

EXPOSURE DRAFT



EXPOSURE DRAFT

Data Availability and Transparency Code 2022

I, Gayle Milnes, National Data Commissioner, make the following code.

Dated 2022

Gayle Milnes [**DRAFT ONLY—NOT FOR SIGNATURE**]
National Data Commissioner

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Preliminary **Part 1**

Section 1

Part 1—Preliminary

1 Name

This instrument is the *Data Availability and Transparency Code 2022*.

2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument	The day after this instrument is registered.	

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under section 126 of the *Data Availability and Transparency Act 2022*.

4 Definitions

Note: A number of expressions used in this instrument are defined in the Act, including the following:

- (a) accredited entity;
- (b) accredited user;
- (c) ADSP;
- (d) data custodian;
- (e) data scheme entity;
- (f) data sharing agreement;
- (g) data sharing purpose;
- (h) delivery of government services;
- (i) entity;
- (j) output;
- (k) personal information;
- (l) project;
- (m) use.

In this instrument:

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Part 1 Preliminary

Section 4

Act means the *Data Availability and Transparency Act 2022*.

permanent resident has the same meaning as in the *AusCheck Act 2007*.

Part 2—Data sharing principles

5 Purpose of Part

For sharing, collection or use of data to be authorised by the Act, the entity sharing, collecting or using the data must be satisfied (among other things) that the project is consistent with the data sharing principles. This Part sets out matters to be taken into account, and requirements to be complied with, by an entity in satisfying itself that a project is consistent with the data sharing principles.

Note: This Part is to be read together with the Act.

6 Project principle—project reasonably expected to serve the public interest

Scope of this section

- (1) As part of satisfying itself that a project is consistent with the project principle set out in subsection 16(1) of the Act, including the element set out in paragraph 16(2)(a) of the Act, an entity must take into account the matters, and comply with the requirements, set out in this section.

Note: See also subsection 16(11) of the Act (which provides that a data scheme entity must be satisfied that it has applied each of the data sharing principles to the sharing, collection or use of data in such a way that, when viewed as a whole, the associated risks are appropriately mitigated).

Projects that can reasonably be expected to serve the public interest

- (2) If the only data sharing purpose of the project is delivery of government services (see subsection 15(1A) of the Act), the project can reasonably be expected to serve the public interest.

Note: See also subsection 11A(5) of the Act (which sets out circumstances in which multiple projects may be treated as a single project).
- (3) If the project is for the data sharing purpose of informing government policy and programs, or research and development, the project can reasonably be expected to serve the public interest only if the entity concludes that the arguments for the project serving the public interest outweigh the arguments against the project doing so.
- (4) In reaching the conclusion mentioned in subsection (3), the entity:
 - (a) must consider all of the following matters:
 - (i) whether the project promotes the objects of the Act (see section 3 of the Act);
 - (ii) any issues relevant to Australia's national interests, as set out in policies of the Australian government;
 - (iii) benefits to individuals or groups of people, including commercial benefits;

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Part 2 Data sharing principles

Section 7

- (iv) adverse impacts to individuals or groups of people, including impacts related to privacy;
 - (v) social, economic, environmental, cultural and other benefits of sharing, collecting and using the data, or not doing so;
 - (vi) social, economic, environmental, cultural and other costs of sharing, collecting and using the data, or not doing so;
 - (vii) if the project is for the data sharing purpose of informing government policy and programs—the desirability of government policy and programs being informed by evidence;
 - (viii) whether, and when, output of the project will be made public; and
- (b) may consider any other matters the entity thinks relevant.

Note: The fact that a project may have commercial benefits does not necessarily mean that the project is not in the public interest. For example, an Australian university may obtain a commercial benefit as a result of using public sector data. The public may also benefit if the research contributes to knowledge or understanding of an issue of public concern.

Projects that do not serve the public interest

- (5) A project that is for the data sharing purpose of informing government policy and programs, or research and development, does not serve the public interest if any of the following apply:
- (a) the project does not serve the interests of Australian citizens, permanent residents or other people in Australia;
 - (b) the project exclusively serves the interest of another nation;
 - (c) the project exclusively serves commercial interests;
 - (d) the project is merely of interest to the public.

