

05 October 2017

Mr Scott Farrell
The Treasury
Langton Crescent
PARKES ACT 2600

sent via email: OBR@treasury.gov.au

Business
Council of
Australia



Dear Mr Farrell

Review into Open Banking in Australia

The Business Council welcomes the opportunity to provide input to the Review.

Many of our members from the banking industry have already made submissions to the review.

This submission essentially refers the Review to the principles outlined by the Business Council in its submissions to the Productivity Commission Inquiry into Data Access and Availability (copies attached).

As outlined in those submissions, the Business Council strongly supports consumers having access to data about themselves and some measure of control over it.

Consumers also need to have trust about how their data is being used. A comprehensive consumer right, as recommended by the Productivity Commission, is one way of achieving this.

How such a right is implemented in practice will be critical for ensuring net community benefits. Clear, workable definitions of consumer data are essential to ensure that proprietary, value-added data is not subject to the right to transfer.

In this respect, we agreed with the Commission that the case for requiring the provision of value-added data directly to competitors (or indirectly via consumers) is weak. This would chill incentives to invest in adding value to data.

We also noted privacy and security risks associated with data transferred to third parties. In this respect, the Australian Bankers Association proposal for a customer initiated transfer would help address this. Clarity around liability of entities responsible for security breaches will also be crucial.

We also consider that Review proposals for open banking need to closely align with the government's response to the Productivity Commission report.

The framework for regulation should be consistent across industries and only differ where there is a clear reason to do so, agreed by industry (the so-called industry agreements in the Commission's framework). Inconsistent or double regulation or more onerous requirements should be avoided, absent demonstrable net community benefits.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jennifer Westacott', written in a cursive style.

Jennifer A. Westacott

Chief Executive

Attachment/s: Submissions to the Productivity Commission inquiry into Data Availability and Use



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 asymmetry¹
- 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 Right², 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.

¹ BCG, *The value of our digital identity*

² 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.³ The enthusiastic provision of data by consumers⁴, 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'⁵, 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

³ 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.

⁴ Figure 2 in the Commission's Draft Report

⁵ Draft Recommendation 9.1

its consumers).⁶ 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

⁶ 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.⁷

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.

⁷ 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.⁸
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.⁹
 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.¹⁰

⁸ Draft Recommendation 9.1

⁹ Draft Recommendations 9.4, 9.7

¹⁰ Draft Recommendations 9.4, 9.7

Key issues

Comprehensive Right

The Productivity Commission has recommended the creation of a Comprehensive Right¹¹, 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

¹¹ 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'.¹²

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

¹² 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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SUBMISSION

Submission to the Productivity
Commission's Inquiry into Data
Availability and Use

AUGUST 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 submission to the Productivity Commission's inquiry into Data Availability and Use. This submission primarily addresses four aspects of the inquiry's terms of reference:

- options for increasing availability of public sector data
- options for increasing availability of private sector data
- options to improve individuals' access to data about themselves
- ways to enhance and maintain individuals' and businesses' confidence and trust in the way data is used.

Overview

Use of data, and associated technologies, can generate significant economic benefits.

PwC estimates that data-driven innovation added an estimated \$67 billion in new value to the Australian economy in 2013.¹ Better use of data can also greatly improve firms' productivity, with some estimates suggesting an increase in the order of 5 to 10 per cent.²

Most of the economic benefit of data ultimately accrues to consumers, through lower prices, access to benefits often at no cost, more convenience, greater personalisation and reduced information asymmetry. The benefit to customers could be more than double the benefit to organisations.³

Data use needs to balance the benefits of data with the risk of inappropriate collection, sharing or use of data. Governments and organisations must be careful to ensure the integrity and protection of data, especially personal data that can identify individuals.

The Business Council sees this inquiry as an opportunity to examine how best to balance these considerations and maximise the benefits of data to the consumer and community.

Although the Business Council believes that increased data collection and use has the potential to generate substantial community benefits, this does not imply that there should be a one-size-fits-all approach to availability and access. In particular, although this inquiry has been asked how to increase availability of data, making data publicly available will not always yield the highest net benefits for consumers and the community.

¹ PwC, *Deciding with Data: How Data-fuelled Innovation is Fuelling Australia's Economic Growth*, September 2014, <http://www.pwc.com.au/consulting/assets/publications/data-drive-innovation-sep14.pdf>

² A McAfee and E Brynjolfsson, 'Big Data: The Management Revolution', *Harvard Business Review*, October 2012.

