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## Will Australia need a new approach to data protection?

### Data and digital transformation in consumer markets

CPRC CEO, Lauren Solomon's presentation at the 2019 Australian Consumer Law Conference

#### Enhancing the benefits, minimising the risks of big data and AI

It's almost a disclaimer that I now feel I need to do each time I talk about big data and consumer markets. So, I'm going to say this upfront – significant benefits are flowing and will continue to flow to consumers as a result of big data and digital transformation.

As Consumers International CEO, Helena Leurent stated just last month at the Digital Hive conference, the massive expansion of sensors and data collection throughout our economy presents consumers with possibly the best opportunity to know just how products have been produced, right from the source, the processing through to their delivery.

This sort of data and information can help us make more informed choices with confidence about the origin of our products, the environmental or social impact of the manufacturing process, and key elements of the supply chain.

It is unquestionable that significant benefits can and will flow to consumers from greater data collection and processing.

The challenge facing policymakers is how to develop a framework sufficiently robust to facilitate and foster innovation to benefit society, while adequately protecting consumers against exploitation and harm.

It's about maximizing opportunities and welfare, while minimising harm. And it's about making an active choice to do so. As Kranzberg's first law states - *technology is neither good, nor bad, nor is it neutral*.

This requires active, engaged and vigilant policy and regulatory bodies, because if we want to build a more inclusive and fairer digital consumer market, it's not going to happen by default, assuming technology alone will solve all our problems.

#### Big Data is big business

Getting our policy settings right when it comes to data is not just about privacy.

It's about economic growth. It's about who benefits from that growth and the significant social transformation that will occur across our community.

With an estimated \$100 billion globally to flow to the big data market by the end of the next decade, how Australia establishes itself within this will be fundamental to our economic and social wellbeing.

Data is the fuel to the Fourth Industrial Revolution. Data is what's going to fuel the developments and innovation in AI and machine learning. Whoever has access to the greatest quantity and the most valuable data is ultimately going to build the machines with thing like... the greatest predictive capacity for human behaviour... the most lifelike human dialogue.... or the most effective targeting of medical treatments.

These breakthroughs and innovations are going to be incredibly valuable to both governments and the private sector alike. And that value is only going to increase with the speed of technological capability.

And, at the moment, policymakers are playing a very big game of catch up.

Given the stakes – both economically and socially – it is both prudent and necessary that policymakers, politicians and civil society start asking the tough questions...

*..About who is benefiting from these innovations, how these benefits are shared amongst consumers, industry and the state.*

*And, what the big data supply chain looks like... when it is consumers and citizens now generating the fuel just as we go about our daily lives?*

We need to move forward from the binary conversations of

*'regulate and kill innovation or let the market rip'... 'completely open data up, or shut it down'... 'implement GDPR, or not'...*

This reductionist approach to the challenges we are now grappling not only does a great disservice to the capacity and intellect of our policy and research community.

This sort of narrow and blinkered way of approaching policy in the digital age will end up with separate hammers everywhere seeing every issue as a separate nail.

The last thing we need is more of a patchwork – an incoherent and inflexible framework to deal with the new challenges and opportunities to come.

Now is the time to be asking more questions.

We need to be analysing these issues and bringing together people from different disciplines to ensure we've fully understood the problems we're trying to address.

## **Who owns the data?**

Data is now a major input to production.

*So – who owns the data?*

*How is it valued?*

*And how is that value shared?*

These questions are being asked the world over. By our historians, economists, civil society, business leaders and lawyers.

As Yuval Noah Harari stated in his most recent contribution 21 lessons for the 21st century:

*“So we had better call upon our lawyers, politicians, philosophers and even poets to turn their attention to this conundrum: how do you regulate the ownership of data? This may be the most important political question of our era.”*

Something which was also echoed by ACCC Chair, Rod Sims in releasing the Digital Platforms Inquiry preliminary report stating that:

*“How we regulate data is one of the defining questions of our age.”*

## **Privacy as a human right**

Internationally, we are now seeing a flurry of apologies and pledges that companies are ‘turn a new leaf’ when it comes to privacy. A cynical mind may wonder whether this is only now that the community has twigged to the extraction of their personal information, often without their knowledge and without their permission.

