Interview: Peter Harris AO

In light of the recently completed inquiries into Australia's intellectual property arrangements, telecommunications universal service obligation, and data availability and use, the Chairman of Australia's Productivity Commission, Peter Harris AO, sat down with *Communications Law Bulletin* co-editor, Eli Fisher, for a discussion about proposed changes to IP, telecommunications and data law.

ELI FISHER: Peter, thank you so much for your time. On behalf of the Communications and Media Law Association, and the readers of the *Communications Law Bulletin*, we really appreciate your comments on the recent inquiries. Could you please tell us a little bit about the Productivity Commission, its role in advising the Federal Government, and your role within the Commission?

PETER HARRIS: The Commission has been Australia's primary independent economic and social policy design group since 1998, when it was assembled by then Treasurer Peter Costello. The new body combined the Industry Commission (itself a successor to Tariff Board, responsible for much of Australia's transition from a protectionist economy to a successful international trading nation) and the Inter-State Commission, a body established in the Constitution with two other smaller Commonwealth research agencies.

The term 'independent' I just used is often taken pretty loosely, but the Commission has over a long period now demonstrated that if the Government asks it to review a subject, the result will be what the evidence, the data and the analytical input of submissions make it. We don't deliver a preconceived outcome.

FISHER: Your background is in economics, as are the respective backgrounds of the Deputy Chair and many of the Commissioners. How does that, in your opinion, differentiate the Productivity Commission's service to the Government from that of, say, the Australian Law Reform Commission and other advisory bodies?

HARRIS: We have Commissioners with legal qualifications, social policy qualifications, science qualifications and in business disciplines. But with so much of public policy today founded in the language of economics, it's not too surprising that this is a common qualification in a body like ours.

This lingua franca of economics is particularly apt for taking a national prosperity-oriented perspective to the accepted wisdom and accreted regulatory structure of policy across many social and environmental topics - almost all of which would similarly say they are specialised in some way.

So when you read that the PC rather than a specialist body has been asked to do a report, it should be obvious thee Government is asking for an assessment of a policy in the widest economic and social context. In our Act, we are obliged to aim at improving the overall economic performance and via that to achieve improved living standards for all Australians.

Add to that we have a good track record in diverse circumstances: widely-respected inquiries on the record into highly diverse topics like Gambling, Child Care, the Australian car industry, Aged Care, the NDIS or even as sweeping a question of Access to Justice. We specialise in this sort of work.

FISHER: Let's turn first to the inquiry into Australia's intellectual property arrangements, whose final report was made public on 20 December 2016. Given the scope of the inquiry, it represents perhaps the most wide-ranging analysis of Australia's IP laws in many years. The motivation for the inquiry was to empower government to promote innovation and to encourage an appropriate balance between access to ideas and product, on the one hand, and investment and production of creative and valuable work, on the other. Could you comment on what you consider to be the most important proposals arising out of the inquiry?

HARRIS: IP is at its most basic an agreement between society and an innovator that, in return for access to the idea or the art, a right to exclusive use is offered by regulation for a period.

It surely is an economic model, since it creates an incentive to deliver an item in return for a right to extract payment. And our critics generally have to accept this, since most of the adverse comment made has also been couched in exactly those terms - the language of such transactions.

The question that is posed in a review like ours is then: is this system adding the value it could do to overall economic performance and the prosperity of all Australians?

And as we can see in the rise of patent trolls, innovation may be impeded as well as enhanced under the IP system. So it becomes a vital question *for governments* in an era of demonstrably slowing productivity, where mostly productivity is driven by spread of knowledge, technology and the rate of application of change, are we impeding or enhancing these key inputs via our regulatory system?

We tend not to say X is more important than Y once we have published a report. It can support cherry-picking of ideas and more often than not the ideas travel best together.

FISHER: Intellectual property can be an area that elicits quite heated debate. Was this inquiry different in nature and in politics to others over which you have presided?