³ BCG, *The Value of Our Digital Identity*.

Indeed, in some cases, the optimal approach will be no access and protection of data, or access on specified terms. The best approach could also change, as the value of data use and data properties could evolve over time.

Instead, the Business Council recommends that the Commission's inquiry should be guided by a set of principles that allow different levels of availability and access for different types of data.

- Consumers should have a reasonable level of access to their personal data. The objective of consumer access is best met through fit-for-purpose regulation to protect essential rights, complemented by businesses' voluntary efforts to respond to their customers' preferences.

Access to customer data is currently provided through privacy legislation. Many businesses already provide detailed data (like consumption data) to their customers through intuitive, often digital tools, as part of their competitive offering. Any measures to increase consumer access beyond the existing framework should be industry-led, rather than regulatory, to ensure businesses continue to compete and innovate on how best to provide consumer information.

- Commercial data is the result of private sector investment and innovation, generated to benefit the enterprise's customers. This data needs to be protected, or the investment and innovation may not occur. In some instances, commercial data – that otherwise should be kept internal – should be made available so that markets can function (for example, financial performance information for listed companies).

The Commission should not recommend data reporting requirements for companies beyond the minimum required for markets to function. Excessive data provision requirements can impose costs on a business and its customers that outweigh other possible benefits.

- Data that generates the highest benefits through sharing or commercial trading on specific terms should be exchanged through market mechanisms. Third party access to private sector data should not be mandated.
- Subject to community comfort, governments should encourage greater availability of public sector data. When done appropriately, this can promote greater transparency, increased effectiveness of government services and broader innovation. The Business Council recommends health system data for priority examination.

Technology, uses of data and community attitudes to data are evolving rapidly. The speed of change poses a challenge for regulation to be relevant, fit for purpose and aligned with community expectations.

For this reason, regulatory frameworks that govern access and availability of data (like privacy laws) should be frequently tested, and subject to periodic, structural review. Excessive regulation could have the consequences of chilling data-related investment, denying consumers the benefits of data.

Industry-led approaches to data will often be more effective than regulation because businesses can innovate and adjust faster than regulation.

Different approaches to access are needed to maximise the wider community benefits of data

Depending on the dataset, benefits to the community could be maximised by:

- not sharing data. Keeping certain data internal to an organisation allows the organisation to provide valuable services to consumers or the community, and maintain trust. The costs of making the data available (financial, reputational, security and privacy) would outweigh any benefits. Examples include national security data, confidential unit record data, customer data not authorised for sharing, or operational and trade secrets.
- sharing or commercial trading on specific terms. This allows the data owner/holder to minimise risks and costs by limiting or prescribing use of the data. Examples of this data include data provided for research purposes, aggregated commercial data (like industry benchmarks), or customer data provided only to the customer on request.
- making data publicly available. Where the spillover benefits to external parties outweigh the costs to the data owner of making the data available, data should be freely available. Examples of this data include the performance of the economy, health systems and weather forecasts.

Many public sector datasets will generate large spillover benefits. For example, Lateral Economics estimates that greater use of public sector administrative data could generate an additional \$16 billion of economic value, through greater efficiency, contestability and accountability of public services.

Key recommendations

1. Regulatory frameworks that govern access and availability of data should be periodically reviewed to ensure they are fit for purpose, relevant and aligned with community expectations.
2. Access by consumers to their own personal data should be increased through industry-led initiatives, rather than greater regulation.
3. A shared effort by government, business and other organisations is required to improve consumers' education and awareness about avenues of access already available to them.
4. Data reporting requirements for companies should not be increased beyond the minimum required for markets to function, to avoid undermining incentives for investment and innovation.
5. Third party access to private sector data should not be mandated, to avoid undermining investment and innovation in data, which ultimately benefits consumers.
6. Subject to maintaining community trust, government datasets should be made more available, where this generates net benefits. Health system data should be a priority area for examination.

Background

What is data?

Companies, governments, organisations and individuals collect and maintain a range of data, such as:

- performance and operational data that is typically not personally identifiable (including financial performance)
- customer or citizen data (also called ‘volunteered data’)
- employee data
- supplier data
- observed data (either human behaviour or the environment), often aggregated and not identifiable
- inferred data (either human behaviour or the environment), again often aggregated and not identifiable.

A number of the categories identified above could include personal data.