7 Project principle—applicable processes relating to ethics

- (1) As part of satisfying itself that a project is consistent with the project principle set out in subsection 16(1) of the Act, including the element set out in paragraph 16(2)(b) of the Act, an entity must have regard to any process of ethics applicable (on the basis of law or policy) to all or part of the project. If more than one process is applicable, the data custodian and the accredited user must agree to observe at least one applicable process.

Note: Ethics processes involve the review of the ethical risks of sharing, collecting and using data, using an established method that is appropriate in view of the individuals, entities or subject matter to which the data relates. A project may be subject to ethics processes even if the data to be shared, collected and used does not directly relate to individuals (it may, for example, relate to the environment). Ethics processes may include an assessment of the potential harm of the outcomes of the project to individuals, society or the economy. They may be mandated by policy frameworks within an entity that is a data custodian or accredited entity, or by an independent body such as the National Health and Medical Research Council or the Australian Institute of Aboriginal and Torres Strait Islander Studies.

- (2) The project principle does not prevent the observing of any additional ethics processes.

8 People principle—existence of conflicts of interest

- (1) For the purposes of the people principle set out in subsection 16(3) of the Act, a person who has an actual, potential or perceived conflict of interest in relation to the sharing of data is not an appropriate person to make the data available to, unless the conflict has been appropriately managed.
- (2) Subsection (1) does not limit the circumstances in which a person may not be an appropriate person to make data available to.

9 People principle—actions in relation to conflicts of interest

- (1) As part of satisfying itself that a project is consistent with the people principle set out in subsection 16(3) of the Act, an accredited entity must do the following:
 - (a) identify any actual, potential or perceived conflicts of interest of those designated individuals for the entity who are permitted by the data sharing agreement to access the output, or ADSP-enhanced data, of the project;
 - (b) if any such conflicts are identified—notify them to the data custodian, and any other accredited entities who are parties to the data sharing agreement and take appropriate steps to manage the conflicts.

- (2) If the accredited entity identifies an actual, potential or perceived conflict of interest, this alone does not prevent the sharing, collection or use of the data. The entity must take steps to manage the conflict. Once risk-mitigation action has been taken or committed to, the entity must determine whether it is appropriate for the project to proceed.

Example: A researcher accesses personal health information to inform medical research. The information includes information about the researcher's family members. In this case, a conflict of interest exists. Under these circumstances, the potential conflict could have been managed before the sharing of data (for example, by performing a de-identification data service). Once an actual conflict arises, additional controls must be applied.

- (3) As part of satisfying itself that a project is consistent with the people principle, a data custodian and any ADSP is entitled to assume that, if the accredited user is a Commonwealth body, a State body or a Territory body, the accredited user has acted consistently with subsections (1) and (2) of this section and section 8.

10 People principle—appropriate persons

- (1) As part of satisfying itself that a project is consistent with the people principle set out in subsection 16(3) of the Act, including the element set out in paragraph 16(4)(a), of the Act, an entity must take into account the matters set out in this section in relation to individuals who are:
 - (a) designated individuals for an accredited entity that is party to the data sharing agreement; and
 - (b) permitted by the data sharing agreement to access data.
- (2) Relevant attributes of the individuals include whether they have the security or other clearances that the data custodian or accredited entity considers to be necessary.

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Part 2 Data sharing principles

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- (3) Relevant qualifications of the individuals include any tertiary qualifications, or other formal qualifications, they hold.
- (4) An individual's affiliations may enhance, or detract from, the individual's appropriateness to access data. Relevant affiliations of the individuals include the following:
 - (a) employment or sponsorship by a party to the data sharing agreement or any other entity involved in the sharing, collection or use of the data;
 - (b) contractual obligations, moral or commercial expectations or personal interests that conflict with the data sharing scheme's restrictions on sharing, collection or use of data;
 - (c) interests declared by an individual employed by a party to the data sharing agreement;
 - (d) sponsorships and scholarships provided by, or other ties to, third parties.

Example: An individual who has a scholarship provided by a foreign university, or is or was part of a talent development program, has relevant affiliations that detract from the individual's appropriateness to access data.