HARRIS: We get politics a lot. Think of Workplace Relations or Motor Vehicles.

Context matters to how we handle that. Both IP and Data were significant elements of the Harper Review of national competition policy, a 2015 inquiry that sought to reinvigorate this policy field, twenty years after Fred Hilmer's landmark effort that demonstrably added significantly to national prosperity. Both major parties express strong support national competition policy, most of the time.

The Harper process recommended to the Government that the Productivity Commission undertake thorough reconsideration of policy in IP and in Data, driven by a strong view that a digitally-based competitive environment is the probable future for much of the Australian economy and thus policy structures should accordingly be fit for purpose to such a future. All political parties will eventually have to face this; I don't think any are unaware of that outlook.

So the Data and the IP inquires weren't really subject to the politics of the major party kind, and I think both will pay close attention to the arguments and the strategic shift in the reports.

There has been some effort to apply a political lever of the deep self-interest kind. But when it comes to private interest versus public interest, playing the political card is just part of the tactical playbook. Our better political leaders are pretty familiar with this playbook, it dates back to the 1980s.

FISHER: What has been the response of Government since the report was handed to it on 23 September 2016, and what continuing role, if any, does the Productivity Commission play in law reform discussions going forward?

The Government released a response to the IP report on 25 August 2017. The full response is available on the Department of Industry's website, and is worth considering in light of what we said in our report.

We are asked to speak at times on our reports by various groups and our Act envisages a role for us in communicating with the public on industry policy and productivity. There is usually so much on the record by the time an inquiry is finished that interested journalists or commentators can keep the debate going for a fair number of months after an inquiry is finished. But where an inquiry is left to languish without response for years, we do speak out on that from time to time. The public does deserve a result, even a negative one, for the effort invested.

FISHER: Let's turn next to the inquiry into the Telecommunications Universal Service Obligation, the final report of which was publicly released on 19 June 2017. The USO has been a consumer safeguard ensuring access to telecommunications services – such as standard telephone services and payphones – to all Australians on reasonable request. But there are suggestions that the obligation is becoming less and less necessary. What has triggered the recent inquiry, and what in your view are some of the most important revelations from the Productivity Commission's research?

HARRIS: Well, with the advent of the NBN and the predominance today of mobile telephony in the hands of Australians – who are amongst the world's quickest adopters of new technology, when given the chance – the concept of a fixed line telephone as a universal service is no longer a reflection of reality. We now have far more mobile phone subscribers than we have people in Australia; and we've had more than 2 million fixed line services disappear in the last decade. When reality shifts, policy should shift too; and that's particularly true when current phone users and taxpayers are paying to maintain a subsidy scheme in excess of $300 million per annum.

But in fact it isn't the money that is the greater negative consequence of this policy. It is, rather, that broadband has become the new community expectation of an indispensable service. So we may not even be buying the right thing. Telephony today is cheap and fast due to digital transmission, it's very clear there's no going back from that and a new standard should take this into account. If it doesn't, ultimately as fixed line services come up for replacement in the normal cycle of maintaining infrastructure or as the NBN replaces them, we will have a USO policy insisting on preserving something that isn't efficient – but even worse, isn't what people increasingly and demonstrably expect.

FISHER: What do you expect might be the next steps taken in relation to the USO?

HARRIS: While we do the redesign of policy according to what the facts and analysis tell us will be the most effective and efficient way to meet a new technological paradigm, a community engagement process run by the government itself usually follows. We are like the architect, the government and community though are the client.

That means the government gets a clear look at what first best design looks like, but in the implementation phase the judgment will have to be made about what is equitable and how far the community wants to go in ensuring those with least access retain an assurance of service.

FISHER: The inquiry into data availability and use was completed on 8 May 2017. It set out to investigate ways to improve the availability and use of public and private sector data, while also protecting individual privacy and control over data use. What are some of the most interesting developments to arise out of that inquiry?

