

Attachment: Key policy provisions of the Data Availability and Transparency Bill mapped against recommendations in the Productivity Commission’s *Inquiry Report on Data Availability and Use*, November 2020

| Data Availability and Transparency Bill policy provisions | Relevant recommendations and details in Productivity Commission inquiry report |
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| <p>Authority to share data</p> <p>The Bill provides an optional and alternative authority for the Australian Government to share public sector data.</p> <p>The Bill will not undermine or invalidate existing data sharing arrangements that are working successfully for all participants. Rather, the Bill will provide an alternative pathway to share data where it is currently prevented by secrecy provisions or where it simplifies existing pathways.</p> | <p><u>Productivity Commission recommendation 8.1 (Extract)</u></p> <p>New Commonwealth legislation — the Data Sharing and Release Act — should be passed drawing on the full range of Commonwealth powers to regulate digital data, in order to authorise the better sharing and release of data.</p> <p><u>Productivity Commission recommendation 8.3 (Extract)</u></p> <p>The Data Sharing and Release Act (DSR Act) would, where possible, override secrecy provisions or restrictions on use that prevent original custodians actively providing access to data to other public sector data custodians and Accredited Release Authorities (ARAs).</p> <p>[...]</p> <p>The DSR Act should establish modern, clear and supportive standards — the new ‘rules of the game’ — for data sharing and release. The Commonwealth Privacy Act would continue to apply, as well as any residual obligations emanating from the original data custodian’s legislation.</p> <p><u>Productivity Commission recommendation 8.5 (Full)</u></p> <p>Legislative reform to implement the Commission’s recommendations would need to be undertaken in two parts, moving forward together:</p> <ul style="list-style-type: none"> • the first part is the passage of the Data Sharing and Release Act (DSR Act) itself, that authorises to the greatest extent practical in a single statute, the sharing and release of data for the purposes of the Act and removes existing Commonwealth and State restrictions on integrating, linking and research uses of datasets by Accredited Release Authorities • the second part is a further legislative amendment process that may be necessary, depending on the particular characteristics of, for example, National Interest Datasets, in order to address residual restrictions on the use of specific datasets that were not able to be effected by the DSR Act itself. <p>The National Data Custodian should be asked to identify residual legislative restrictions that need removal in its consideration of National Interest Datasets.</p> |
| <p>Permitted purposes for sharing</p> <p>The Bill authorises sharing for three data sharing purposes – for delivery of government services, to inform government policies and programs, and for research and development.</p> | <p><u>From Productivity Commission report, Chapter 8 (‘A modernised regulatory framework’), pages 312-3</u></p> <p>[The DSR] Act should signal that since modern risk management approaches would mean that data can be shared and released safely, then this should happen as a matter of course (when there is a public interest in doing so, which is not the case now).</p> <p>Public interest purposes should include but not be limited to:</p> <ul style="list-style-type: none"> • increasing the availability of open data • promoting better service planning and delivery and program management • allowing the development of better statistics or analysis • assessing the performance of public services or programs • informing policy • allowing public benefit research to occur • National Interest Datasets (NIDs) • exercise of the Comprehensive Right, and • other purposes as declared by the NDC via disallowable instrument. |

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| <p>Sharing precluded for national security and law enforcement</p> <p>The Bill precludes the sharing of data for national security purposes, including activities to prevent domestic terrorism or espionage, and for purposes that would prejudice national security, such as terrorism or espionage. The Bill also precludes data sharing for enforcement-related purposes, such as law enforcement, policing, compliance, and assurance activities.</p> | <p><u>From Productivity Commission report, Chapter 1 ('Australia's data landscape'), page 55</u></p> <p>It is important to note that while security data (such as that pertaining to military organisations, much police investigatory work, or secret intelligence services) is certainly public sector data, there are typically national security or other compelling public interest considerations that tell against its release, even in the absence of privacy concerns, and as such we do not consider security data within the scope of this Inquiry.</p> |
