

EXPOSURE DRAFT

2019-2020

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

EXPOSURE DRAFT

Data Availability and Transparency Bill 2020

No. , 2020

(Prime Minister)

**A Bill for an Act to authorise the sharing of public
sector data, and for related purposes**

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EXPOSURE DRAFT

1 **A Bill for an Act to authorise the sharing of public**
2 **sector data, and for related purposes**

3 The Parliament of Australia enacts:

4 **Chapter 1—Preliminary**

5 **Part 1.1—Introduction**
6

7 **1 Short title**

8 This Act is the *Data Availability and Transparency Act 2020*.

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Chapter 1 Preliminary Part 1.1 Introduction

Section 2

1 **2 Commencement**

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

6

Commencement information

Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this Act	The day after this Act receives the Royal Assent.	

- 7 Note: This table relates only to the provisions of this Act as originally
8 enacted. It will not be amended to deal with any later amendments of
9 this Act.

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

13 **3 Objects**

14 The objects of this Act are to:

- 15 (a) promote better availability of public sector data; and
16 (b) enable consistent safeguards for sharing public sector data;
17 and
18 (c) enhance integrity and transparency in sharing public sector
19 data; and
20 (d) build confidence in the use of public sector data; and
21 (e) establish institutional arrangements for sharing public sector
22 data.

23 **4 Simplified outline of this Act**

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Data custodians of public sector data may share their data with 25 accredited users in accordance with the controls established by this
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Act. Data custodians may share data with accredited users directly, or indirectly through an ADSP (short for accredited data service provider).

Public sector data is defined as data lawfully created, collected or held by or on behalf of Commonwealth bodies. A Commonwealth body that controls such data and has the right to deal with it is the data custodian of the data and, so, authorised to share it in a controlled way.

There are corresponding authorisations for accredited entities to collect and use shared data.

The National Data Commissioner is the regulator for the data sharing scheme and also has the function of advocating for the sharing and release of public sector data more generally. The Commissioner is assisted by APS employees in the Department and by the advice of the National Data Advisory Council.

Entities must be accredited by the Commissioner in order to have public sector data shared with or through them.

Data scheme entities (i.e. data custodians and accredited entities) have responsibilities under the Act. Data scheme entities may complain to the Commissioner about breaches of the Act by other data scheme entities. The Commissioner also has powers to require information and to assess, monitor and investigate data scheme entities. A range of enforcement options are available to the Commissioner.

25 **5 Act binds the Crown**

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- (1) This Act binds the Crown in each of its capacities.
- (2) However, this Act does not make the Crown liable to be prosecuted for an offence.
- (3) To avoid doubt, subsection (2) does not prevent the Crown from being liable to pay a pecuniary penalty under a civil penalty order

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Chapter 1 Preliminary

Part 1.1 Introduction

Section 6

1 under Part 4 of the Regulatory Powers Act, as that Part applies in
2 relation to the civil penalty provisions of this Act.

3 **6 Extension to external Territories**

4 This Act and the Regulatory Powers Act as it applies in relation to
5 this Act extend to every external Territory.

6 **7 Extraterritorial operation**

7 (1) This Act, and the Regulatory Powers Act as it applies in relation to
8 this Act, extend to acts, omissions, matters and things outside
9 Australia.

10 Note: Geographical jurisdiction for civil penalty provisions and offences is
11 dealt with in section 122.

12 (2) This Act, and the Regulatory Powers Act as it applies in relation to
13 this Act, have effect subject to:

- 14 (a) the obligations of Australia under international law, including
15 obligations under any international agreement binding on
16 Australia; and
17 (b) any law of the Commonwealth giving effect to such an
18 agreement.

19 **8 Application of this Act**

20 This Act applies in relation to sharing of data in any of the
21 following circumstances:

- 22 (a) accredited entities with or through which the data is shared
23 are Commonwealth bodies or Territory bodies;
24 (b) the data is shared for a data sharing purpose set out in
25 paragraph 15(1)(a) or (b) and the government concerned is or
26 includes the Commonwealth;
27 (c) the accredited user with which the data is shared is a
28 constitutional corporation and the sharing is for the data
29 sharing purpose set out in paragraph 15(1)(c) (research and
30 development);

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Section 8

- 1 (d) the accredited user with which the data is shared is a foreign
- 2 person and the sharing is done in accordance with an
- 3 international agreement binding on Australia;
- 4 (e) the data is shared with or through accredited entities by
- 5 means of electronic communication;
- 6 (f) the sharing is done to enable analysis for statistical purposes;
- 7 (g) the data shared is statistical information.

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Chapter 1 Preliminary
Part 1.2 Definitions

Section 9

Part 1.2—Definitions

9 Definitions

In this Act:

accreditation framework means the framework prescribed by the rules for the purposes of section 74.

accredited entity: see subsection 11(4).

accredited user: see subsection 11(4).

ADSP: see subsection 11(4).

ADSP-enhanced data: see subsection 10(3).

adverse or qualified security assessment means an adverse security assessment, or a qualified security assessment, within the meaning of Part IV of the *Australian Security Intelligence Organisation Act 1979*.

ancillary contravention of a civil penalty provision means a contravention that arises out of the operation of section 92 of the *Regulatory Powers Act*.

ancillary offence has the same meaning as in the *Criminal Code*.

APP entity has the same meaning as in the *Privacy Act 1988*.

appointed member: see paragraph 61(1)(e).

approved form for a provision of this Act, the rules or a data code means a form approved by the Commissioner for the purposes of the provision under section 118.

Australia, when used in a geographical sense, includes the external Territories.

Australian aircraft has the same meaning as in the *Criminal Code*.

1 ***Australian entity*** means any of the following:

- 2 (a) a Commonwealth body, State body or Territory body;
- 3 (b) an Australian citizen or a permanent resident of Australia;
- 4 (c) a body corporate incorporated by or under a law of the
- 5 Commonwealth or a State or Territory;
- 6 (d) a partnership formed in Australia;
- 7 (e) a trust created in Australia;
- 8 (f) an unincorporated association that has its central
- 9 management or control in Australia.

10 ***Australian ship*** has the same meaning as in the *Criminal Code*.

11 ***authorised officer*** of a data scheme entity has the meaning given

12 by section 123.

13 ***breach***: a data scheme entity *breaches* this Act if the data scheme

14 entity engages in conduct that contravenes, or is inconsistent with,

15 this Act.