- (5) Relevant expertise of the individuals includes any education, training, or work history additional to their attributes, qualifications or affiliations. This includes on-the-job training or other types of courses that do not result in formal qualifications.

11 Setting principle—reasonable security standards

- (1) As part of satisfying itself that a project is consistent with the setting principle set out in subsection 16(5) of the Act, including the element set out in paragraph 16(6)(b) of the Act, an entity must take into account the matters set out in this section.
- (2) To be a reasonable security standard, a security standard must be proportionate to both of the following, as assessed by the entity:
 - (a) the sensitivity of the data;
 - (b) the risks posed by sharing, collecting or using the data.
- (3) The application of reasonable security standards may, in some cases, mean that accredited entities that are not Commonwealth bodies must comply with Commonwealth security standards, or parts of them.

12 Data principle—appropriate protection

- (1) As part of satisfying itself that a project is consistent with the data principle set out in subsection 16(7) of the Act, including the element set out in subsection 16(8) of the Act, an entity must take into account the matters, and comply with the requirements, set out in this section.
- (2) The entity must consider whether, before the data is shared, it should be altered, or whether some of the data should be removed, in a way that contributes to the proportionate management of the risks of sharing, collecting and using the data.

- (3) Alteration or removal of data includes processes that effectively decrease the detail of the data through deletion, modification or combination of variables, categories or unit records.
- (4) If the data is to be shared through an ADSP, the data custodian must consider the appropriateness of removing or altering the data before the sharing with the ADSP.

Note: See also the privacy protections in sections 16A and 16B of the Act, and the requirements relating to de-identification or secure access data services in section 16C of the Act.

- (5) The entity must consider whether a reasonable person, who is properly informed, would agree that the data to be shared, collected or used is reasonably necessary to achieve the data sharing purpose or purposes of the project.

Note: See also paragraph 13(2)(e) of the Act, and the privacy protections in sections 16A and 16B of the Act.

13 Output principle

- (1) As part of satisfying itself that a project is consistent with the output principle set out in subsection 16(9) of the Act, including the elements set out in subsection 16(10) of the Act, an entity must have regard to the matters set out in this section.
- (2) The entity must consider the nature and intended use of the output. These may include (but are not limited to) any of the following:
 - (a) pre-filled forms;
 - (b) aggregated data sets (tables or unit records) for further analysis;
 - (c) mathematical models for monitoring government programs;
 - (d) publications such as academic journals or government reports.
- (3) Other matters that the entity may consider include the following:
 - (a) the appropriateness of the data sharing agreement allowing access in accordance with any of sections 20B to 20D of the Act;
 - (b) if access in accordance with section 20C or 20D of the Act is considered appropriate—procedures that are reasonably necessary to manage the access.

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Part 3 Privacy protections

Section 14

Part 3—Privacy protections

14 Purpose of Part

For the purposes of paragraphs 126(2A)(b) and (c) and subsections 126(2B) and (2C) of the Act, this Part sets out:

- (a) requirements relating to consent by an individual to the sharing of personal information about the individual, for the purposes of sections 16A and 16B of the Act; and
- (b) principles to be applied when determining the following:
 - (i) for a project that has the data sharing purpose of delivery of government services—whether it is necessary to share personal information to properly deliver a government service;
 - (ii) whether the public interest to be served by a project justifies the sharing of personal information without consent.

15 Consent to sharing personal information—sections 16A and 16B of the Act

- (1) This section sets out how to apply subsection 16A(1) and subparagraphs 16B(1)(a)(ii) and (3)(a)(i) of the Act, so far as those provisions relate to the consent by an individual to the sharing of personal information about the individual.
- (2) Before the consent is given, the individual must be adequately informed about the sharing, including the following:
 - (a) the nature of the personal information to be shared;
 - (b) whether the information is to be shared more than once;
 - (c) the accredited entity or entities with whom the information will be shared.
- (3) The consent must be voluntary.
- (4) The consent must:
 - (a) relate specifically to the sharing of the information for the project; and
 - (b) be current at the time of the sharing.
- (5) At the time of the sharing, the consent must not have been withdrawn.
- (6) The consent must be given:
 - (a) if the individual has the capacity to consent—by the individual; or
 - (b) otherwise—by a responsible person for the individual (within the meaning of the *Privacy Act 1988*).
- (7) Consent for the purposes of subparagraph 16B(1)(a)(ii) or (3)(a)(i) of the Act may be express (either oral or in writing) or implied (in circumstances where it may be reasonably inferred from conduct).