The role of data has changed significantly over the last two decades:

- Continuous connectivity has enabled mass digitisation.
- Devices and applications that collect and generate data (such as mobile phones, social media, sensors and drones) have become more affordable and more widely used.
- Advances in computing power, and the development of more sophisticated analytical tools, have improved the ability to analyse large sets of data.
- Cloud computing has enabled greater decentralised access to data.

These advances in technology have meant that data is now massive, ubiquitous and vastly more useful. It has also resulted in the emergence and increasing availability of goods and services that collect, store, process, analyse and present data.

This trend is likely to continue: the Organisation for Economic Co-operation and Development estimates the total amount of data in the world will multiply by a factor of 40 by the end of the decade.⁴

⁴ OECD, *Data-Driven Innovation: Big Data for Growth and Well-Being*, 2015, <http://dx.doi.org/10.1787/9789264229358-en>

The costs and benefits of data

The use of data incurs costs, including the costs of collecting, storing, accessing, formatting, processing, analysing, presenting or transmitting data. Although costs are generally reducing⁵, the use of data can still require significant investment.

Depending on the dataset, there can also be costs in sharing the data or making it available. These can be financial, administrative, opportunity or reputational.

There is also some risk of inappropriate collection, sharing or use of data. Organisations need to be diligent to ensure compliance with legal frameworks, and ensure that they are operating in line with community expectations.

On the other hand, data generates economic benefit in a number of ways:

- greater automation of processes. Greater use of data, and associated algorithms, can replace or support human decision making.
- improved efficiency. Providing and processing data in real time means that goods and services can be produced more efficiently.
- improved capacity for research. Broader, richer datasets mean that greater insight can be drawn than from narrow samples.
- innovation of new business models, products and services.
- greater personalisation. The availability of more data about the behaviour of consumers, individually and in aggregate, means that goods and services can be more personalised.
- reduced information asymmetry. Asymmetry of information – between buyers and sellers, and principals and agents – is being addressed simply by having more data available.

Available evidence suggests that firms which use data-driven innovation raise their productivity by five to 10 per cent, and are six per cent more profitable, compared to competitors who do not use data-driven innovation.⁶ In fact, a retailer that embraces best-practice use of data could increase its operating margin by more than 60 per cent.⁷

Data is also a key enabler of more empowered consumers. The majority of economic benefits generated by use of data goes to customers, consumers and citizens.⁸ In fact, the benefit to consumers is estimated to be more than double the benefit to organisations.⁹

⁵ McKinsey Global Institute, *Big Data: The Next Frontier for Innovation, Competition and Productivity*, June 2011.

⁶ A McAfee and E Brynjolfsson, 'Big Data: The Management Revolution', *Harvard Business Review*, October 2012.

⁷ McKinsey Global Institute, op. cit.

⁸ *ibid.*

⁹ BCG, op. cit.

The consumer surplus from personal location data (a specific subset of personal data) alone could be worth \$600 billion annually.¹⁰

Policy recommendations

Overarching principles

The Business Council welcomes this inquiry as an opportunity to examine how best to balance the potential costs and risks of data in a way that maximises the benefits of data to the consumer and the wider economy and community.

Because the costs, risks and benefits will be different for each dataset, the approach to access and availability will differ for each dataset.

The remainder of these policy recommendations are presented according to the Business Council's recommended levels of availability (from not publicly available to publicly available):

- data for consumers
- commercial data
- data that generates highest net benefits through sharing or commercial trading on specific terms (public and private data)
- data that generates highest net benefits when broadly available.

Across all areas, regulatory frameworks that govern access and availability of data (like privacy laws) should be frequently tested, and subject to periodic, structural review.

Technology, uses of data and community attitudes to data are evolving rapidly. The speed of change poses a challenge for regulation to be relevant, fit for purpose and aligned with community expectations.

Excessive regulation could have the consequences of chilling data-related investment, denying consumers the benefits of data. For this reason, industry-led approaches to data offer a way to manage the risks associated with data, and are better placed than regulation to innovate and adapt in response to changes in technology, use and community preferences.

Recommendation 1: Regulatory frameworks that govern access and availability of data should be periodically reviewed to ensure they are fit for purpose, relevant and aligned with community expectations.

¹⁰ McKinsey Global Institute, op. cit.

Data for consumers

Consumers should generally have access to their personal data, and access to data required for markets to operate transparently. Where consumers choose to provide data about themselves, they should have a measure of control and transparency over that data.

The objective of consumer access is best met through fit-for-purpose regulation to protect essential rights (like privacy legislation), complemented by businesses' voluntary efforts to respond to their customers' preferences.