16 ***Circuit Court*** means the Federal Circuit Court of Australia or, if

17 the court previously known by that name has been continued in

18 existence as the Federal Circuit and Family Court of Australia

19 (Division 2)—that court as continued in existence.

20 ***civil penalty provision*** has the same meaning as in the Regulatory

21 Powers Act.

22 ***class member***, in relation to a representative complaint, means any

23 of the data scheme entities on whose behalf the complaint was

24 made, but does not include a data scheme entity that has withdrawn

25 under subsection 83(2).

26 ***Commissioner*** means the National Data Commissioner referred to

27 in section 40.

28 ***Commonwealth body*** means:

- 29 (a) a Commonwealth entity, or a Commonwealth company,
- 30 within the meaning of the *Public Governance, Performance*
- 31 *and Accountability Act 2013*; or

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Chapter 1 Preliminary
Part 1.2 Definitions

Section 9

1 (b) any other person or body that is an agency within the
2 meaning of the *Freedom of Information Act 1982*.

3 ***constitutional corporation*** means a corporation to which
4 paragraph 51(xx) of the Constitution applies.

5 ***Council*** means the National Data Advisory Council established by
6 section 60.

7 ***court/tribunal order*** means an order, direction or other instrument
8 made by:

9 (a) a court; or

10 (b) a judge (including a judge acting in a personal capacity) or a
11 person acting as a judge; or

12 (c) a magistrate (including a magistrate acting in a personal
13 capacity) or a person acting as a magistrate; or

14 (d) any other person or body that has the power to act judicially
15 under a law of the Commonwealth or a State or Territory; or

16 (e) a tribunal; or

17 (f) a member or an officer of a tribunal;

18 and includes an order, direction or other instrument that is of an
19 interim or interlocutory nature.

20 ***covered***: see subsection 18(2).

21 ***data***: see subsection 10(5).

22 ***data breach***: see section 34.

23 ***data code***: see subsection 112(1).

24 ***data custodian***: see subsection 11(2).

25 ***data scheme entity***: see subsection 11(1).

26 ***data service*** means any operation performed on or in relation to
27 data, at any stage from collection or creation to destruction.

28 ***data sharing agreement***: see section 18.

29 ***data sharing purpose***: see subsection 15(1).

1 ***data sharing scheme*** means this Act and the regulations, rules,
2 data codes and guidelines made under it.

3 ***Defence Department*** means the Department administered by the
4 Minister administering the *Defence Act 1903*.

5 ***electronic communication*** means a communication of information
6 in any form by means of guided electromagnetic energy, unguided
7 electromagnetic energy or both.

8 ***enforcement related purpose***: see subsections 15(3) and (4).

9 ***engage in conduct*** means:

- 10 (a) do an act; or
11 (b) omit to do an act.

12 ***entity*** includes the following:

- 13 (a) an individual;
14 (b) a body corporate;
15 (c) a Commonwealth body;
16 (d) a State body or a Territory body;
17 (e) a body politic;
18 (f) a partnership;
19 (g) an unincorporated association;
20 (h) a trust.

21 ***excluded entity***: see subsection 11(3).

22 ***Federal Court*** means the Federal Court of Australia.

23 ***foreign entity*** means an entity that is not an Australian entity.

24 ***guidelines*** means guidelines made under section 113.

25 ***mandatory term*** of a data sharing agreement means a term
26 included to meet the requirements set out in the table in subsection
27 18(1).

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Chapter 1 Preliminary

Part 1.2 Definitions

Section 9

1 ***offence against this Act*** includes an offence against section 6 of
2 the *Crimes Act 1914*, or Chapter 7 of the *Criminal Code*, that
3 relates to this Act.

4 Note: Ancillary offences that relate to this Act are also offences against this
5 Act (see section 11.6 of the *Criminal Code*).

6 ***officer*** of an entity includes a person who makes, or participates in
7 making, decisions that affect the whole, or a substantial part, of a
8 business or undertaking of the entity.

9 ***output***: see subsection 10(4).

10 ***paid work*** means work for financial gain or reward (whether as an
11 employee, a self-employed person or otherwise).

12 ***personal information*** has the same meaning as in the *Privacy Act*
13 1988.

14 ***point***: see subsection 122(9).

15 ***precluded purpose***: see subsection 15(2).

16 ***primary contravention*** of a civil penalty provision means a
17 contravention that does not arise out of the operation of section 92
18 of the Regulatory Powers Act.

19 ***primary offence*** has the same meaning as in the *Criminal Code*.

20 ***public sector data***: see subsection 10(2).

21 ***regulatory function*** means a function set out in section 44.

22 ***Regulatory Powers Act*** means the *Regulatory Powers (Standard*
23 *Provisions) Act 2014*.

24 ***release*** means provide open access (and does not include share).

25 ***representative complaint*** means a complaint where the persons on
26 whose behalf the complaint was made include persons other than
27 the complainant, but does not include a complaint that the
28 Commissioner has determined should no longer be continued as a
29 representative complaint.

- 1 *responsible individual*: see subsection 110(6).
2 *reviewable decision*: see section 104.
3 *rules* means rules made under subsection 119(1).
4 *scheme data*: see subsection 10(1).
5 *share* means provide controlled access (and does not include
6 release).
7 *State body* means a department or authority of a State.
8 *Territory body* means a department or authority of a Territory.

9 **10 Data definitions**

- 10 (1) *Scheme data* is:
11 (a) public sector data shared under subsection 13(1); or
12 (b) output of such data, other than output that has exited the data
13 sharing scheme under section 20.
14 (2) *Public sector data* is data lawfully collected, created or held by or
15 on behalf of a Commonwealth body, and includes ADSP-enhanced
16 data.
17 (3) *ADSP-enhanced data* is data that is the result or product of data
18 services performed by an ADSP in relation to public sector data
19 shared with the ADSP by the data custodian of the data under
20 subsection 13(1).
21 (4) *Output* is data that is the result or product of the use, by an
22 accredited user, of public sector data shared with the accredited
23 user under subsection 13(1).
24 (5) *Data* is any information in a form capable of being communicated,
25 analysed or processed (whether by an individual or by computer or
26 other automated means).

