

17 July 2020

Our ref: KS - PDLC

Luis Gutierrez
Project Manager
National Transport
Commission Level 3/600
Bourke Street Melbourne
VIC 3000

By email: [REDACTED]

Dear Mr Gutierrez

Government access to vehicle-generated data

Queensland Law Society (QLS) welcomes the release of the National Transport Commission's (NTC) discussion paper Government access to vehicle-generated data (**the discussion paper**). We thank NTC for the opportunity to make a submission and for the additional time allowed to do so.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the QLS Privacy and Data Law Committee, whose members are practitioner volunteers with substantial expertise in this area.

This submission and privacy

This submission highlights approaches and suggestions on some key data law issues.

As regards privacy law, while sections of the discussion paper address this, it does not purport to be a detailed paper on privacy law aspects or the potential impacts on the privacy of individuals of Option 2 (a collaborative, co-regulatory, framework) and Option 3 (a mandatory framework).

QLS agrees that privacy management is fundamental to the implementation of any robust framework for government access to vehicle-generated data. Data sharing options may lack community support without clear parameters taking into account informed consumer consent. The data being reviewed is more than just the average car owner's data. At issue is government access to location data, the privacy implications of which are significant.

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QLS does not agree with the suggestion that most of the privacy law issues will be adequately addressed through proposed access being only to "raw/unprocessed" or de-identified data. Privacy law is relevant to de-identified, anonymised and pseudonymised data where there is scope for re-identification, especially where there is scope for the combination of anonymised or pseudonymised data with other vehicle identifiers. There is also the issue of vehicle analytics being revelatory as to personal information, for example driver behaviour and habits, and the associated privacy and law enforcement implications.

QLS submits that privacy law issues must be explored in more detail as concepts introduced by NTC are developed.

Vehicle-generated data

NTC proposes that for the purpose of this project, vehicle-generated data is:

any data generated by the vehicle itself that is about the vehicle, the road environment or the use of the vehicle.

QLS submits that a definition which captures the required data scope of this project would be one which focuses only on the type and source of data, not what the data "is about". We therefore propose that vehicle-generated data be defined as:

a form of process control data¹ that is generated or captured through sensors located on or within the vehicle.

Such a broad definition is appropriate given the focus of the discussion paper on government access to and use of vehicle-generated data for the purposes of network operations, investment, maintenance, planning and road safety. The definition proposed by QLS removes the threshold issue of needing to establish what the data is *about*. What the data is about is integrally linked to purpose, which is a separate and discrete issue. For example, data recording the number of times a driver activated a navigation system might be seen to be *about the driver* or *about the use of the vehicle*, depending on the context in which the data is being considered. The difficulties associated with characterising whether information is 'about' something or someone are illustrated in the privacy law context in *Privacy Commissioner v Telstra Corporation Limited* [2017] FCAFC 4.

Option 2

Subject to our comments in the next section, we submit that exploring the development of Option 2 is the preferred starting point over the other options in the discussion paper. A co-regulatory framework, as proposed in Option 2, where there is cooperative investment by key stakeholders in areas of aligned interests, augurs well for regulatory success and is favourable for the various reasons set out in the discussion paper. If, however, it becomes clear at an early stage that a co-regulatory framework is likely to require unreasonable concessions on

¹ 'Process control data' is data that is generated by a machine without any human intervention. For example, the data generated through sensors within a machine such as a vehicle, is process control data.

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such matters as efficacy, certainty, good data governance and data security, then a move to a regulated framework (Option 3) should be the focus of reform initiatives.

Points of contention may arise with vehicle industry stakeholders in relation to contractual terms. Collaborative arrangements would require key industry stakeholders to agree to change their terms and conditions to facilitate optimal data access as between the manufacturer/consumer and in regard to controls over ownership of data, which will impact the ease with which vehicle-generated data can be accessed by government. It is understood that controls over data have been the subject of tension, for example in Tesla's dealings with US regulators tasked with investigating fatal accidents involving vehicles in semi-autonomous modes.

The international nature of the vehicle industry and the industry's resultant desire for consistency of access to and management of vehicle-generated data will also likely influence industry engagement in development of a co-regulatory framework.

A further important legal issue that would need to be factored in under Option 2 concerns competition law. This may not be overly problematic because the vehicle industry is well used to working collaboratively with entities such as the ACCC and the government for road safety purposes. However, to the extent that potential competitors are being asked to directly agree with each other on arrangements about which there may be competitive tension between them, cartel laws such as the *Competition and Consumer Act* would need to be appropriately navigated.

Incremental approach

As the discussion paper correctly recognises, Australian governments' consideration of overarching frameworks for access to vehicle-generated data for public purposes is largely uncharted territory on the Australian regulatory landscape.

Because of this, QLS strongly advocates for an incremental/testing/proof of concept approach to any initiatives, whether Option 2 or otherwise. The legal issues are many and varied. The taking of small steps that can gain momentum, before making major changes which may take a long time to resolve, holds more promise of positive and workable outcomes for the future.

