is not the result of significant investment from the dataholder (presumably making it available would erode the competitive advantage to the dataholder and, by extension, the incentive to invest in the first place)
- the dataholder is not currently sharing that dataset on commercial terms
- a process has been undertaken to show that the potential benefits of making it available outweigh the costs.

#### **Recommendation 4:**

The Commission should establish a clear set of criteria to determine what is meant by the 'national interest', and a tighter scope for private sector datasets to be published as a National Interest Dataset.

2. We recommend that the process of considering whether a dataset should be made available as a National Interest Dataset be based on rational consideration of the costs and benefits.

The Commission's current thinking is that a parliamentary committee would review nominations for National Interest Datasets. While we support a process for carefully considering which datasets are appropriate for publication, a parliamentary decision-making process would be open to rent-seeking.

We would instead recommend that the process follow similar processes for regulation-making, overseen by the National Data Custodian. The process should include a 'best efforts' attempt to consider the costs and benefits, and ensure the benefits would outweigh the costs.

These costs and benefits can be factored into the Comprehensive Right by retaining the design feature of market-based pricing.

The Commission should have consideration for how best to encourage good governance, including possible avenues for appeal or review of decisions to encourage accountability.

The Commission should also not make available by default all information that is currently provided by companies to regulators.

Businesses provide a significant amount of information to regulators, to assist them in ensuring markets are functioning as they should. Many regulators have broad information-gathering powers. If these broad powers were combined with a default rule of making that data available, the scope of data provided would be massive and enormously costly for companies to provide. It could also have unintended consequences of chilling the competitive process, prejudicing litigation or revealing market-sensitive information.

Instead, we would recommend that, if any data sets that are currently given to regulators are considered for publication, consideration should occur on a case-by-case basis, according to the process set out above.

#### **Recommendation 5:**

The process for considering whether a specific private sector data set would meet the National Interest Datasets criteria should properly account for both the costs and benefits of release.

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