- (8) Any withdrawal of consent must be express (either oral or in writing). If consent is withdrawn, the effect of the withdrawal is to prevent sharing of the data on the basis of the consent after, but not before, the withdrawal.

16 Unreasonable or impracticable to seek consent

- (1) For the purposes of paragraph 16B(4)(a) of the Act, the data custodian's conclusion that it is unreasonable or impracticable to seek an individual's consent to the sharing of data that includes personal information about the individual must be based on considerations including the following:
 - (a) whether the data custodian is able to contact the individual to seek consent, including whether the data custodian has resources, systems and practices to do so;
 - (b) whether the proposed sharing is authorised by any other law;
 - (c) the likely impact (whether positive or negative, or direct or indirect) of the project of which the sharing is a part on the individual about whom personal information will be shared, or a group of people that includes the individual;
 - (d) the likely impact on the individual of seeking, or not seeking, the individual's consent;
 - (e) whether the sharing relates to a serious threat to, or urgent situation involving, the individual about whom personal information will be shared, or a group of people that includes the individual.
- (2) It may be unreasonable or impracticable to seek consent if seeking consent would be excessively burdensome in all the circumstances.
- (3) It is not unreasonable or impracticable to seek consent merely because it would be inconvenient, time-consuming or incur costs.
- (4) It is not unreasonable or impracticable to seek consent merely because the consent of a very large number of individuals needs to be sought.

17 Personal information—determining necessity of sharing and minimum amount necessary

Scope of section

- (1) This section sets out, in relation to projects that have the data sharing purpose of delivery of government services, the principles to be applied by data custodians when determining whether it is necessary to share personal information to properly deliver the service (see subparagraph 126(2C)(b)(i) of the Act).

General principle

- (2) Except as provided by this section, it is not necessary to share personal information to properly deliver a government service.

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Part 3 Privacy protections

Section 17

Providing information

- (3) To properly deliver a government service mentioned in paragraph 15(1A)(a) of the Act (providing information), it is necessary to share the following personal information:
 - (a) contact information for the individual to whom the service is being delivered;
 - (b) any information relevant to the timing of the provision of the information, or to the content of the information.

Providing services, other than services relating to payment, entitlement or benefit

- (4) To properly deliver a government service mentioned in paragraph 15(1A)(b) of the Act (providing services, other than services relating to a payment, entitlement or benefit), it is necessary to share the following personal information:
 - (a) contact information for the individual to whom the service is being delivered;
 - (b) any information relevant to the timing of the provision of the service, or to the scope or content of the service.

Determining eligibility for a payment, entitlement or benefit, or paying a payment, entitlement or benefit—under legislation

- (5) If the delivery of a government service mentioned in paragraph 15(1A)(c) or (d) of the Act (determining eligibility for a payment, entitlement or benefit, or paying a payment, entitlement or benefit) is being done under legislation, then, to properly deliver the service, it is necessary to share the following personal information:
 - (a) contact information for the individual to whom the service is being delivered;
 - (b) any information about the individual:
 - (i) that, under the legislation, may be taken into account; and
 - (ii) that is expected to be taken into account when delivering the service.

Determining eligibility for a payment, entitlement or benefit, or paying a payment, entitlement or benefit—other than under legislation

- (6) If the delivery of a government service mentioned in paragraph 15(1A)(c) or (d) of the Act (determining eligibility for a payment, entitlement or benefit, or paying a payment, entitlement or benefit) is being done other than under legislation, then, to properly deliver the service, it is necessary to share the following personal information:
 - (a) contact information for the individual to whom the service is being delivered;
 - (b) information about the individual that may be taken into account in accordance with any written policies, procedures, processes or guidance applicable to delivery of the service;
 - (c) other information about the individual:

- (i) that may lawfully be taken into account in relation to delivery of the service; and
- (ii) that is expected to be taken into account when delivering the service.