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Chapter 1 Preliminary

Part 1.2 Definitions

Section 11

1 11 Entity definitions

- 2 (1) The following are *data scheme entities*:
- 3 (a) data custodians of public sector data;
- 4 (b) accredited entities.
- 5 (2) A Commonwealth body is the *data custodian* of public sector data
- 6 if:
- 7 (a) the body controls the data; and
- 8 (b) the body has the right to deal with the data:
- 9 (i) apart from this Act; or
- 10 (ii) in accordance with a data sharing agreement that
- 11 declares the body to be the data custodian of the data;
- 12 and
- 13 (c) the body is not an excluded entity.
- 14 Note: Data custodians are not authorised by this Act to share data in all
- 15 circumstances (see subsection 13(1), and in particular paragraph
- 16 13(1)(c)).
- 17 (3) Each of the following is an *excluded entity*:
- 18 (a) the Australian Commission for Law Enforcement Integrity;
- 19 (b) the agency known as the Australian Criminal Intelligence
- 20 Commission established by the *Australian Crime*
- 21 *Commission Act 2002*;
- 22 (c) that part of the Defence Department known as the Australian
- 23 Geospatial-Intelligence Organisation;
- 24 (d) the Australian National Audit Office;
- 25 (e) the Australian Secret Intelligence Service;
- 26 (f) the Australian Security Intelligence Organisation;
- 27 (g) the Australian Signals Directorate;
- 28 (h) that part of the Defence Department known as the Defence
- 29 Intelligence Organisation;
- 30 (i) the Inspector-General of Intelligence and Security;
- 31 (j) the Office of the Commonwealth Ombudsman;
- 32 (k) the Office of National Intelligence.
- 33 (4) An entity accredited under paragraph 73(1)(a) as an:
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Preliminary **Chapter 1**
Definitions **Part 1.2**

Section 11

- 1 (a) accredited user (an *accredited user*); or
2 (b) ADSP (short for accredited data service provider) (an
3 *ADSP*);
4 is an *accredited entity*.

5 Note: Excluded entities cannot be accredited (see paragraph 73(1)(a)).

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Chapter 2 Authorisations to share data

Section 12

1 Chapter 2—Authorisations to share data

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4 12 Simplified outline of this Chapter

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Data custodians of public sector data may share their data with accredited users in accordance with the controls established by this Chapter. Data custodians may share data with accredited users directly, or indirectly through an ADSP.

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Broadly, the controls relate to ensuring that sharing is done only for appropriate purposes and consistently with data sharing principles, and that it is done under a data sharing agreement and with the agreement of any other data custodians of that data. Sharing is excluded in certain circumstances (for example, if the sharing would contravene a prescribed law or an agreement).

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There are corresponding authorisations for accredited entities to collect and use the shared data.

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Data scheme entities must comply with the rules and data codes and have regard to the guidelines when sharing data.

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The authorisation to share data overrides other laws that would otherwise be contravened by the sharing, with some exceptions.

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Data custodians cannot be required to share data under the data sharing scheme.

23 13 Authorisations to share data

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Sharing by or on behalf of data custodian

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- (1) A data custodian of public sector data is authorised to share the data with an accredited user, either directly or through an ADSP, if:

- 1 (a) the sharing is for a data sharing purpose and not a precluded
2 purpose (see section 15), and only the data reasonably
3 necessary to contribute to the purpose is shared; and
4 (b) the sharing is consistent with the data sharing principles (see
5 section 16); and
6 (c) the sharing is not excluded (see section 17); and
7 (d) the sharing is in accordance with a data sharing agreement
8 (see section 18); and
9 (e) if the data custodian is not the only data custodian of the
10 data—the sharing is authorised in writing by each other data
11 custodian, or by a data custodian authorised in writing by
12 each other data custodian to act on their behalf for the
13 purposes of this section.

14 Note: The application of this section, along with the other provisions of this
15 Act, is limited by section 8 (application of this Act).

- 16 (2) Sharing data through an ADSP is authorised only if the
17 requirements of subsection (1) are met in relation to both stages in
18 which sharing through an ADSP occurs. The stages are:
19 (a) the data custodian of public sector data shares the data with
20 the ADSP; and
21 (b) the ADSP shares the data, or ADSP-enhanced data that is
22 public sector data of the data custodian, with the accredited
23 user on behalf of the data custodian.

24 *Collection and use by accredited entity*

- 25 (3) An accredited entity is authorised to collect public sector data
26 shared with or through the entity under subsection 13(1), and to use
27 the data and output of the data, if:
28 (a) the collection and use is:
29 (i) for the data sharing purpose for which the data was
30 shared with or through the entity and not a precluded
31 purpose (see section 15); and
32 (ii) consistent with the data sharing principles (see section
33 16); and

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Chapter 2 Authorisations to share data

Section 14

- 1 (iii) in accordance with a data sharing agreement (see
2 section 18); and
3 (b) the entity's accreditation is not suspended.
4 Note 1: Sharing and releasing are examples of using data (see also section 20).
5 Note 2: The application of this section, along with the other provisions of this
6 Act, is limited by section 8 (application of this Act).

7 **14 Sharing must be authorised**

8 *Penalties for unauthorised sharing*

- 9 (1) A person contravenes this subsection if:
10 (a) the person shares data; and
11 (b) the sharing purportedly relies on the authorisation in
12 subsection 13(1); and
13 (c) the sharing is not authorised by that subsection.

14 Note: See also Part 6.3 (treatment of certain entities).

15 Civil penalty: 300 penalty units.

- 16 (2) A person commits an offence if:
17 (a) the person shares data; and
18 (b) the sharing purportedly relies on the authorisation in
19 subsection 13(1); and
20 (c) the sharing is not authorised by that subsection and the
21 person is reckless with respect to that circumstance.

22 Note 1: See also Part 6.3 (treatment of certain entities).

23 Note 2: Unauthorised access to or modification of data held in a computer
24 may be an offence regardless of whether subsection 13(1) is relied on
25 (see Part 10.7 of the *Criminal Code* (computer offences)).

26 Penalty: Imprisonment for 2 years.

27 *Penalties for unauthorised collection or use*

- 28 (3) A person contravenes this subsection if:
29 (a) the person:

- 1 (i) collects data that was shared with or through the person
2 under subsection 13(1); or
3 (ii) uses such data or the output of such data; and
4 (b) the data or output is scheme data; and
5 (c) the collection or use is not authorised by subsection 13(3).

6 Note: See also Part 6.3 (treatment of certain entities).

7 Civil penalty: 300 penalty units.

8 (4) A person commits an offence if:

9 (a) the person:

10 (i) collects data that was shared with or through the person
11 under subsection 13(1); or

12 (ii) uses such data or the output of such data; and

13 (b) the data or output is scheme data; and

14 (c) the collection or use is not authorised by subsection 13(3)
15 and the person is reckless with respect to that circumstance.

