Submission to the Productivity Commission on the Draft Report of the Inquiry into Data Availability and Use

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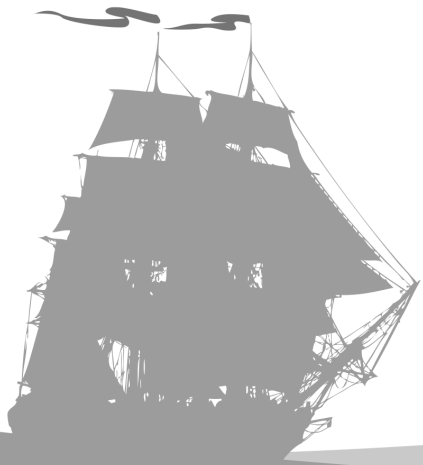

Submission to the Productivity Commission on the Draft Report of the Inquiry into Data Availability and Use

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The Pirate Party of Australia thanks the Productivity Commission for the invitation to submit its thoughts on the draft report on Data Availability and Use (the Report). The Pirate Party of Australia strongly believes that the open availability and use of data is fundamental to the strength of Australian democracy. It is through free access to information that citizens are able to directly judge the actions and outcomes of government policy. In this, the Pirate Party supports the Productivity Commission in its goals for this report. However, the Pirate Party also notes that this report either ignores or sidelines the rights and privacy of an individual. Outside of the proposed "Comprehensive Rights of Consumers", which we explore further below, the right of an individual to their own privacy and data is often either only given a cursory glance, or neglected completely.

To this end, we wish to highlight the last sentence of the first paragraph on page 309, which states in response to an individuals "right to due process" and "right to appeal" that

> it would be important not to stymie the development of big data analytics.

Similar wording appears on page 308, where the Report says in response to the right of Australians to prevent processing based on distress that such rights are

> likely to be costly for businesses to implement

and are therefore not considered.

However, the most exemplary wording appears already on page 11, where the Report states that

> Governments across Australia hold enormous amounts of data, but

*Pirate Party Australia is a federal political party registered under the *Commonwealth Electoral Act 1918* (Cth) and an incorporated association under the *Associations Incorporation Act 2009* (NSW).

> lag behind other comparable economies by typically not exploiting it beyond the purposes for which it was initially collected, nor allowing others access to do so.

With examples such as these, the Pirate Party thinks it clear that the Productivity Commission has only considered economic and business needs for improving data availability and use. This is not completely unreasonable, as that is their mandate and is also the scope of the Inquiry. However, given that this is their scope, we think the Report should not feign a half-baked attempt at consoling individuals with the dregs at the bottom of the rights barrel. We believe the Report should own up to its goals more clearly, and leave the rights of individuals to those who actually consider said rights important.

1 Introduction

This submission will cover some parts of the Report. As highlighted above, the Pirate Party believes that the Report often fails to consider the privacy of the individual when discussing the use and publication of data. We recognise that the Report does recommend (in draft recommendation 9.1) the introduction of the term "consumer data" which would encompass the private data that we are concerned about. However, we also note that further references to consumer data are primarily about how to exploit data further, where the rights of the consumer in regards to consumer data is only mentioned in "Section 8 Options for comprehensive reform", and the term consumer data is not used at all in "Section 5 It's all about you: the challenges of using identifiable information." Given that so much of the report does focus on data use, but yet completely ignores how consumer data will be treated differently (if at all), the Pirate Party has significant concerns with large portions of the Report. We will not go into details regarding each point, as to do so would belabour the point. Instead only the most relevant points are discussed. If invited, representatives would be happy to try to help the Productivity Commission re-write the Report with privacy in mind, but we think that the best way forward is for the Productivity Commission to focus on productivity (as it rightly has done) and for other organisations (potentially the Office of the Australian Information Commissioner) to create, define and deliberate over the rights of the consumers with regard to their data.