Alignment

Part of an incremental approach should be to explore, in close detail, areas in which the interests of the wide range of stakeholders are aligned, and those in which they are not.

Stakeholders extend from government and vehicle manufacturers, to a significant range of other aggregators of vehicle-related data such as insurers, parts suppliers, the major data platforms (such as Amazon, Google and Facebook), as well as Australian State and local governments. The latter, for example are already considering vehicle-related data collection initiatives. An example is the *Transport and Other Legislation (Road Safety, Technology and Other Matters) Amendment Bill 2020* (Qld).

QLS submits that it is only with a clear view of areas of alignment and non-alignment that the feasibility of Option 2 can be properly tested and, if likely to be viable, appropriate details for the co-regulatory regime can be developed. If it transpires that it is not possible to articulate

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areas of stakeholder interest alignment for vehicle-generated data on such issues as who should store it, who can access it and for what purposes, then agencies such as NTC would be in a good position to reassess viable options.

Ownership

Aside from privacy law issues, legal issues associated with data and data ownership require further consideration.

The discussion paper cites a 2018 *Harvard Journal of Law and Technology* paper as summarising the legal position on data ownership. The position outlined in the Harvard paper conflates physical control with legal rights and does not recognise that databases containing in whole or in part the same information may be sourced from and/or owned by more than one stakeholder. The position outlined in the Harvard paper may be appropriate for United States law purposes but does not represent the more granular position under Australian law.

Development of initiatives in this area on the basis of an incorrect or incomplete understanding of this key issue of data ownership may have significant consequences. For example, if property rights (such as copyright) are affected, any legislative outcome which involves the forced acquisition of rights may encounter constitutional law hurdles (for example involving the acquisition of property other than on just terms). On the other hand, to the extent that no property rights are impacted under Australian law, government initiatives may not be as impeded by commercial interests as might at first be thought. It is important to note information in and of itself is not 'property' as that concept is understood under Australian law.

Before further work in this area is progressed, QLS submits that a further NTC analysis of 'ownership' rights in vehicle-generated data, with conclusions, ought to be undertaken.

International experience

From a legal perspective, there are risks in modelling Australian initiatives regarding vehicle-generated data access arrangements on those of other jurisdictions without assessing the relevance of the different data law underpinnings in those jurisdictions. There are some significant differences. For example, in Europe there is the Database Directive which provides for a *sui generis* form of intellectual property protection for databases. Despite a leading Federal Court of Australia judgement calling for urgent reform to Australian law in this area, Australia does not have this kind of database law protection.² Another example concerns Crown use and fair use provisions. Any initiatives concerning vehicle-generated data which were modelled on US experience should factor in some very important legal framework differences on government and fair use when compared to Australian law.

² Gordon J (whose decision was upheld on appeal) considered legal protection for databases in [*Telstra Corporation Limited v Phone Directories Company Pty Ltd*](#) [2010] FCA 44. After referring to the EU Database Directive, Her Honour concluded: "As the High Court observes, there is no counterpart in Australian law. It is not open to me to ignore the express words of the [Copyright Act 1988 \(Cth\)](#) to expand protection consistent with that set out in the Directive as summarised by the High Court. *That is a matter for Parliament and, in my view, a matter which they should address without delay.*" [emphasis added]

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Data Law framework

QLS acknowledges the many transport regulation-specific issues involved in vehicle-generated data access arrangements. However, QLS submits that in the data law context, consideration must be given to the broader framework reform concepts which have been mooted in Australia not just a narrow transport regulation specific focus. The framework is more than that. One example is the adoption of something similar to the European Database Directive referred to above. Reforming what are becoming increasingly outdated data law concepts applying in Australia may well have benefits not just for the transport sector, but in other sectors such as health.

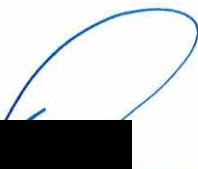
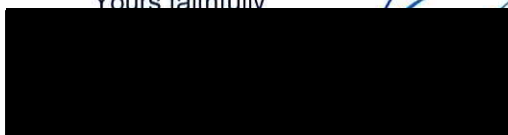
Broader reforms may not only have the benefit of accommodating commercial interests but of addressing some of the key barriers and gaps identified in the discussion paper. For example, clearer copyright protection in respect of databases would give rise to clearer scope for Crown use access under recognised exceptions to copyright protection. Law reform on broader data law issues has the potential to create a better balance between commercial interests on the one hand and legitimate public interests on the other. This need for balance is well-highlighted by NTC in this discussion paper.

Purpose

With reference to the *purpose* issues raised by questions 10-16, QLS submits that the COVID-19 pandemic illustrates the need for focus on broader purposes. For example, vehicle-generated data is particularly relevant in analytics on vehicle movement/location tracking analytics, an important issue which has surfaced as a priority issue in tackling COVID-19. Accordingly, QLS submits that consideration should be given to defining the priority purpose as *safety*, not just *road safety*.

QLS would be very pleased to consult further with NTC on any issues relevant to this submission. If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully



Luke Murphy
President