16 Note: See also Part 6.3 (treatment of certain entities).

17 Penalty: Imprisonment for 2 years.

18 (5) Subsections (3) and (4) have effect despite any other law of the
19 Commonwealth or a State or Territory, whether enacted before or
20 after the commencement of this Act.

21 (6) To avoid doubt, subsections (3) and (4) have effect regardless of
22 whether a permitted general situation, or a permitted health
23 situation, exists within the meaning of the *Privacy Act 1988*.

24 *Exception*

25 (7) This section does not apply in relation to a disclosure of
26 information authorised by subsection 121(1) (disclosure of scheme
27 data in relation to information-gathering powers).

28 Note: A person who wishes to rely on subsection (7) bears an evidential
29 burden in relation to the matter in subsection (7) (see
30 subsection 13.3(3) of the *Criminal Code* and section 96 of the
31 Regulatory Powers Act).

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Section 15

1 **15 Data sharing purposes**

2 *Data sharing purposes*

- 3 (1) The following are *data sharing purposes*:
- 4 (a) delivery of government services;
- 5 (b) informing government policy and programs;
- 6 (c) research and development.

7 Note: In considering whether sharing is for a data sharing purpose, the data
8 scheme entity must comply with the rules and any data codes (see
9 section 25) and have regard to the guidelines (see section 26).

10 *Precluded purposes*

- 11 (2) The following are *precluded purposes*:
- 12 (a) an enforcement related purpose;
- 13 (b) a purpose that relates to, or prejudices, national security
14 within the meaning of the *National Security Information*
15 *(Criminal and Civil Proceedings) Act 2004*;
- 16 (c) a purpose prescribed by the rules for the purposes of this
17 paragraph.
- 18 (3) An *enforcement related purpose* means any of the following
19 purposes:
- 20 (a) detecting, investigating, prosecuting or punishing an offence
21 or a contravention of a law punishable by a pecuniary
22 penalty;
- 23 (b) detecting, investigating or addressing acts or practices
24 detrimental to public revenue;
- 25 (c) detecting, investigating or remedying serious misconduct;
- 26 (d) conducting surveillance or monitoring, or
27 intelligence-gathering activities;
- 28 (e) conducting protective or custodial activities;
- 29 (f) enforcing a law relating to the confiscation of proceeds of
30 crime;
- 31 (g) preparing for, or conducting, proceedings before a court or
32 tribunal or implementing a court/tribunal order.

- 1 (4) However, a purpose of delivery of government services, or
2 informing government policy or programs, or research and
3 development, in relation to matters that relate generally to
4 compliance with or enforcement of laws is not an *enforcement*
5 *related purpose*.

6 **16 Data sharing principles**

7 *Project principle*

- 8 (1) The project principle is that data is shared for an appropriate
9 project or program of work. The principle includes (but is not
10 limited to) the following elements:
11 (a) any applicable processes relating to ethics are observed;
12 (b) any sharing of the personal information of individuals is done
13 with the consent of the individuals, unless it is unreasonable
14 or impracticable to seek their consent;
15 (c) a description of how the public interest is served by the
16 sharing is to be set out in the data sharing agreement;
17 (d) the data custodian considers using an ADSP to perform data
18 services in relation to the sharing.

19 *People principle*

- 20 (2) The people principle is that data is made available only to
21 appropriate persons.

22 *Setting principle*

- 23 (3) The setting principle is that data is shared in an appropriately
24 controlled environment.

25 *Data principle*

- 26 (4) The data principle is that appropriate protections are applied to the
27 data.

28 Note: See also paragraph 13(1)(a), which requires that the data shared is
29 only data reasonably necessary to contribute to the relevant data
30 sharing purpose.

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Chapter 2 Authorisations to share data

Section 17

1 *Outputs principle*

2 (5) The outputs principle is that outputs are as agreed.

3 *Application of data sharing principles*

4 (6) A data scheme entity's sharing of data is not consistent with the
5 data sharing principles set out in this section unless the entity is
6 satisfied that each principle is applied to the sharing in such a way
7 that, when viewed as a whole, the risks associated with the sharing
8 are appropriately mitigated.

9 Note: The data scheme entities sharing, and collecting and using, the data
10 must also comply with the rules and any data codes (see section 25)
11 and have regard to the guidelines (see section 26).

12 (7) A reference to sharing in this section includes a reference to
13 collection and use.

14 **17 When sharing is excluded from the data sharing scheme**

15 *When sharing is excluded*

16 (1) For the purposes of paragraph 13(1)(c), sharing is excluded if the
17 sharing is excluded under any of the following subsections.

18 Note: If a sharing of data is excluded under this section, it is not authorised
19 by subsection 13(1).

20 *National security and law enforcement etc.*

21 (2) The sharing is excluded if:

22 (a) the data shared is held by, or originated with or was received
23 from, an excluded entity; or

24 (b) the data shared is operational data that is held by, or
25 originated with or was received from, any of the following:

26 (i) AUSTRAC (within the meaning of the *Anti-Money*
27 *Laundering and Counter-Terrorism Financing Act*
28 *2006*);

29 (ii) the Australian Federal Police;

- 1 (iii) the Department administered by the Minister
2 administering the *Australian Border Force Act 2015*.

3 *Contravention or infringement of rights etc.*

- 4 (3) The sharing is excluded if:
5 (a) sharing the data contravenes or infringes:
6 (i) copyright or other intellectual property rights to which
7 the data is subject; or
8 (ii) a contract or agreement to which a data custodian of the
9 data is party; or
10 (iii) a common law duty or privilege; or
11 (iv) a privilege or immunity of a House of the Parliament, a
12 member of a House of the Parliament, or a committee
13 within the meaning of the *Parliamentary Privileges Act*
14 *1987*; or
15 (b) the data is commercial information and sharing it founds an
16 action by a person (other than the Commonwealth or a
17 Commonwealth body) for breach of confidence.

18 *Prescribed by the regulations*

- 19 (4) The sharing is excluded if:
20 (a) a provision of a law prescribed by the regulations for the
21 purposes of this paragraph prohibits the data custodian, or
22 any of the persons whose conduct is taken under section 109
23 to be conduct of the data custodian, from disclosing the data
24 in the circumstances in which the sharing is done; or
25 (b) the data custodian of the data is prescribed by the regulations
26 as an entity that must not share data in the capacity of data
27 custodian; or
28 (c) any other circumstances prescribed by the regulations for the
29 purposes of this paragraph exist.