1.1 Submission outline

This submission is split into four further sections. Section 2 gives specific responses to some of the recommendations made by the Report. Section 3 discusses how the Report aims to utilise data for reasons beyond those for which it was gathered, and what that implies for the privacy of the individual. Section 4 explains the flaws in use of data de-identification as a magic bullet which would solve all the problems that come with releasing data. Section 5 looks at the so-called "Comprehensive" rights of consumers, and explains why they are not comprehensive, why the limits to these rights are unreasonable (if any reason is given at all to restrict the rights) and why the Productivity Commission is not the correct group to solely decide upon a set of comprehensive rights for consumers.

2 Responses to specific recommendations

2.1 Draft recommendation 5.1

Research into data de-identification is not strictly limited to government agencies. Indeed, the recent leak of Medicare data[1] indicates that government agencies may not even be at the forefront of such technologies.

> **Recommendation 1:** Any practical guidelines developed should involve collaborations with private entities that also engage in privacy research.

The introduction of a "best practice" definition of de-identification process seems to be aimed towards providing a safe haven approach for releasing data. Seeing as such an idea is provided solely for those who wish to publish data, we believe such determinations should be made public, so that all can see what the OAIC determines is "best practice".

> **Recommendation 2:** Any certification of "best practice" de-identification should be public, to maintain trust in the system.

[1] Paris Cowan, *Health pulls Medicare dataset after breach of doctor details* <http://www.itnews.com.au/news/health-pulls-medicare-dataset-after-breach-of-doctor-details-438463>.

2.2 Draft recommendation 5.2

The Privacy Act 1988[2] does require that medical research follow guidelines prescribed by the CEO of the National Health and Medical Research Council to be exempt from the Privacy Act. Medical data almost always relies on individual data, so the medical profession having guidelines that deal with the privacy of the individuals is to be expected. However, other fields may not have such guidelines, nor even have a person who would play the equivalent role of the CEO of the National Health and Medical Research Council. With that in mind, we feel it much more appropriate to delegate the power to approve or deny any applications for such research to a suitable officer or committee which has suitable experience with privacy matters and data de-identification techniques, rather than granting exemptions to all research simply based on the outcome of the research.

Recommendation 3: Exceptions similar to those in the Privacy Act 1988 should be expanded to all research that is approved by a duly appointed privacy officer or committee. Such an officer may be the Australian Privacy Commissioner, or someone delegated by said commissioner, or even a committee that could include experts in the research in question, as well as experts in privacy and data de-identification techniques.

2.3 Draft recommendation 5.3

This recommendation seems to ignore the possibility that a linked dataset and statistical linkage keys might be too volatile to keep at the completion of a research project. We agree that the ongoing use of linked datasets may, in some scenarios, still be useful, and that a risk-based approach to their use is correct. However we think it important to use a risk-based approach to also determine whether to even keep the linked datasets.

Recommendation 4: Data custodians should use a risk-based approach to determine if it is best to destroy a linked dataset, or if it is to be kept, how to best enable the ongoing use of the linked dataset.

[2] *Privacy Act 1988* (Cth).

2.4 Draft recommendation 9.2

See Section 5.

3 Data overreach

The Report puts significant emphasis on using data to the fullest, but seems to mostly ignore any consideration of the private data of Australians which may have been given out for only specific reasons. Many people are happy to give their address out for a newspaper delivery service. However, said newspaper service could potentially on-sell said data to other entities for any one of a dozen reasons. Luckily, such things do not seem common place, as they would be seen as exploitative. However, page 11 of the report states that

> Governments across Australia hold enormous amounts of data, but lag behind other comparable economies by typically not exploiting it beyond the purposes for which it was initially collected, nor allowing others access to do so.

Presumably this paragraph only discusses the exploitation of data which is not related to any individuals. At least, the Pirate Party hopes that the aim of the Productivity Commission is not to exploit the privacy of Australians. Nevertheless, the Pirate Party considers it paramount that the Report be clear that the exploitation of the individual is not one of the desired outcomes.