Massive value is clearly being extracted from the processing of data and it’s appropriate that we are now hearing major warnings from privacy advocates and human rights advocates sounding the alarm bells. Privacy and data protection are increasingly being recognised as fundamental to building trust and driving effective competition.

Even by Microsoft CEO Satya Nadella at the recent World Economic Forum Davos stating that:

*“My own point of view is that it’s a fantastic start in treating privacy as a human right. I hope that in the United States we do something similar, and that the world converges on a common standard.”*

Satya also stated that the default had to be that people owned their own data.

## **International developments**

We are not alone in grappling with these issues. Internationally, we’re seeing a growing recognition of intersection between competition, consumer protection and privacy regulation. Something also flagged by the ACCC Digital Platforms Inquiry.

The keys to consumer choice and agency are often enshrined in privacy and data protection law, such as:

- Disclosure obligations pertaining to the communication to consumers about what data is collected, who it is shared with and how it is used
- Consent obligations relating to how informed consent must be obtained
- What rights and controls consumers have over their personal information – such as deletion rights if they are no longer comfortable with companies holding that information
- Minimum protections and exclusions for vulnerable groups - minors

Market power issues associated with large volumes of data being amalgamated without express, voluntary consent of consumers are increasingly being explored by competition authorities.

Earlier this year we saw German competition regulator, the Bundeskartellamt determining that Facebook in combining user data from Facebook, Instagram, WhatsApp, third-party websites (who display Facebook likes) and smartphone apps has an awful lot of power and information about users, thanks to the collection and amalgamation of data across many sources.

The Bundeskartellamt has proposed significant restrictions on the extent to which Facebook can amalgamate and process data without consent of users. In their view, the user terms and conditions

underpinning these arrangements were not justified under data protection principles, or competition law standards.

Lastly, there is also growing interest in the policy community around the questions of:

*Who owns the data?*

*And what is the value of data?*

Data absolutely has a value; it is an input to production and the moment that value is not transparent and is set unilaterally by the providers of platforms and services who are often advertising their services as 'free'.

However, the services are not free. Consumers are paying with their data and that value exchange is deeply opaque, both to consumers and to regulators. Much more research is required in this area to build a better understanding of the data ecosystem, data and value flows through the supply chain.

In the EU there was almost a 7-year process leading up to the 2018 enforcement of General Data Protection Regulation (GDPR):

- 22nd Jun 2011 – The European Data Protection Supervisor publishes an Opinion on the European Commission's Communication, 'A comprehensive approach on personal data protection in EU'
- 25th Jan 2012 - Initial proposal for updated data protection regulation by the European Commission
- 15th June 2015 – Legislation passed with two-year post adoption grace period, enforced May 2018

## **Current data policy in Australia**

In Australia, by contrast, this reform process really only got started with the release of the Productivity Commission Data Availability and Use report in 2017, just two years ago.

What we see in the Australian environment is not a principles-based, cascading regime when it comes to data protection and portability – but three separate processes often dealing with similar fundamental issues in completely different ways.

## **Three key observations from our research**

### **1. Consumers currently cannot make informed choices about their data**

We agree with the ACCC Digital Platforms Inquiry report that significant regulatory and market failure has prevented consumers from making informed choices.

At a consumer level – it is currently impossible for consumers to make informed choices with the current level of opacity being produced by companies about what data is being collected, who it is shared with, and used for. This is largely due to vague terminology, take-it-or-leave-it terms and the use of click-wrap agreements.

Two thirds of the consumers we surveyed last year said that they signed up for products and services even though they weren't comfortable with the privacy policy, and 73% did so because it was the only way to access the service. That's not a choice, it's a take-it-or-leave-it proposition.

Similarly, the prevalence of click-wrap agreements also presents significant barriers for consumers with very little options available for consumers to opt-in and out of certain kinds of data collection, sharing and use.

Transparency is essential not only for consumers to make informed choices and build trust in the data economy, but also for the policy community to build a greater understanding of the data ecosystem.

For example, it is completely unclear to most consumers and policymakers alike that data collected in one specific setting by one company, is now ending up being used by a completely different company, and in a totally different setting and impacting consumers in ways which were not necessarily foreseen.