30 *International matters*

- 31 (5) The sharing is excluded if:
32 (a) sharing the data is inconsistent with:
-

EXPOSURE DRAFT

Chapter 2 Authorisations to share data

Section 17

- 1 (i) the obligations of Australia under international law,
2 including obligations under any international agreement
3 binding on Australia; or
4 (ii) any law of the Commonwealth giving effect to such an
5 agreement; or
6 (b) the data was collected from a foreign government and the
7 foreign government has not agreed to the sharing.

8 *Evidence and court/tribunal orders*

- 9 (6) The sharing is excluded if:
10 (a) the data is being held as evidence before a court; or
11 (b) the data was obtained by a tribunal, authority or other person
12 using a power to require the answering of questions or the
13 production of documents and is being held as evidence
14 before the tribunal, authority or other person; or
15 (c) the data:
16 (i) is subject to a court/tribunal order that manages,
17 prohibits or restricts publication or other disclosure of
18 the data; or
19 (ii) relates to the existence or content of such a
20 court/tribunal order and a law of the Commonwealth
21 prohibits or restricts disclosure of that existence or
22 content.

23 *Accreditation suspended*

- 24 (7) The sharing is excluded if the data is shared with or through an
25 entity whose accreditation is suspended.

26 *Commissioner or member of the staff participating*

- 27 (8) The sharing is excluded if the data custodian of the data, or an
28 accredited entity with or through which the data is shared, is the
29 Commissioner or a member of the staff mentioned in section 46.

18 Data sharing agreement

- (1) An agreement is a *data sharing agreement* if:
- (a) the agreement is:
 - (i) in an approved form (if any); or
 - (ii) if there is no approved form—in writing; and
 - (b) the agreement is entered into, on behalf of each data scheme entity that is party to the agreement, by an authorised officer of the data scheme entity (see section 123); and
 - (c) any requirements specified in the rules are met in relation to the agreement; and
 - (d) the agreement meets the requirements set out in the table.

Note: Data scheme entities must also have regard to the guidelines (see section 26) in entering a data sharing agreement.

Requirements for data sharing agreement

Item	Requirement
1	The parties to the agreement must be identified in the agreement and must include a data custodian of public sector data and an accredited user.
2	The agreement must relate to the sharing of public sector data and must specify that the sharing is to be done under this Act.
3	The agreement must identify the data that is covered by the agreement, including the agreed outputs for the purposes of subsection 16(5) (outputs principle).
4	The agreement must identify the data custodian of scheme data covered by the agreement and the basis on which it is the data custodian.
5	The agreement must identify any law that the sharing would contravene but for section 22 (authorisation to share overrides other prohibitions).
6	The agreement must: <ul style="list-style-type: none">(a) identify for which of the data sharing purposes set out in subsection 15(1) the data is to be shared; and(b) prohibit the accredited user from using scheme data covered by the agreement for any purpose other than the data sharing purpose for which it was shared.
7	The agreement must specify how the data sharing principles set out in section 16 are to be applied, including by specifying which party is required

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Chapter 2 Authorisations to share data

Section 18

Requirements for data sharing agreement

Item	Requirement
------	-------------

to take which actions.

- | | |
|----|---|
| 8 | If the sharing is being done through an ADSP, the agreement must:
(a) specify any data services the ADSP is to perform in relation to public sector data shared with the ADSP by the data custodian; and
(b) both:
(i) specify the circumstances in which the ADSP is to share data covered by the agreement with the accredited user on behalf of the data custodian; and
(ii) prohibit the ADSP from sharing the data in any other circumstances and from releasing the data. |
| 9 | The agreement must either prohibit the accredited user from sharing output that is scheme data covered by the agreement, or allow the accredited user to share the output only in specified circumstances that meet the requirements set out in subsection 20(1). |
| 10 | The agreement must either prohibit the accredited user from releasing output that is scheme data covered by the agreement, or allow the accredited user to release the output only in specified circumstances that meet the requirement set out in subsection 20(3). |
| 11 | The agreement must set out the actions the parties will take for the purposes of Part 3.3 (data breach responsibilities). |
| 12 | The agreement must specify the circumstances in which it may be varied or terminated and how a variation or termination is to be done. |
| 13 | The agreement must specify either or both of the following:
(a) its duration;
(b) the intervals at which the parties must review it. |
| 14 | The agreement must provide for how scheme data covered by the agreement is to be dealt with when the agreement ends. |
-

1 Note: Copies of data sharing agreements, including variations, must be
2 given to the Commissioner (see subsection 32(1)). The terms required
3 by this table are included in a publicly available register (see section
4 116).

5 (2) The following data is *covered* by a data sharing agreement:

- 1 (a) the public sector data that the data custodian is to share
2 (including any ADSP-enhanced data an ADSP is to share on
3 behalf of the data custodian);
4 (b) the output of the shared data.
- 5 (3) A data sharing agreement may also deal with matters not
6 mentioned in this section.

7 **19 Compliance with mandatory terms of data sharing agreement**

8 A data scheme entity must comply with the mandatory terms of a
9 data sharing agreement to which it is party.

10 Civil penalty: 300 penalty units.

11 **20 Exit from data sharing scheme of shared or released output**

12 *Sharing output for validation etc.*

- 13 (1) For the purposes of item 9 of the table in subsection 18(1), a data
14 sharing agreement may allow the accredited user to share output in
15 circumstances specified in the agreement, if the circumstances
16 meet the following requirements:
- 17 (a) before the output is shared, the data custodian of the data
18 used to create the output is satisfied that the sharing will be
19 done in accordance with subsection 13(3);
- 20 (b) the output is shared:
- 21 (i) with an entity that carries on a business to which the
22 output relates, for the purpose of validating or
23 correcting the output; or
- 24 (ii) with an individual to whom the output relates, or a
25 responsible person (within the meaning of the *Privacy*
26 *Act 1988*) for such an individual, for the purpose of
27 validating or correcting the output; or
- 28 (iii) in circumstances prescribed by the rules.
- 29 (2) Output shared by an accredited user in accordance with subsection
30 13(3) exits the data sharing scheme:

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Section 21

- 1 (a) if shared for the purpose of validating or correcting the
2 output—at the time the output is validated or corrected by the
3 entity with which it is shared; or
4 (b) if shared in circumstances prescribed by the rules—at the
5 time specified by the rules.