| <p>Establishment of National Data Advisory Council</p> <p>The Bill establishes a National Data Advisory Council as a source of expertise, to support the Commissioner through advice on ethical data use, community expectations, technical best practice, and industry and international developments. Members of the Council are appointed by virtue of their depth of experience and expertise relevant to the data sharing scheme.</p> | <p><u>Productivity Commission recommendation 6.6 (Extract)</u></p> <p>The Office of the NDC should include a small advisory board, comprising members with technical skills related to the NDC's activities, and a dedicated ethics adviser.</p> <p><u>Productivity Commission recommendation 10.1 (Full)</u></p> <p>The Australian Government should engage actively with the community on matters related to data availability and use.</p> <p>At a minimum, the National Data Custodian should regularly convene forums for consultation, to ensure community concerns about increased use of data are addressed.</p> |
| <p>Accreditation required to share</p> <p>To access data under this scheme, users must be accredited by the National Data Commissioner through Rules established by the Minister. Accreditation streamlines access by ensuring users meet requirements on security, privacy, governance, and technical skills and capabilities. The Bill also allows the Commissioner to accredit experts as accredited data service providers to help share data safely, making use of contemporary tools and techniques. Accredited data service providers must meet the accreditation criteria set by the Minister in rules.</p> | <p>Details of this accreditation scheme that the legislation will give effect to have been set out across multiple recommendations:</p> <p><u>Productivity Commission recommendation 6.2 (Full)</u></p> <p>Additional qualified entities should be accredited to undertake data linkage.</p> <p>State-based data linkage units should be able to apply for accreditation by the National Data Custodian (Recommendation 6.6) to allow them to link Australian Government data.</p> <p><u>Productivity Commission recommendation 6.6 (Extract)</u></p> <p>The Office of the NDC should have responsibility for:</p> <ul style="list-style-type: none"> • accrediting release authorities, be party to determining a funding agreement for Accredited Release Authority (ARA) activities, and promoting cooperation between ARAs <p><u>Productivity Commission recommendation 6.8 (Extract)</u></p> <p>Selected public sector and public interest entities should be accredited as release authorities. Accreditation should be determined based on sectoral expertise, capability, governance structures, and include consultation throughout the relevant sector.</p> <p>Accredited Release Authorities (ARAs) would be responsible for:</p> <ul style="list-style-type: none"> • deciding (in consultation with original data custodians) whether a dataset is available for public release or limited sharing with trusted users • collating, curating, linking and ensuring the timely updating of National Interest Datasets and other datasets • offering advice, services and assistance on matters such as dataset curation, de-identification and linking • providing risk-based access to trusted users. |

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| | <p><u>Productivity Commission recommendation 6.12 (extract)</u></p> <p>Accredited Release Authorities (ARAs) should be given responsibility to grant, on a continuing program-wide basis, data access to trusted users from a range of potential entities that:</p> <ul style="list-style-type: none"> • have the necessary governance structures and processes in place to address the risks of inappropriate data use associated with particular datasets, including access to secure computing infrastructure, and • have a signed legal undertaking that sets out safeguards for data use and recognises relevant privacy requirements. |
| <p>Penalties for unauthorised sharing</p> <p>The Bill enables the Commissioner to take a graduated approach to regulatory enforcement and publish process guidance on how they will apply their powers. Following an investigation, the Commissioner could give recommendations, accept and enter into enforceable undertakings, issue written directions, issue infringement notices, seek injunctions, or seek civil or criminal penalties from a court.</p> | <p><u>From Productivity Commission report, Chapter 4 ('A way forward: what we must aim at'), page 186</u></p> <p>Transparency and accountability in Australia's data framework can be enhanced by</p> <p>[...]</p> <ul style="list-style-type: none"> • clearly setting out the consequences for individuals or institutions for breaches, and creating good incentives for compliance – the Data Sharing and Release Act would harmonise penalties and establish robust safeguards. <p><u>From Productivity Commission report, Chapter 8 ('A modernised regulatory framework'), page 331</u></p> <p>The DSR Act should contain a simple sequence of penalties to enable the NDC to adopt the 'enforcement pyramid' principle — at the top, systemic, deliberate breaches should be subject to the highest penalties. At the bottom, mistakes with no consequences that are immediately reported to the NDC should be used for learning.</p> <p>The NDC should be allowed to issue a warning and work with the breaching party to improve their data handling processes, in all but the highest categories of breach above. We have also endorsed the NDC being able to accredit best practice de-identification processes and conduct audits to support improvement in risk management processes over time (chapter 6).</p> <p>Failure to report a breach should fall within the high penalty range. But the DSR Act should not contain criminal penalties. We also consider ARAs should be held to a higher standard because of their trusted position in the Framework.</p> |