The Privacy Act and Australian Privacy Principles simply do not deliver sufficient disclosure requirements for transparency as this relates to data collection, sharing and use practices, nor adequate specificity when it comes to the key criteria for informed consent.

## **2. A lack of transparency reduces competition in privacy (quality)**

Without greater requirements for disclosure consumers cannot make informed choices, this presents an adverse selection problem... and competition in privacy and good data practices declines.

First posed by George Akerlof in his 1970 paper *The Market For Lemons* – an information asymmetry between buyer and seller about the quality of a product (in this case – a second hand cars) - ultimately leads to consumers being unable to distinguish a well serviced car from a lemon.

This lack of information and disclosure ultimately results in consumers heavily relying on imperfect proxies such as brand, and overall a reduction in competitive pressure in the marketplace to sell quality used cars.

What we see, is a race to the bottom on quality. And that's a problem we should be concerned about.

In the digital economy, one of the key qualities of the service being delivered is the privacy of the products and services being supplied.

As I highlighted earlier, consumer research clearly demonstrates the considerable difficulty and frustration that consumers are experiencing when trying to compare digital services and privacy due to a range of problems such as:

- Bundled consents and clickwrap agreements
- Lack of clarity and transparency about what data is being collected, who it is being shared with and what it is being used for

To encourage and foster competition in pro-privacy products and services it is essential that policymakers and regulators force greater disclosure in relation to the data collection, sharing and use practices being used by businesses.

Without such intervention, consumers are at a significant power and bargaining imbalance and we simply cannot rely on them exerting choice in the market reflective of their preferences.

## **3. Tracking of consumers offline and online has dramatically increased**

Our forthcoming report *A Day in The Life of Data* explores an average 24-hour period and summarises the current data collection environment facing consumers.

The proliferation of not only online but offline tracking technologies is unprecedented, with no signs of slowing down without intervention. Consumers today are tracked online and offline by a range of technologies and organisations that share that information with each other and data brokers to create online customer profiles.

Trackers are now embedded within 82% of web traffic, with 91% of the top one million websites tracking their visitors.

Mobile apps are also harvesting unprecedented levels of personal information and data – our Norwegian counterparts, the Norwegian Consumer Council back in 2016 released a report aptly named App Fail – Threats to Consumers in Mobile Apps.

In analysing 20 mobile apps and the terms and conditions they found a litany of vagaries in the definition of personal information and a litany of loose definitions such as ‘may’ share your data or with our ‘trusted partners’. This aligns with CPRC’s own analysis of app Privacy Policies in Australia.

And of particular interest to Australians, 5G technology soon to be rolled out at scale, this will enable very precise pinpointing of the location of individuals to within a building... potentially even within a 1m radius of the phone location. It is well worth spending some time just taking pause to think about what that sort of granular data can directly garner or infer about individuals.

Shoshana Zuboff in her latest book: *The Age of Surveillance Capitalism* outlines some of the extractive practices in this new era of “*surveillance capitalism*,” where human experience is the “*free raw material for hidden commercial practices of extraction, prediction and sales.*”

With Australians some of the earliest adopters of new technology – combined with relatively much weaker privacy and data protection laws – this leaves Australian consumers more open to a vast amount of data being collected or inferred about everything from their personality to their estimated income, sexual orientation, familial and personal relationships, political affiliations and health conditions.

## **Four key pillars for an effective policy framework for Australia**

### **1. A principles-based, economy-wide data protection regime**

An economy-wide, principles-based data protection regime is going to be a critical fundamental safety net in the new digital age. Trust is central to ensuring that consumers continue to share information and data.

Without such a basic protection framework in place, initiatives to open up more data flows only increase the risk for consumers and are likely to erode trust in the longer term. A central place to start is ensuring a protection framework and safety net adequately addresses:

- Transparency (so that consumer clearly understand the choices they are presented with)
- Meaningful consent (we believe the GDPR definition here is useful)
- Agency and control (so that consumers have the ultimate say and control about where there data goes and what it’s used for)
- Minimum protections for vulnerable groups (such as minors)

### **2. Better ways of addressing exploitation and manipulation**

Data about our behaviours, preferences, personality and predictions about our needs are increasingly being used by firms – both to push advertising, but also to increasingly personalise the products and services we receive.