6 Note: If a data sharing agreement specifies circumstances that meet the
7 requirements in subsection (1), sharing of output by the accredited
8 user is an authorised use of the output as long as the sharing is done in
9 the specified circumstances and in accordance with subsection 13(3).

10 *Releasing output*

- 11 (3) For the purposes of item 10 of the table in subsection 18(1), a data
12 sharing agreement may allow the accredited user to release output
13 in circumstances specified in the agreement, if releasing the output
14 in those circumstances does not contravene a law of the
15 Commonwealth or a State or Territory.
- 16 (4) Output released by an accredited user in accordance with
17 subsection 13(3) exits the data sharing scheme at the time it is
18 released.

19 Note: If a data sharing agreement specifies circumstances that meet the
20 requirement in subsection (3), release of output by the accredited user
21 is an authorised use of the output as long as the release is done in the
22 specified circumstances and in accordance with subsection 13(3).

23 **21 Other authorisations for data custodians not limited**

24 The authorisation in subsection 13(1) for a data custodian to share
25 particular data does not limit any other law of the Commonwealth
26 or a State or Territory that authorises the data custodian to share
27 the data.

28 **22 Authorisation to share overrides other prohibitions**

- 29 (1) A sharing of data that is authorised by subsection 13(1) does not
30 contravene any law of the Commonwealth or of a State or
31 Territory, whether enacted before or after the commencement of
32 this Act.

Section 23

1 Note: A sharing of data that is excluded under section 17 (including a
2 sharing prohibited by a law or provision of a law prescribed by the
3 regulations) is not authorised by subsection 13(1) (see paragraph
4 13(1)(c) and section 17).

5 (2) A collection or use of data that is authorised by subsection 13(3)
6 does not contravene any law of the Commonwealth or of a State or
7 Territory, whether enacted before or after the commencement of
8 this Act.

9 **23 No duty to share**

10 This Chapter does not require, or authorise any person to require, a
11 data custodian to share public sector data. However, data
12 custodians should consider reasonable requests for sharing.

EXPOSURE DRAFT

Chapter 3 Responsibilities of data scheme entities

Part 3.1 Introduction

Section 24

1 **Chapter 3—Responsibilities of data scheme**
2 **entities**

3 **Part 3.1—Introduction**
4

5 **24 Simplified outline of this Chapter**

6 The responsibilities imposed on data scheme entities are mainly set
7 out in this Chapter, although some important responsibilities are set
8 out elsewhere (see especially sections 14 and 19 in Chapter 2).

9 Civil penalties apply in some cases if responsibilities in this
10 Chapter are not met. In any case, the responsibilities may be
11 enforced by use of the Commissioner’s other regulatory powers
12 under Part 5.5.

1 **Part 3.2—General responsibilities**
2

3 **25 Comply with rules and data codes**

4 A data scheme entity must comply with:

- 5 (a) the rules; and
6 (b) data codes.

7 **26 Have regard to guidelines**

8 Data scheme entities must have regard to the guidelines when
9 engaging in conduct for the purposes of this Act.

10 **27 Privacy coverage**

- 11 (1) A data scheme entity that is not an APP entity must not engage in
12 an act or practice with respect to personal information for the
13 purposes of this Act unless:
14 (a) the *Privacy Act 1988* applies in relation to the act or practice
15 as if the entity were an organisation within the meaning of
16 that Act; or
17 (b) a law of a State or Territory that provides for all of the
18 following applies in relation to the act or practice:
19 (i) protection of personal information comparable to that
20 provided by the Australian Privacy Principles;
21 (ii) monitoring of compliance with the law;
22 (iii) a means for an individual to seek recourse if the
23 individual's personal information is dealt with in a way
24 contrary to the law.
- 25 (2) An act or practice engaged in by an accredited entity that is an
26 organisation referred to in paragraphs 7B(2)(a) and (b) of the
27 *Privacy Act 1988* is not, despite subsection 7B(2) of that Act,
28 **exempt** for the purposes of paragraph 7(1)(ee) of that Act if the act
29 or practice is engaged in with respect to personal information for
30 the purposes of this Act.

EXPOSURE DRAFT

Chapter 3 Responsibilities of data scheme entities

Part 3.2 General responsibilities

Section 28

1 Note: Paragraphs 7B(2)(a) and (b) of the *Privacy Act 1988* refer to an
2 organisation that would be a small business operator if it were not a
3 contracted service provider for a Commonwealth contract (within the
4 meaning of the *Privacy Act 1988*).

5 (3) Except as provided by subsection (2) and Part 3.3, nothing in this
6 Act affects the operation of the *Privacy Act 1988* in relation to a
7 data scheme entity that is an APP entity.

8 Note: Part 3.3 (data breach responsibilities) deals with the relationship
9 between this Act and the requirements of Part IIIC of the *Privacy Act*
10 *1988* (notification of eligible data breaches).

11 **28 Engage ADSP for prescribed data services**

12 The data custodian of public sector data that is to be shared under
13 subsection 13(1) must ensure that, if data services prescribed by
14 the rules for the purposes of this section are performed on or in
15 relation to the data, they are performed on behalf of the data
16 custodian by an ADSP.

17 **29 Comply with conditions of accreditation**

18 An accredited entity must comply with the conditions of the
19 entity's accreditation.

20 Civil penalty: 300 penalty units.

21 **30 Report events and changes in circumstances affecting 22 accreditation to Commissioner**

23 (1) An accredited entity must notify the Commissioner of any event, or
24 change in circumstance, that affects the entity's accreditation.

25 (2) Subsection (1) does not apply in relation to an event or change in
26 circumstances prescribed by the rules for the purposes of this
27 subsection.

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1 **31 Not provide false or misleading information**

- 2 (1) A data scheme entity must not, in giving information or a
3 document in compliance or purported compliance with this Act, the
4 rules or a data code, give the Commissioner:
5 (a) information or a document that is false or misleading; or
6 (b) information that omits any matter or thing without which the
7 information is false or misleading.

8 Note: A data scheme entity that contravenes this subsection might also
9 commit an offence under Division 136 or 137 of the *Criminal Code*.

10 Civil penalty: 300 penalty units.

- 11 (2) A data scheme entity must not, in giving information or a
12 document for the purposes of entering into or giving effect to a
13 data sharing agreement, give another data scheme entity:
14 (a) information or a document that is false or misleading; or
15 (b) information that omits any matter or thing without which the
16 information is false or misleading.