Protection of personal data

Many organisations understand that their use of data is entirely based on trust from consumers. Customers need to trust that firms are judicious in the personal data they collect, that any data will be used appropriately and that personal data will be protected and secured – otherwise, they will withdraw the provision of their data.

To proactively respond to what consumers want, many businesses voluntarily provide consumers the ability to opt out of collection of their data, or provide tools to give consumers greater control (see **Case Study 1**).

Case Study 1: AGL IQ

The energy company AGL has invested in a range of market-leading digital offerings that enable customers to track their energy data, and which enhance their comfort, convenience and control. For example:

- The My AGL IQ® service allows customers to monitor their energy usage via an online portal, and compare the energy performance of their home to similar homes in the local area.
- The world-leading AGL Energy app presents information on a customer's electricity, gas and rooftop solar in a single interface. Customers with digital meters are able to view their data in near-real time, in 60-minute intervals, for comparison by day, week, month or year.

These tools use data to provide consumers greater understanding and choice over the services they receive from AGL, and greater transparency and control over their consumption.

Voluntary efforts by business are backed up by an existing robust framework in the *Privacy Act 1988* (amended recently in 2014), which gives consumers several strong controls, including:

- the avenue to request any information any business holds on them, in a format requested by the consumer (subject to a reasonable cost test)
- the ability to choose to transact anonymously
- a guarantee that personal data provided offshore will receive the same level of privacy protection as if it were kept in Australia.

Other regulations provide rights additional to the Privacy Act: for example, the Australian Energy Market Commission's 2014 rule change to improve the availability of information to customers.

It is important to have a nuanced understanding of consumers' perspectives on privacy. There is a clear difference between consumers' stated preferences and revealed consumer behaviour.¹¹ As outlined by Boston Consulting Group, 'while consumers voice concern about the use of their data, their behaviours – and their responses to a survey conducted specifically for this report – demonstrate that they are willing, even eager, to share information when they get an appropriate benefit in return'.¹²

Many consumers are willing to share their personal data, as long as: they perceive they are receiving a fair return for it; they have some measure of control; and they are confident it is not being used for inappropriate purposes.

For this reason, use of personal data should not be inhibited. As put by Boston Consulting Group, 'ultimately, prohibitions designed to protect individuals can actually hamper or delay innovations that would benefit them'.¹³ Instead, any measures to increase consumer access beyond the existing framework should be industry-led, rather than regulatory, to ensure businesses continue to compete and innovate on how best to provide consumer information.

Recommendation 2: Access by consumers to their own personal data should be increased through industry-led initiatives, rather than greater regulation.

Encouraging consumer confidence

Potential community concern can be addressed through a cooperative approach by business, government and other relevant interest groups to build community confidence in uses of data.

Business, government and other interest groups (such as privacy organisations or consumer groups) have a shared responsibility to collaborate and build consumer confidence in the data market and system.¹⁴

In particular, considering potential community uncertainty around data, government has a critical role as a trusted institution. The Business Council recommends that the Australian Government improve its efforts to educate and raise consumer awareness around the benefits of data, and empower consumers to manage their own risk, where they can.

¹¹ <http://www.pewinternet.org/2012/02/24/privacy-management-on-social-media-sites/>

¹² BCG, op. cit.

¹³ BCG, ibid.

¹⁴ World Economic Forum, *Personal Data: the Emergence of a New Asset Class*, 2011.

Another key precondition of consumer confidence is the ability to maintain the safety and security of data, especially personal data.

Cybersecurity also benefits economic growth, since national losses from cybersecurity incidents are estimated potentially as high as \$17 billion per year.¹⁵

As the Business Council has said previously, 'Australian businesses are way out in front, and have been extending their world-leading culture of safety in the workplace to safety online. Businesses are ready to collaborate with government and research institutions to improve on existing practices, and improve standards that set a higher benchmark than is required by regulation.'¹⁶

The Cyber Security Strategy released by the government in April 2016 established a collaborative approach from government, business and the research.¹⁷ Business is well placed to advise on what approaches to cybersecurity are robust enough to minimise risk, but flexible enough to respond to changes in technology and avoid excessive cost.

Recommendation 3: A shared effort by government, business and other organisations is required to improve consumers' education and awareness about avenues of access already available to them.

Commercial data

Keeping some data internal to an organisation allows the organisation to generate a sufficient return on the initial investment on the data, delivering benefits to customers. The costs of requiring the data to be available (financial, administrative, opportunity or reputational) would outweigh any benefits.

