



Australian Government

IP Australia

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IP Australia Submission to the Office of National Data Commissioner

Exposure Draft of the Data Availability and
Transparency Code 2022



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Introduction

IP Australia welcomes the opportunity to provide comments on the *Exposure Draft of the Data Availability and Transparency Code 2022* (the draft data code). This submission provides comments on specific components of the exposure draft.

About IP Australia

IP Australia is the Australian Government agency that administers the intellectual property (IP) rights legislation governing patents, trade marks, designs, and plant breeder's rights. As well as granting exclusive rights under the statutes we administer, IP Australia:

- Delivers proactive outreach programs that inform and educate Australian businesses, with emphasis on small and medium enterprises.
- Build and leverage partnerships with Government, industry partners and universities to promote the IP system and maximise impact.
- Provide high quality advice to the Government on the development of IP policy and legislation.
- Engage internationally, working with bodies such as the World Intellectual Property Organization and other IP offices to influence IP policy and practice.
- Administer the Trans-Tasman IP attorney regime for Australian and New Zealand patents attorneys, and Australian trade marks attorneys.

Comments on the draft data code

Project principle: project reasonably expected to serve the public interest

We believe that it is appropriate for Commonwealth, State and Territory bodies to engage in weighing up the public interest. Commonwealth entities, for example, already consider public interest considerations in Freedom of Information decisions. Because the data custodian(s) (being Commonwealth bodies) is/are the sharers of the public sector data (per s 13(1)(b) and 13(2) of the Act), the 'public interest test' may be applied by these entities. However, there is a requirement for accredited users and ADSPs to be satisfied that the project be consistent with the data sharing principles (ss 13A and 13B of the Act).

As a broad range of entities are covered by the Act's definition of entity (not just Commonwealth, State and Territory), regard should be had as to what capacity these entities would have to decide or be satisfied that a project is 'in the public interest'. Where these entities can be guided by data custodians on public interest considerations, this requirement may be acceptable.

There appears to be some overlap between s6(4); (iii) and (v), as well as s6(iv) and s 6(vi). We suggest these sections may be consolidated in this manner:

- s 6(4)(iii) - social, economic, environmental, cultural, commercial and other benefits to individuals or groups of people of sharing, collecting and using the data, or not doing so;
- s 6(4)(iv) - adverse social, economic, environmental, cultural and other impacts to individuals or groups of people of sharing, collecting and using the data, or not doing so, including impacts related to privacy;

The list of projects effectively defines who the 'public' is. The inclusion of sub-section (5)(d) is useful as it implies that projects must have some value to the public.

Notes provided in these sections are useful. The note in section 6(4) is especially useful as it clarifies that a project having a commercial benefit does not necessarily mean it will also not be in the public interest.

Project principle: applicable processes relating to ethics

Where one or more process of ethics (specifically within law or policy) applies, this section creates an obligation to 'have regard to' that process/es. A question arises as to what extent an entity is required to follow a process if this section only requires them to turn their mind to the question of ethical processes (and not necessarily adhere to one or more ethical process).

Producing a (non-exhaustive) guide on ethical process (or agencies that may be contract in relation to certain matters) expected to be commonly used may be helpful.

People principle: conflicts of interest

The requirements of this element are sufficiently clear regarding a data custodian being entitled to 'assume' that if an accredited user is a Commonwealth body, a state, or a territory body, they have acted consistently with the principle of conflict of interest. As there will be accredited users outside of these groups, is the data custodian entitled to assume these users have acted consistently with the principles of conflict of interest?

The example provided in this section was useful. The inclusion of an example on additional controls and non-Commonwealth, State, and Territory bodies as accredited users would be beneficial.

People principle: appropriate persons

This section is clear regarding the formal and informal qualifications being considered.

The example provided in s 10(4) with slight variations can be similarly applied to the other relevant affiliations listed in that sub-section. Inclusion of examples of what are appropriate attributes and qualifications would be beneficial if there was a requirement for the data custodian to verify supporting documentation.

Setting principle: reasonable security standards

Section 11(3) should be further clarified as it is unclear in what instances non-Commonwealth accredited users are required to comply with Commonwealth security standards. This could be addressed through a note under section 11(2) with the inclusion of some of the information that was contained in the Consultation Paper.

Data principle: appropriate protection – whether data should be altered

In practice, this element of the data principle, the privacy protections, and three data services set out in the Act, all work together to provide a framework to appropriately protect data. Noting, The ONDC acknowledges there is a need to strike the right balance between taking a layered approach and not making the DATA Scheme too complex. Could the draft data code be improved to better assist entities apply this element of the data principle?

Privacy protections

Consider whether a section would need to be included covering the scenario where after reasonable efforts have been taken (by the data custodian) to obtain consent and no response has been obtained from the affected individual within a reasonable timeframe, consent is then taken to have been provided. Consideration of what constitutes reasonable efforts.

Separate guidelines which would form part of the DATA Scheme may be better than including guidelines such as those provided by the National Health and Medical Research Council in this Code.

The 'content of the information' could be on any number of topics, and therefore the personal information which is 'relevant to' could be too broad and may not truly limit the scope of personal information that may be shared.

The subparagraphs (a) and (b) would benefit from clarification as to whether both were required (and/or) if personal information is being shared to provide the government service of 'providing information'.

Data sharing agreements

Additional details would be helpful for cases where the designated individual is a foreign national. In cases where data sharing is required, it is important to know if the principles of the data sharing agreement would be like that of a case where the designated individual is an Australian citizen/permanent resident.

Potential additions to the data code

A potential topic to be included in the data code:

- Principles relating to maintaining the quality of shared data by the data sharing entities/custodians.
- Principles relating to open by default for data that can be shared on data.gov.au in order to prevent unnecessary data sharing agreements being created for data that is considered open.