| <p>DAT Bill based on risk management principles</p> <p>The Bill provides layers of safeguards, including the data sharing principles, which are based on an internationally recognised framework for managing risks associated with sharing data. The principles guide how risks are assessed and managed and must be applied to each data sharing project across five dimensions (projects, people, data, settings, and outputs).</p> | <p><u>From Productivity Commission report, Chapter 7 ('Getting value from Australia's national interest datasets'), page 301</u></p> <p>The 'five safes' model was discussed in chapter 4. It needs to be applied but also adapted by the NDC in development under the Commission's Framework model.</p> <p><u>From Productivity Commission report, Chapter 8 ('A modernised regulatory framework'), page 316</u></p> <p>In chapters 4 and 6 we endorsed embedding the five safes principles within a risk based approach to data access. The DSR Act should explicitly endorse the application of these principles (as 'trusted user principles'), with specific sharing processes and more detailed guidance issued by the NDC. A risk-based approach means that higher risk uses should be subject to more stringent controls, while lower risk uses are likely to have less stringent controls applied.</p> <p><u>Productivity Commission recommendation 6.9 (Extract)</u></p> <p>All Accredited Release Authorities must have and publish formal risk management processes to effectively assess and manage the risks associated with sharing and release of data under their control.</p> <p>[...]</p> <p>Risk management processes should be regularly reviewed and revised to account for new and emerging risks.</p> |

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| | <p><u>Productivity Commission recommendation 8.2 (Full)</u></p> <p>The Data Sharing and Release Act should establish the risk-based approach to data sharing and release and accompanying institutional frameworks.</p> <ul style="list-style-type: none"> • All non-sensitive data held by agencies and Accredited Release Authorities (ARAs) should be explicitly presumed to be made public, consistent with the Australian Government’s Public Data Policy Statement. • Data custodians and ARAs would be authorised to provide sensitive data to trusted users in a secure environment, with de-identification where necessary for risk management of the data. <p>The National Data Custodian should have the authority to issue guidance on how the risks of <i>all</i> sharing of identifiable data between entities should be managed. This guidance should be updated where it judges the risks have shifted.</p> |
| <p>Transparent sharing through data sharing agreements</p> <p>The Bill formalises data sharing arrangements through data sharing agreements which detail what safeguards are in place. The National Data Commissioner will publish details of the agreement to build transparency and accountability in the data sharing scheme.</p> | <p><u>Productivity Commission recommendation 6.9 (Extract)</u></p> <p>Standardised, access-friendly Data Sharing Agreements should be implemented with external data providers and users to formalise the activities that can take place with identifiable and de-identified data.</p> <p><u>Productivity Commission recommendation 8.3 (Extract)</u></p> <p>Access should be governed by Data Sharing Agreements that embed the trusted user principles, actively assist data sharing and create clarity of understanding amongst the parties. The National Data Custodian (NDC) should issue a model Data Sharing Agreement early in its life, and update it from time to time.</p> |
| <p>Merits review for the National Data Commissioner’s decisions</p> <p>Merits and judicial review will be available for decisions made by the National Data Commissioner such as accreditation decisions. Existing avenues for redress are unaffected, such as complaints to the Ombudsman about the actions of Australian Government agencies and complaints to the Australian Information Commissioner under the Privacy Act 1988 where a suspected mishandling of personal information has occurred.</p> <p>The Bill does not provide for merits review of data sharing decisions by data custodians. Data custodians’ sharing decisions will be capable of challenge through judicial review channels, such as the Administrative Decisions (Judicial Review) Act 1977.</p> | <p>The Bill’s approach to merits review is consistent with how legislation is developed to establish a regulator.</p> <p>The Productivity Commission noted in <u>Chapter 8 (‘A Modernised regulatory framework), page 330</u> of the report:</p> <p style="padding-left: 40px;">We do not consider issues of judgement around risk management under the guidance issued by the NDC should be subject to appeal — this judgement is the NDC’s core work. What matters is whether the underlying outcomes have been achieved.</p> <p>And <u>page 312 of the report</u> outlines reasons for why the decision to share is not one for the NDC to make:</p> <p style="padding-left: 40px;">The DSR Act would provide that data custodians and ARAs <i>may</i> share and release data despite the terms of other legislation as long as it is done:</p> <ul style="list-style-type: none"> • to achieve a public interest purpose; and • applying the five safes principles, in compliance with one of the sharing and release processes set out by the DSR Act; and • subject to the safeguards contained in the DSR Act. <p>To be clear, that Act should signal that since modern risk management approaches would mean that data can be shared and released safely, then this should happen as a matter of course (when there is a public interest in doing so, which is not the case now).</p> |