If this data is made available without adequate recompense, data holders would likely reduce their effort in data collection and innovation and thus reduce the overall value creation, including to their consumers.

Excessive policy or regulatory intervention to force commercial data to be available could be highly damaging to innovation and investment. Additional investment in data may be forgone because it is not sufficiently attractive, meaning the total benefits to consumers are reduced. Where the value of data is ambiguous or speculative, private businesses will be uncertain about investing in data-related innovation, and the risk of chilling investment is higher.

In some instances, commercial data – that otherwise should be kept internal – should be made available so that markets can function (for example, financial performance information for listed companies). Data is often required to be made available to governments or consumers for the purposes of consumer protection.

¹⁵ Cisco, *Australian Government Cyber Security Strategy Review – the Cisco Response*, <https://www.cisco.com/web/ANZ/assets/pdf/cisco-cybersecurity-response.pdf>

¹⁶ <http://www.bca.com.au/media/cyber-security-strategy>

¹⁷ <https://cybersecuritystrategy.dpmc.gov.au/assets/img/PMC-Cyber-Strategy.pdf>

The Australian Consumer Law establishes a robust framework for consumer protection.

There are suggestions internationally that new regulation can improve consumer protection by encouraging small changes in consumer behaviour (drawing from ‘nudge’ theory).¹⁸ Nudge-related regulation aims to maximise data available, often to influence consumer choices.

However, ‘market institutions are rapidly evolving to a situation where very often the buyer and seller have roughly equal knowledge’, due to the proliferation of technology and communication tools that allow consumers to coordinate and share information with each other on goods and services.¹⁹ Regulatory problems like moral hazard can start to be addressed by the market through cheap, ubiquitous information.

In that context, it is not clear that additional regulation is necessary to mandate data availability, for the purposes of enabling markets to function.

The existing regulatory framework is also sufficient to address foreseeable problems in areas such as competition. (In fact, data may be *less* likely to entrench market power than in relation to other assets because there are a greater number of substitutes and lower barriers to entry). As the Commission has already identified, ‘the sustainability of models to extract rent from monopoly control of information is an open question ... Existing regulation may be adequate to address restraints of trade that come from control of data and networks.’²⁰

In fact, as information asymmetry continues to decrease, there may be potential to remove some existing regulation.

For this reason, data reporting requirements for companies should not be increased beyond the minimum required for markets to function.

Recommendation 4: Data reporting requirements for companies should not be increased beyond the minimum required for markets to function, to avoid undermining incentives for investment and innovation.

¹⁸ See, for example, R Finigan, ‘The Potential of Behavioural Economics: Beyond the Nudge’, *The Conversation*, 28 July 2015, <https://theconversation.com/the-potential-of-behavioural-economics-beyond-the-nudge-43535>

¹⁹ A Tabarrok and T Cowen, ‘The End of Asymmetric Information’, *Cato Unbound*, 6 April 2015, <http://www.cato-unbound.org/2015/04/06/alex-tabarrok-tyler-cowen/end-asymmetric-information>

²⁰ Productivity Commission, Digital Disruption.

Sharing or trading data

In some situations, the benefits of data are maximised by sharing or trading on specific terms.

For example, GlaxoSmithKline provided their work to researchers on the structures behind 13,500 chemical compounds that may inhibit the malaria parasite.²¹

In other instances, companies are willing to make data or databases available to other industry participants, on a commercial basis. There may be significant investment required to collect, collate, store, format, present and analyse data, and a commercial return may be needed to cover the cost of providing the data or to justify the initial investment.

Sharing or trading is best done through a market that allows buyers and sellers to reach agreed pricing and terms.

Some mechanisms for a data market are beginning to emerge, such as bilateral trading, or third party brokerage. Any regulatory interventions should minimise the impact on the development of a data market.

It is essential that any policy proposals arising from this inquiry do not undermine the primacy of legitimate commercial negotiations as the avenue by which companies share proprietary data with each other.

In particular, third party access to private sector data should not be mandated.

Recommendation 5: Third party access to private sector data should not be mandated, to avoid undermining investment and innovation in data, which ultimately benefits consumers.

Highest benefits through broad availability

Finally, in other cases, the benefits of data will be maximised by encouraging public openness of the data. Many (but not all) of these datasets are those held within the public sector.

The benefits of data are generated by opening it up to allow for innovation and generation of value by other users, where this does not lessen the incentives to invest in the data in the first place. When done appropriately, this can promote greater transparency, innovation in and effectiveness of government services and innovation in the economy more widely.