17 Civil penalty: 300 penalty units.

18 **32 Notify Commissioner in relation to data sharing agreements**

- 19 (1) A data custodian that is party to a data sharing agreement must
20 give the Commissioner, in an approved form (if any):
21 (a) an electronic copy of the agreement; and
22 (b) if the agreement is varied—an electronic copy of the
23 variation, or the agreement as varied;
24 no later than 30 days after the day the agreement or variation is
25 made.

26 Note: The Commissioner must maintain a publicly available register
27 containing the names of parties to each data sharing agreement and the
28 mandatory terms included in the agreement (see section 116).

- 29 (2) A data custodian that was party to a terminated data sharing
30 agreement must give the Commissioner written notice of the
31 termination of the agreement, no later than 30 days after the
32 termination takes effect.

EXPOSURE DRAFT

Chapter 3 Responsibilities of data scheme entities

Part 3.2 General responsibilities

Section 33

1 **33 Assist Commissioner as required in preparation of annual report**

2 A data scheme entity must give the Commissioner any information
3 and assistance the Commissioner reasonably requires in relation to
4 the preparation of the annual report mentioned in section 124.

Part 3.3—Data breach responsibilities

34 Definition of *data breach*

If:

- (a) a data scheme entity holds scheme data; and
- (b) any of the following apply:
 - (i) there is unauthorised access to, or unauthorised sharing or unauthorised release of, the data;
 - (ii) the data is lost in circumstances where there is likely to be unauthorised access to, or unauthorised sharing or unauthorised release of, the data;
 - (iii) an event prescribed by a data code occurs in relation to the data;

the access, sharing, release, loss or event is a *data breach* of the data scheme entity.

35 Take steps to mitigate data breach

- (1) If a data scheme entity reasonably suspects or becomes aware that a data breach of the entity has occurred, the entity must take reasonable steps to prevent or reduce any harm resulting from the breach to entities, groups of entities and things to which the data involved in the breach relates.

(2) If:

- (a) a data custodian reasonably suspects, or becomes aware that, a data breach of an accredited entity has occurred; and
- (b) the data breach involves scheme data that the data custodian shared with or through the entity, or that is the output of such data;

the data custodian must take reasonable steps to prevent or reduce any harm resulting from the breach to entities, groups of entities and things to which the data involved in the breach relates.

EXPOSURE DRAFT

Chapter 3 Responsibilities of data scheme entities

Part 3.3 Data breach responsibilities

Section 36

1 **36 Interaction with Part IIIC of the *Privacy Act 1988* (notification of**
2 **eligible data breaches)**

3 *Deemed holding of personal information by data custodian*

4 (1) If:

5 (a) a data custodian of public sector data has shared personal
6 information about one or more individuals with or through an
7 accredited entity under subsection 13(1); and

8 (b) the entity holds the personal information;

9 Part IIIC of the *Privacy Act 1988* (notification of eligible data
10 breaches) has effect as if:

11 (c) the personal information were held by the data custodian; and

12 (d) the data custodian were required under section 15 of that Act
13 not to do an act, or engage in a practice, that breaches
14 Australian Privacy Principle 11.1 in relation to the personal
15 information.

16 Note: This means that the data custodian has responsibilities under Part IIIC
17 of the *Privacy Act 1988* (notification of eligible data breaches) in
18 relation to the personal information held by the accredited entity.

19 (2) However, subsection (1) does not apply if:

20 (a) the accredited entity that holds the personal information is an
21 APP entity that is required under section 15 of the *Privacy*
22 *Act 1988* not to do an act, or engage in a practice, that
23 breaches Australian Privacy Principle 11.1 in relation to the
24 personal information; and

25 (b) the data sharing agreement under which the personal
26 information was shared with the entity provides that
27 subsection (1) is not to apply in relation to the personal
28 information.

29 Note: This means that only the entity with which the personal information
30 was shared, and not the data custodian, has responsibilities under
31 Part IIIC of the *Privacy Act 1988* (notification of eligible data
32 breaches) in relation to the personal information held by the entity.

EXPOSURE DRAFT

1 *Give Commissioner a copy of statement about eligible data breach*

2 (3) If a data scheme entity is required under section 26WK of the
3 *Privacy Act 1988* to give the Information Commissioner a
4 statement that complies with subsection 26WK(3) of that Act, the
5 entity must give a copy of the statement to the National Data
6 Commissioner as soon as practicable.

7 *Meaning of hold*

8 (4) A reference in this section to an entity holding personal
9 information is a reference to the entity holding the information
10 within the meaning of the *Privacy Act 1988*.

11 **37 Notify Commissioner of serious non-personal data breach**

12 *Notice*

13 (1) A data scheme entity must notify the Commissioner, in an
14 approved form (if any) and in accordance with any requirements
15 prescribed by a data code, if:
16 (a) the entity reasonably suspects or becomes aware that a data
17 breach of the entity has occurred; and
18 (b) data involved in the breach is not personal information about
19 one or more individuals; and
20 (c) a reasonable person would conclude that the breach would be
21 likely to result in serious harm to an entity, a group of entities
22 or a thing to which the data relates.

23 Note: Breaches involving personal information are dealt with under
24 Part IIIC of the *Privacy Act 1988* (see section 36).

25 *Serious harm*

26 (2) In determining, for the purposes of paragraph (1)(c), whether a
27 reasonable person would conclude that the breach would, or would
28 not, be likely to result in serious harm to an entity, a group of
29 entities or a thing to which the data involved in the breach relates,
30 have regard to the following:
31 (a) the kind or kinds of data;

EXPOSURE DRAFT

Chapter 3 Responsibilities of data scheme entities

Part 3.3 Data breach responsibilities

Section 37

- 1 (b) the sensitivity of the data;
- 2 (c) whether the data is protected by one or more security
- 3 measures and, if so, the nature of those measures;
- 4 (d) the persons, or the kinds of persons, who have obtained, or
- 5 who could obtain, the data;
- 6 (e) the nature of the harm;
- 7 (f) any other relevant matters.

EXPOSURE DRAFT

1 **Chapter 4—National Data Commissioner and**
2 **National Data Advisory Council**

3 **Part 4.1—Introduction**
4

5 **38 Simplified outline of this Chapter**

6 There is to be a National Data Commissioner.

7 The Commissioner is the regulator for the data sharing scheme,
8 and provides advice and guidance about it. The Commissioner also
9 has the function of advocating for the sharing and release of public
10 sector data more generally.