Data gathered from an individual for a specific purpose should not be used carte blanche. If an individual agrees that their postal address be used to send one parcel, that does not grant the right to then sell that address to any takers, or as an invitation to market completely unrelated articles.

Recommendation 5: The report should clearly state that data that directly relates to an individual should not be exploited, but should only be used for the intention for which it was gathered.

Page 11 also states

> Despite claims of a few privacy advocate groups, this Inquiry has

> not been presented with evidence to suggest widespread concern about the provision of personal information to governments.

The Pirate Party questions whether this claim is useful, given that it would be news to the general populace that data collected by the government is now being considered for exploitation for any purpose whatsoever once a big-data or anonymisation approach can be applied. It is also a strange statement, given that these ”privacy advocate groups” are the very organisations in civil society best placed to raise such concerns. The Inquiry should not dismiss these concerns so arrogantly. It is the Inquiry which is tasked with collecting evidence for its reports, not simply expecting it to be provided by others. The Inquiry could consider conducting further more detailed surveys on the acceptability of various uses of data, testing the public's opinions on exploited data set use, using examples of low to high levels of privacy abuse of information and data sets to discover a more accurate level of public concern and sentiment about the provision of personal information to governments and its use. For evidence of public concern around the use of large data sets we point to the ABS, who unilaterally decided to retain names and addresses of Census respondents, which resulted in an unprecedented boycott by the public (including Senators and House of Representative members of the Commonwealth Parliament) to various aspects of the information being collected. The ABS also decided to link these names and addresses (as statistical linkage keys) with ”various datasets” without any clear definition of which datasets would be linked against, nor who would ultimately have access to them. Instead we were left with the ABS promising that it had studied the impacts itself, and had decided that it was in the best interests of the ABS to do this, and therefore they went ahead.

Recommendation 6: If the Inquiry intends to dismiss concern about the provision of personal information to governments, then the Inquiry should actively spread the details of how personal information provided to governments would be exploited (which doesn't seem to have any strict limits) and see if people are even aware of what is going on. Only then would the Inquiry have an understanding of whether such concerns are reasonable.

4 The caveats of anonymisation

Anonymisation (de-identification) techniques are a very strong tool to protect privacy, but the Report seems to treat them as a magic bullet that solve all problems. On Page 11, the report discusses

> the need for all data collectors to remain vigilant and up-to-date in technology around data collection, handling and de-identification.

The Pirate Party feels that it is important to point out that while staying ”vigilant and up-to-date” is important, it does not protect against all risks. In particular, once a data set is released publicly, it cannot be recalled. Even if the anonymisation techniques used are found to be flawed, staying vigilant cannot simply “will” the data back from public eyes. Similar themes continue as the Report states

> In reality, most risks of data misuse arise not through the public release of robustly de-identified data.

This quote appears deliberately vague. One could just as easily state that most risks of burglary arise not through the dwellings which use robust security measures. The very use of the word “robust” would imply that the data has been properly de-identified, for some definition of the word properly. The Pirate Party would like to point out, and we believe the Productivity Commission would agree, that there is no gold standard for de-identification of data, and that the only fool-proof method would involve not releasing the data. To be explicit, the Pirate Party requests the Inquiry concluded that there will be times when some data sets, no matter how they are de-identified, will remain too dangerous to the privacy of individuals to be released, be that to the public, researchers, or government departments.

The Report would seem to imply that de-identification is always going to be the appropriate tool for releasing data. Unless “not releasing the data” is considered a de-identification method, the Pirate Party respectfully disagrees.

Recommendation 7: The limits to data de-identification be explicitly considered in this report. For any given data set, there should be no expectation that a suitable de-identification technique can be found which would allow the release of said data set.