In some ways this can be a good thing. In others, it can mean that in a world where we are incredibly time poor, and our consumer markets have become so complex, that we turn to quick decisions.... Or decisions that can be made by intermediaries about what products and services we should engage with.

Behavioural economics has known for a long time that the way we construct choice architecture has a big impact on what decisions consumers make. The deployment of 'dark patterns' by firms designed specifically to confuse... and to extract maximum rent are now part of the standard environment.

Consequently, policymakers similarly deploying behavioural interventions to reset this choice architecture and rebalance the playing field – for example through the setting of defaults will be key.

Vigilance and greater monitoring of price discrimination and differential treatment of consumers is also central in an environment where we are going to see increased personalisation, and increased inequality based on the profiles that have been developed about us.

### **3. Providing consumers with the right to access and port their data**

The first mover advantage that large data-opolies now have also needs to be addressed. Clearly, data can be a significant source of market power to those that have gathered an awful lot of it – either directly or through sharing arrangements, or just outright purchasing great slabs of consumer data from brokers.

Ensuring that it's consumers not companies that have ultimate control over their personal information is key.

We believe it's critical that consumers have better access to and portability of their own data.

The Consumer Data Right slated to be introduced next year is a good start, however as we've raised in all submissions over the past 12 months – we do not believe it is in consumer's interests for a data portability regime to be introduced prior to having an adequate protection framework in place. Namely, through the significant reform of our Privacy Act, for the reasons outlined previously.

An effective protection regime, complemented with a portability right, we believe will put consumers in more control and enable them to make better choices and decisions when it comes to what products and services are best suited to their needs.

### **4. Improved product safety standards**

Lastly, we need to get serious when it comes to product safety.

Moves by CHOICE who are calling for a general safety provision to be introduced - something that simply doesn't exist when it comes to the sale of products and services in Australia, much to the detriment of our children in many circumstance – are welcome.

We need to also closely consider how product safety standards can minimise the data being hoovered up by companies in all of the products and services making their way into the marketplace today – often without any disclosure.

### **A role for ethics?**

2017 and 2018 saw a convergence of soul searching across the disciplines and sectors. Each trying to grapple with the very significant ethical challenges posed by their disciplines or industries.

Cass Sunstein one of the grandfathers of behavioural economics last year released what he termed a ‘Bill of Rights for Nudging’. Nudges have received much attention in recent years, with nudge units popping up all over the world. Companies have hired behaviouralists and they are deploying them to improve consumer experiences and to improve shareholder profit.

Nudges or behavioural interventions are increasingly being used by governments – some famous examples of nudges doing well are in areas like organ donation and public health. We’re trying them here in energy right now with bill redesigns and CPRC has been working closely with regulators on improving consumer comprehension and welfare from decision-making.

But just the same as with technology, nudges can clearly be used in bad ways to reduce welfare or the agency of individuals.

A classic example is the use of defaults – MyHealthRecord yet again being an example of a bad nudge.

Good nudges according to Cass need to have the following features:

1. Nudges must be consistent with people’s values and interests.
2. Nudges must be for legitimate ends
3. Nudges must not violate anyone’s individual rights.
4. Nudges must be transparent
5. Nudges ought not to take things from people without their consent

This last one is really important for data and the advanced views about what consent needs to contain for it to be genuine – ie: voluntary is part of a significant discussion here.

Lastly, I echo the messages of our international counterparts – ethical guidelines, while a useful contribution to help guide our thinking – are NOT a replacement for hard regulation and enforcement. These tools must work together to improve the overall ecosystem.

## Conclusion

In concluding today, I’d just like to say that there are so many facets to the challenges and opportunities posed by the digital economy, it would be folly for any of us to assume that any single discipline alone will solve the problem.

It’s partly why CPRC has been specifically funding interdisciplinary research from across the fields of competition, consumer protection, AI, computing science and behavioural science.

It’s also why we’ve formed the Consumer Data Research Network – which now has over 50 members from around Australia, with academics conducting research across a range of fields.

For more information on our research, policy submission and grants, please head to our website, or join us for our next report release via webinar on the 29<sup>th</sup> May. Sign up is also available on the website.

How we collectively develop a framework to govern the new digital economy is going to be central to our economic and social welfare and we’d like to see consumers firmly placed at the centre of innovation and reform.