HARRIS: The most startling thing isn't all the fascination with the amount of data being generated, sexy as that may seem to be. Or even the astonishing imputed results we can get today from intelligent algorithms that can detect a better car insurance risk between people who buy red meat and purchase petrol during the day versus those that don't.

Rather, it's that all this data is being basically created for or by consumers, including businesses as consumers of business-to-business services, and yet there is almost no way for them to access or control their data for subsequent re-use.

Yet re-use is what is creating all these new services and disruptions of business models.

Unlike the paper-based stuff, digital data is almost costless to re-use and many people can simultaneously be doing just that. Thus firms across the globe are aggregating and analysing data to create services that we all apparently aspire to have. So when one user doesn't impede another user and even better when a big variety of simultaneous users don't wear the asset out, you have a uniquely interesting resource.

Yet when those who create it, and often as well are paying to see it created by buying a service in the first place, nevertheless don't own it nor do they get to re-use it, there's something seriously awry in the incentives at work here.

FISHER: An interesting comment on the final report was that the proposed "comprehensive right" for individuals or small businesses to access, correct and transfer data about themselves held by third parties "frames personal information as a commodity rather than as an inviolable attribute of our identity. It encourages us to share and sell it, rather than guard and protect it. It envisages individuals as walking data compilations (Jessica Lake, in *The Conversation*)" What are your thoughts about that?

HARRIS: We received that view from a number of the privacy regulators around the country in submissions to us. They perceive privacy as a basic human right and the trading of something that carries such a label as being in some way lesser or tacky. We don't disagree with the former but the latter is more a form of moralising.

Worse, for policy there are two problems with that approach. First, it's a bit late now. That data is being traded by corporations and social media sites continuously and despite advice to the contrary most of us are willingly signing up for the services, and whether we know it or not we *are* trading our data. So it's the same point as the USO: reality is mugging perception.

Second, nothing in what we have proposed will require people to do more than they are today – there is no forced trading. We propose that you have a right which self-evidently will be a of value to some, but with no cost to others.

Thus should you wish to get a better insurance deal, and your data shows you are good risk, under our proposal you can choose to order your current data holder to send your data to a new data holder and seek a better deal. Similarly for banks and mortgages; or your smart meter data in electricity. Or send your medical records to your new GP.

These services actually exist in other countries, albeit in ad hoc forms. We say, bundle up that right – along with better ability to know what your current provider is doing with your data – and apply it universally to all the entities that today collect your data. You and they then have a joint right to this data that you and they jointly created.

FISHER: There were important changes to the proposed nature of the "comprehensive right" between the draft and final reports. What made them necessary?

HARRIS: We had proposed the two angles to your consumer data – the right to order transfer and right to know who else is trading in your data – along with three other rights: the right to review of automated decision-making, the right to obtain a copy of your data and the right to propose a correction to an error in your data. The latter two were to replicate for *consumer* data what is already available for personal information under privacy legislation. And they remain recommended rights.

But we dropped the idea of a right to review automated decision-making. The reasons for this vary – first off, we often use a draft report to try to get advice on the seriousness of an issue that on first principles looks important. In response to the draft, we got limited evidence offered to us of issues with automated decision-making in Australia, although we know it has been a problem in some other jurisdictions.

That lack of responses alone wouldn't have stopped us recommending it, but we also struggled to put a universal right of appeal into a practical form in this case. There are a lot of machine-assisted decisions today involving a combination of human and automated judgment. Drawing the line is very tricky. And beyond that, there are some automated decisions which are simply desirable in their own right and would become impractical if appealed. In medical science, robots appear to do better than humans in judging some test results. In human resources, algorithms simplify bulk recruitment tasks. If these things and others like them became appealable automatically, it would add cost or slow productivity, or both.

Individually, each of these objections would probably not have swayed us. But together, they do.

FISHER: Peter, thank you so much for your insights. It's truly been a pleasure discussing these significant inquiries with you.