| <p>Complaints about data breaches</p> <p>The Bill includes a scheme-specific complaint mechanism for data scheme entities to complain to the National Data Commissioner about actual or suspected breaches of the Bill by another data scheme entity.</p> <p>Anyone who suspects misuse of their personal data or that a privacy breach has occurred can make a complaint to the Privacy Commissioner. The National Data Commissioner could also launch their own investigations to address any systemic failures in the data sharing scheme or in applying safeguards to protect personal information.</p> | <p><u>Productivity Commission recommendation 6.13 (Full)</u></p> <p>Accredited Release Authorities (ARAs) and data custodians should be required to refer suspected and actual violations of data use conditions that have system-wide implications to the National Data Custodian.</p> <p>Clarification should be issued detailing how this process would interact with the <i>Privacy Amendment (Notifiable Data Breaches) Act 2017</i> (Cth).</p> <p><u>Productivity Commission recommendation 8.7 (Extract)</u></p> <p>The Australian Competition and Consumer Commission (ACCC) and the Office of the Australian Information Commissioner should enter into working arrangements with each other, industry ombudsmen and other relevant bodies at all levels of government to support a ‘no wrong door’ approach to how individuals (including small businesses) pursue complaints or queries regarding their rights as consumers to data held on them.</p> |

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| <p>Exclusions</p> <p>Some exclusions to this override are provided in the Bill and the Draft Regulations to Data Availability and Transparency Bill 2020.</p> | <p>Note, exclusions from the scheme are carved out the reach of the Bill, and will not have any regulatory impact as a result.</p> <p><u>From Productivity Commission recommendation 8.3 (Full)</u></p> <p>Existing protections would remain on datasets that do not utilise the DSR Act, in order to ensure there is no gap between the accountability obligations on original public sector data custodians and the ARA.</p> |
| <p>Commissioner to be an independent regulator</p> <p>The Bill includes a system of safeguards to manage risk and streamline sharing processes and establishes an independent regulator for its oversight.</p> <p>As a statutory office holder, the National Data Commissioner will be independent in performing and exercising their powers and functions.</p> | <p><u>Productivity Commission recommendation 6.6 (Full)</u></p> <p>The Australian Government should establish an Office of the National Data Custodian (NDC) to take overall responsibility for the implementation of data management policy, in consultation with all levels of Government.</p> <p>The Office of the NDC should have responsibility for:</p> <ul style="list-style-type: none"> • broad oversight and ongoing monitoring of and public reporting on Australia’s national data system and the operation of the new Data Sharing and Release Act (recommendation 8.1) • preliminary assessments for, and recommending designation of, National Interest Datasets (recommendation 7.1) • accrediting release authorities, be party to determining a funding agreement for Accredited Release Authority (ARA) activities, and promoting cooperation between ARAs • managing complaints about ARA processes • providing practical guidance material for ARAs and data custodians on matters such as risk management, data curation and metadata, data security, data de-identification and trusted user models • advising on ethics and emerging risks and opportunities in data use. <p>The Office of the NDC should include a small advisory board, comprising members with technical skills related to the NDC’s activities, and a dedicated ethics adviser.</p> <p>The NDC role should be filled administratively by the end of 2017 to be operational by the time that new draft legislation for data access is completed for public consultation (Recommendation 10.2).</p> <p><u>Productivity Commission recommendation 6.7 (Full)</u></p> <p>The National Data Custodian should streamline approval processes for access to data by:</p> <ul style="list-style-type: none"> • issuing clear guidance to all Australian Government data custodians on their rights and responsibilities, ensuring that requests for access to data they hold are dealt with in a timely and efficient manner and are consistent with the risk management approach to be adopted by Accredited Release Authorities (ARAs) • requiring that these data custodians report annually on their handling of requests for data access, including requests from ARAs. <p>State and Territory governments may opt in to these approaches to enable use of data for jurisdictional comparisons and cross-jurisdictional research.</p> |