5 Comprehensive right of the individual

Page 350 of the Report describes the "Comprehensive right" of an individual. The Pirate Party praises the Productivity Commission for their work towards the rights of the individual. However, the Pirate Party thinks that these rights are far from comprehensive. These rights are a good start, but there are plenty of stronger rights that should be had by all Australians that directly relate to their data. The Inquiry never strictly included the rights of consumers in its scope, so it would be understandable that any rights developed would not be comprehensive. However, in that case the Report should clearly state this. If the Report were to simply state that the rights mentioned are some additional rights needed by Australians, but that they were not comprehensive, then the Pirate Party would have much less issue with this report.

Recommendation 8: Remove the word "comprehensive" from the Comprehensive rights, and make it clear that further rights may yet belong to individuals that directly relate to their data.

We now look at individual rights mentioned. To begin with, the Report states that an individual would have a right to

> be informed about the intention to disclose or sell data about them to third parties.

The Pirate Party does not see any reasonable reason given for this right to be so restrictive. Why should individuals not be allowed to approve or deny the transfer of their own data? We acknowledge that page 308 does state that such rights are

> likely to be costly for businesses to implement and for the community to enforce

but there seems to be no reason behind this. Again, as page 308 states, the right to deny processing (under reasonable conditions) is given to UK and EU residents. The Report would seem to highlight that the only concern of the Productivity Commission is the cost to a business, and that the rights of an individual are irrelevant when compared to any such costs.

This item was discussed at a public hearing in Melbourne, on the 21st of

November 2016. The point was made that the "right to be forgotten" from the European Union was proving to be difficult to implement, and that this was one reason for not giving Australians similar rights to those of UK and EU residents. Such details were not included in the Report, and more importantly the "right to be forgotten" is not the only possible right that could be considered.

Recommendation 9: Give consumers the right to deny the transfer of their own information, where appropriate.

Recommendation 10: Explicitly give the reasons for denying further rights to Australians, preferably without just falling back to "it will cost businesses more".

The Report does, albeit briefly, discuss the proportion of Australians who utilise customer loyalty programs. These are programs which allow an individual to trade information about their shopping habits in return for discounts or prizes. However, such programs are not the only way in which the habits of an individual can be tracked. Anyone who uses the same credit or debit card to purchase goods also leaves behind a trace of their habits, in the form of their account number (possibly partially obscured in the case of credit cards). Very recently it was shown that the University of Melbourne was tracking students using WiFi[3], which caused some uproar in particular because the students were unaware that they were being tracked. Tracking people through mobile phones is not limited to universities, however[4]. Indeed, such things are far more common in shopping centres and various malls or retail outlets. Tracking can be done using low powered Bluetooth devices, which allow for an accuracy of only a few metres if suitably used. With such tracking becoming ubiquitous, the Pirate Party thinks that individuals should at the very least be told about any tracking that is to occur, if not given (where reasonable) a choice to opt-out of said tracking.

Recommendation 11: Include in the Comprehensive rights the right to be clearly notified of any tracking which may occur, and what the data

[3] Glyn Moody, *University Tracks Students' Movements Using WiFi, But Says It's OK Because It's Not Tracking Students* <https://www.techdirt.com/articles/20160812/06340735224/university-tracks-students-movements-using-wifi-says-ok-because-not-tracking-students.shtml>.

[4] Nanci Taplett, *Track Your Customers With Bluetooth Smart Technology* <https://blog.bluetooth.com/track-your-customers-with-bluetooth-smart-technology>.

from said tracking will be used for.

Lastly, we wish to again highlight the last sentence of the first paragraph on page 309, which states in response to an individuals “right to due process” and “right to appeal” that

> it would be important not to stymie the development of big data analytics.

The Pirate Party strongly points out that with language such as this, it is clear that the Report has not considered the rights of the individual very highly.

Recommendation 12: When considering any rights of individuals, the Productivity Commission is clearly biased and should delegate any discussion of rights to an entity which is suitably recognised as actually considering the individuals right to privacy as important and valuable. Suitable entities could include the Australian Privacy Commissioner, or privacy-interested civil society organisations such as Australian Privacy Foundation, Electronic Frontiers Australia, and Digital Rights Watch.