18 Whether public interest justifies sharing personal information without consent

- (1) For the purposes of subparagraph 126(2C)(b)(ii) of the Act, this section sets out the principles to be applied by data custodians when determining circumstances, or categories of circumstances, where the public interest to be served by a project justifies the sharing of personal information without consent.
- (2) Any adverse impacts on individuals that are likely to be caused by the sharing of the personal information are to be identified. The public interest to be served by the project only justifies the sharing if the ways in which the public interest is served by the project outweigh all of the likely adverse impacts.
- (3) The data custodian must take into account the following considerations:
 - (a) whether the project relates to preventing, or responding to, a serious threat to life, or to the health, safety or welfare of the public;
 - (b) whether the project includes any safeguards to minimise any impact on an individual, such as de-identification or security measures specified in the data sharing agreement;
 - (c) whether personal information is to be shared with the accredited user, or whether it is only to be shared with an ADSP that will either de-identify the information, or provide the accredited user with ADSP-controlled access;
 - (d) the benefits to individuals or groups of people, and the likelihood of the project achieving those benefits;
 - (e) the social, economic, environmental, cultural or other costs of sharing, collecting and using the data, or not doing so.
- (4) The data custodian must take into account any other relevant considerations.

Part 4—Data sharing agreements

19 Access to data by designated individuals for accredited entities

For the purposes of subsection 19(16) of the Act, a data sharing agreement must require accredited entities to ensure that involvement in the entity's collection or use of output, or ADSP-enhanced data, of the project is restricted to designated individuals for the entity:

- (a) who are Australian citizens or permanent residents; or
- (b) otherwise—who are specified in the agreement by their full names, nationalities and designations, along with a description of their involvement in the project.

20 Access to data by non-Australian designated individuals for Australian universities

- (1) For the purposes of subsection 19(16) of the Act, this section prescribes requirements to be met by a data sharing agreement if:
 - (a) an accredited entity that is party to the agreement is an Australian university; and
 - (b) a designated individual for the Australian university who is permitted by the agreement to access data is neither an Australian citizen nor a permanent resident.
- (2) The agreement must require the Australian university to do the following:
 - (a) have regard to reports published by Australian government security or regulatory agencies responsible for regulating the higher education or research sectors, about foreign interference threats in these sectors, including *Guidelines to counter foreign interference in the Australian university sector* published by the Department of Education;
 - (b) ensure that due diligence has been carried out with respect to the individual and that the individual has undertaken training in national security issues including foreign interference.

Part 5—Miscellaneous

21 Information and documents required at time of giving documents under subsection 33(1) of the Act

- (1) For the purposes of subsection 33(2) of the Act, the entity is required to give the Commissioner:
 - (a) the information set out in subsection (2) of this section, in an approved form (if any); and
 - (b) if the data sharing agreement, or variation, has an attachment—the attachment; and
 - (c) any other information or documents the entity considers relevant in relation to registration of the data sharing agreement or variation.
- (2) For the purposes of paragraph (1)(a), the information is the following:
 - (a) the entities that are parties to the data sharing agreement (whether in the capacity of data scheme entity or any other capacity) and the capacity in which each entity is a party;
 - (b) the date the parties entered into the agreement;
 - (c) a description of the project the agreement covers;
 - (d) the data sharing purpose of the project;
 - (e) a description of the data to be shared;
 - (f) whether personal information is to be shared;
 - (g) if subsection 16B(7) of the Act applies in relation to the agreement—the statement and explanation required by that subsection;
 - (h) if subsection 16B(8) of the Act applies in relation to the agreement—the statement required by that subsection;
 - (i) if, but for section 23 of the Act, sharing, collecting or using data under the agreement would contravene another law—the title of the other law;
 - (j) a statement of how the project will serve the public interest;
 - (k) a description of the final output of the project;
 - (l) if output of the project may exit the data sharing scheme under section 20E of the Act—the circumstances in which the exit may occur;
 - (m) if the agreement has an expiry date—the expiry date.

22 Applicable period for notifying Commissioner of certain information

For the purposes of paragraph 34(4)(a) of the Act, the applicable period for notifying the Commissioner is the period ending on 31 July.

Note: The notification relates to information for inclusion in the annual report prepared under section 138 of the Act.