McKinsey estimates the global value of greater openness of public sector data could be around \$3 trillion annually.²² Based on this figure, Lateral Economics suggests that the

²¹ Bain & Company, *Using Data as a Hidden Asset*.

²² McKinsey & Company, *Open Data: Unlocking Innovation and Performance with Liquid Information*, October 2013.

benefit to Australia of greater open data could add \$16 billion to Gross Domestic Product – around a one per cent increase.²³

The Australian Government has made progress in encouraging open data: since 2013, the number of open datasets available increased from 514 to 5200²⁴, the valuable Geocoded National Address File has been made publicly available²⁵, and in December 2015, the government's Public Data Policy Statement committed to the release of public sector data in a machine-readable format by default.²⁶

Subject to community comfort, governments should encourage greater availability of public sector data. The Business Council recommends this could occur for data that relates to the health system (see **Case Study 2**).²⁷

Case Study 2: Data in the health system

Better measurement and reporting of cost and performance of the health system will provide improved data and incentives for health providers to target improvements and increase the productivity of the health system.

Australia has relatively limited transparency of health system performance compared to other nations. For example, a 2015 analysis of publicly available metrics on nationwide hospital performance found four available metrics in Australia, compared to 94 in the UK and 115 in the United States. In addition, Australia has only five national clinical registries that have national coverage including joint replacement, renal dialysis and various forms of organ transplantation. Clinical registries play a vital role in collecting data on hospital and clinician performance and returning benchmarked data to allow hospitals to compare their performance, and that of their clinicians, with peers.

There are initial steps that can be taken to promote greater transparency within already agreed frameworks and mechanisms. This includes promoting greater reporting of data by hospitals to clinical quality registries under the National Safety and Quality Health Service Standards. There is also an opportunity to publish institution-level hospital and health agency performance data for the full suite of indicators agreed and reflected in the National Health Performance Authority's *Performance and Accountability Framework 2012*.

²³ Lateral Economics, *Open for Business: How Greater Open Data Can Help Achieve the G20 Growth Target*, June 2014, http://apo.org.au/files/Resource/open_for_business_how_open_data_can_help_achieve_the_g20_growth_target_2014.pdf

²⁴ M Turnbull, *Speech to the Locate15 Conference: The Power of Open Data*, speech, 11 March 2015, <http://malcolmturnbull.com.au/media/speech-to-the-locate-15-conference-the-power-of-open-data>

²⁵ H Owens, *Geocoded national address data to be made openly available*, blog post, 7 December 2015, <https://blog.data.gov.au/news-media/blog/geocoded-national-address-data-be-made-openly-available>

²⁶ Australian Government, Department of the Prime Minister and Cabinet, *Australian Government Public Data Policy Statement*, 7 December 2015, https://www.dpmc.gov.au/sites/default/files/publications/aust_govt_public_data_policy_statement_1.pdf

²⁷ Business Council of Australia, *Overview of Megatrends in Health and Their Implications for Australia*; Evans et al., 'Development of Clinical-Quality Registries in Australia'.

Where private sector data generates highest net public benefits through openness, many companies already make this available (see **Case Studies 3 and 4**²⁸). 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.

Case Study 3: IAG Research Centre

IAG's Research Centre studies various aspects of safety. Engineers analyse cars, motorcycles and building products, while technical specialists analyse a variety of data. The centre undertakes road crash tests and studies self-parking cars.

The research provides greater insight into the safety of products, so IAG can better understand the risk profile of these products.

IAG has recognised, however, the public benefit of the information. Data from the research centre is made available to other organisations, like vehicle manufacturers, to improve the safety of those on the roads.

Case Study 4: Google Trends

Through the service Google Trends, Google publishes trends in what users are searching in the Google search engine or on YouTube. A range of tools are provided to assist with analysing and presenting data in various ways, isolating specific variables (like location or topic) or comparing a time series back to 2004.

The service is available for free.

Google Trends is able to be used by other businesses in a range of ways to generate additional value. In fact, PwC estimates that retail sales forecasts based on Google Trends were more accurate than historical sales data, in 75 per cent of testing scenarios.

Recommendation 6: Subject to maintaining community trust, government datasets should be made more available, where this generates net benefits. Health system data should be a priority area for examination

²⁸ PwC, *Using Google Trends to Predict Retail Sales*, 2015, <http://www.pwc.com/us/en/retail-consumer/publications/assets/pwc-using-google-trends-to-predict-retail-sales.pdf>.

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