



6 Nov 2020

Office of the Data Commissioner

Submitted Electronically

DATA AVAILABILITY AND TRANSPARENCY BILL 2020 – BSA COMMENTS

BSA | The Software Alliance (**BSA**) is the leading advocate for the global software industry before governments and in the international marketplace. BSA's members¹ are among the world's most innovative companies, creating software solutions that spark the economy.

Government-generated data is an important asset that can serve as a powerful engine for creating new jobs, promoting economic growth, driving productivity gains, and enabling innovation. BSA is highly supportive of government efforts to enhance the collective benefits of data by advancing responsible policies that facilitate greater sharing, collaboration, and experimentation with data resources while protecting privacy.

Building value for Australians from better use of government data is not limited to data sets subject to government open by default policies. BSA supports the goal of the legislation to facilitate the sharing of potentially sensitive government data with qualified entities (within government and the private sector) who will use that data for in ways will advance the public interest and that are consistent with public expectations of privacy, security, and ethics.

BSA commented on the Office of the National Data Commissioner's Data Sharing and Release Legislative Reforms discussion paper.² In this submission, we supported the development of a legal framework to "enable government agencies to make available sensitive data that is not subject to the "open by default" policy set out in the Public Data Policy Statement."

The Data Availability and Transparency Bill (**the Bill**) is a promising model for encouraging the sharing of sensitive, but potentially high-impact, data internally and externally to build value for Australia.

BSA is very supportive of the Bill and strongly commends the Australian Government for the forward-leaning approach to data governance that is set forth in the Bill. Our comments are focused on aspects of the Bill and the accompanying Accreditation Framework that could benefit from greater

¹ BSA's members include: Adobe, Amazon Web Services, Atlassian, Autodesk, AVEVA, Bentley Systems, Box, Cadence, Cisco, CNC/Mastercam, DocuSign, IBM, Informatica, Intel, MathWorks, Microsoft, Okta, Oracle, PTC, Salesforce, ServiceNow, Siemens Industry Software Inc., Sitecore, Slack, Splunk, Synopsys, Trend Micro, Trimble Solutions Corporation, Twilio, and Workday.

² *BSA Comments on Data Sharing and Release Legislative Reforms*, <https://www.bsa.org/policy-filings/australia-bsa-comments-on-data-sharing-and-release-legislative-reforms>

clarity. First, we seek clarification about the scope of organisations that will be eligible for accreditation under the Bill. Second, we urge you to clarify the definition of “data service providers” to ensure that the term is consistent with what seems to be the intention of the Bill.

COMMENTS

Participation is Limited to Australian Companies

The draft Bill establishes a legal framework to enable government agencies to share “public sector data” that would otherwise be prohibited by law with “accredited users”. BSA is supportive of the principle of restricting the sharing of sensitive government data to organisations that have been vetted in some process. In general, BSA agrees with the governance safeguards that are built in the accreditation process as described in the Accreditation Framework Discussion Paper.³

However, the process as currently described specifies that only Australian organisations are eligible to participate in the scheme as an accredited organisation. It states further that companies applying for accreditation would be subject to an as yet unspecified ownership test to determine whether the ownership structure meets some approved level of Australian ownership.

BSA acknowledges that the Australian Government has a legitimate interest in ensuring that entities accredited under the framework are subject to the jurisdiction of Australian courts. However, the nationality of ownership does not necessarily determine responsible data custodianship or security. Instead, the Australian Government should make a risk based decision based on the company’s ability to best meet the security and data handling requirements of the program, and ultimately provide better government services, inform government policy and programs or conduct research and development.

Accredited Data Service Providers

In addition to requiring “users” to be accredited before they are eligible to enter into data sharing arrangements with government agencies, the Bill also sets forth an accreditation process of “Data Service Providers” (ADSP). The Accreditation Framework Discussion Paper defines a “data service” very broadly as “any operation performed on or in relation to data, at any stage from collection or creation to destruction”. It further notes that service providers will need to be accredited in order to provide “complex data integration services” or “data sharing services” on behalf of Data Custodians (i.e., government agencies). The Discussion Paper suggests that accreditation under the Framework will “not impact on current data service provider arrangements (e.g., cloud infrastructure to host data assets)” and that “other data services can continue to be contracted through standard procurement processes.”

Although the accreditation requirement for “data service provider” seems intended to focus on a very narrow class of services, BSA is concerned that the use of the term “data service provider” may give rise to unhelpful confusion about the scope of data services that are subject to the accreditation requirement. This confusion could lead to accredited entities and government agencies not engaging companies that provide cloud-based and other data services due to the perception that these third-party providers would also require accreditation or similarly be subject to the Australian ownership test.

The Discussion Paper does state that accreditation under the Framework will “not impact on current data service provider arrangements (e.g., cloud infrastructure to host data assets)” and that “other data services can continue to be contracted through standard procurement processes.” Whilst this is reassuring it leaves quite a bit of ambiguity about the scope and potential impact of this accreditation requirement on vendors that currently (or may in the future) provide cloud-based data services to the government.

BSA requests that the Australian Government explicitly define ADSP entities in the Bill as different from data service providers to avoid such confusion. It also asks that subsequent accompanying

³ Accreditation Framework Discussion Paper at <https://www.datacommissioner.gov.au/sites/default/files/2020-09/Accreditation%20Framework%20Discussion%20Paper.pdf>

documentation makes it clear that foreign-owned companies are not excluded from providing services to accredited companies or government agencies for the purposes of this scheme.

To further avoid misconception, it would also be helpful if the Bill explicitly specified that ADSP use of a cloud-based data service providers to hold and process data on the scheme participant's instructions does not constitute "sharing" of the data for the purposes of the Bill. Such a misconception could also exclude cloud-based and other data services from providing services to accredited companies or government agencies for the purposes of this scheme

Privacy-enhancing technologies

As part of data utilization and sharing framework, we recommend that the Australian Government explore and promote opportunities to further build value from the safe and responsible use of data with the application of privacy enhancing technologies. A range of emerging technologies, including homomorphic encryption, differential privacy techniques, and federated machine learning create opportunities for further sharing data while preserving individual privacy. These technologies can be used to maximize both the value and the confidentiality of sensitive information.

Conclusion

Government held data is an important asset that can serve as a powerful engine for creating new jobs, promoting economic growth, driving productivity gains, and enabling innovation. BSA supports policies that enhance the use of high-value government data, and as such, is very supportive of the Bill. Data sharing in the Australian Government has for many years been limited by regulatory uncertainty and public service concerns. The Bill is an excellent regulatory innovation that will be a powerful enabler for the Australian Government to share its more sensitive data across government and accredited private entities and build value for Australia. It will bridge the gap that prevents the Australian Government from fully delivering the benefits of government held data.

BSA thanks the Australian Government for having the opportunity to comment on the Bill. [REDACTED]

Yours faithfully

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BSA | The Software Alliance