11 The Commissioner is assisted in the performance of these
12 functions by APS employees in the Department who are made
13 available by the Secretary. The Commissioner may also engage
14 contractors and consultants.

15 The Commissioner is also assisted by the advice of the National
16 Data Advisory Council.

17 **39 Commissioner to have regard to objects of Act**

18 In performing functions, the Commissioner must have regard to the
19 objects of this Act (see section 3).

EXPOSURE DRAFT

Chapter 4 National Data Commissioner and National Data Advisory Council

Part 4.2 National Data Commissioner

Division 1 Establishment, functions and powers

Section 40

1 **Part 4.2—National Data Commissioner**

2 **Division 1—Establishment, functions and powers**

3 **40 National Data Commissioner**

4 There is to be a National Data Commissioner.

5 **41 Functions**

6 (1) The Commissioner has the following functions:

- 7 (a) the advice related functions set out in section 42;
- 8 (b) the guidance related functions set out in section 43;
- 9 (c) the regulatory functions set out in section 44;
- 10 (d) an advocacy function of promoting understanding and
- 11 acceptance of:
- 12 (i) the benefits of, and best practice in, sharing and
- 13 releasing public sector data; and
- 14 (ii) safe data handling practices;
- 15 (e) any other functions conferred on the Commissioner by this
- 16 Act or the rules or by any other law of the Commonwealth;
- 17 (f) to do anything incidental or conducive to the performance of
- 18 any of the above functions.

19 (2) Without limiting how the Commissioner may perform the

20 advocacy function conferred by paragraph (1)(d), the

21 Commissioner may do so by undertaking, developing or supporting

22 educational programs.

23 **42 Advice related functions**

24 For the purposes of paragraph 41(1)(a), the Commissioner's advice

25 related functions are to do the following, on request by the Minister

26 or on the Commissioner's own initiative:

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National Data Commissioner and National Data Advisory Council **Chapter 4**

National Data Commissioner **Part 4.2**

Establishment, functions and powers **Division 1**

Section 43

- 1 (a) advise on matters relating to the operation of this Act,
2 including Commonwealth laws and changes to
3 Commonwealth laws relating to this Act;
4 (b) inform the Minister about actions to be taken by data scheme
5 entities in order to comply with this Act;
6 (c) report and make recommendations to the Minister in relation
7 to this Act, or the need for or desirability of legislative or
8 administration action in relation to this Act.

9 **43 Guidance related functions**

10 For the purposes of paragraph 41(1)(b), the Commissioner's
11 guidance related functions are to make:

- 12 (a) data codes under section 112; and
13 (b) guidelines under section 113.

14 **44 Regulatory functions**

15 For the purposes of paragraph 41(1)(c), the Commissioner's
16 regulatory functions are to regulate and enforce the data sharing
17 scheme by performing the functions and exercising the powers
18 conferred by:

- 19 (a) Chapter 5 (regulation and enforcement), and the Regulatory
20 Powers Act as it applies in relation to this Act; and
21 (b) the accreditation framework.

22 Note: The Commissioner and members of staff mentioned in section 46
23 cannot participate in sharing under this Act (see subsection 17(8)).

24 **45 Application of finance law**

25 For the purposes of the finance law (within the meaning of the
26 *Public Governance, Performance and Accountability Act 2013*),
27 the Commissioner is an official of the Department.

28 **46 Staff**

- 29 (1) The Secretary of the Department must:
-

EXPOSURE DRAFT

Chapter 4 National Data Commissioner and National Data Advisory Council

Part 4.2 National Data Commissioner

Division 1 Establishment, functions and powers

Section 47

- 1 (a) make available to the Commissioner APS employees in the
2 Department who, in the Commissioner's opinion, have the
3 skills, qualifications or experience necessary to assist the
4 Commissioner to perform the Commissioner's functions and
5 exercise the Commissioner's powers; and
6 (b) do so to the extent the Commissioner reasonably requires.
- 7 (2) An APS employee made available to assist the Commissioner is
8 subject to the directions of the Commissioner in relation to that
9 assistance. The APS employee remains subject to the directions of
10 the Secretary in relation to other matters.

11 **47 Contractors**

12 The Commissioner may, on behalf of the Commonwealth, engage
13 persons under a written agreement to assist the Commissioner to
14 perform or exercise the functions or powers of the Commissioner.

15 **48 Consultants**

16 The Commissioner may, on behalf of the Commonwealth, engage
17 consultants to advise in relation to the performance of the
18 Commissioner's functions.

19 **49 Delegation by Commissioner**

- 20 (1) The Commissioner may, in writing, delegate to a member of the
21 staff mentioned in section 46 any or all of the Commissioner's
22 functions or powers under:
23 (a) this Act; or
24 (b) the rules; or
25 (c) the Regulatory Powers Act as it applies in relation to this
26 Act.

27 Note: Sections 34AA to 34A of the *Acts Interpretation Act 1901* contain
28 provisions relating to delegations.

- 29 (2) Despite subsection (1), the Commissioner must not delegate:
30 (a) functions or powers under the following provisions:

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National Data Commissioner and National Data Advisory Council **Chapter 4**

National Data Commissioner **Part 4.2**

Establishment, functions and powers **Division 1**

Section 50

- 1 (i) section 98 (directions);
2 (ii) section 112 (data codes);
3 (iii) section 113 (guidelines); or
4 (b) a regulatory function, or a power in relation to a regulatory
5 function, to the extent that the function would be performed,
6 or the power exercised, in relation to the Department or any
7 other agency administered by the Minister.
- 8 (3) In performing functions or exercising powers under the delegation,
9 the delegate must comply with any written directions of the
10 Commissioner.
- 11 (4) If the Commissioner delegates functions or powers under this
12 section, the Commissioner must make publicly available
13 information about the persons or class of persons to whom the
14 functions or powers are delegated.

50 Independence of Commissioner

16 Subject to this Act and other laws of the Commonwealth, the
17 Commissioner has discretion in the performance or exercise of the
18 Commissioner's functions or powers and is not subject to direction
19 by any person in relation to the performance or exercise of those
20 functions or powers.

51 Commissioner not to be sued

22 The Commissioner, and any person acting under the direction or
23 authority of the Commissioner, is not liable to an action, suit or
24 proceeding in relation to an act done or omitted to be done in good
25 faith in the performance or purported performance, or exercise or
26 purported exercise, of a function or power conferred by this Act,
27 the rules or a data code.

EXPOSURE DRAFT

Chapter 4 National Data Commissioner and National Data Advisory Council

Part 4.2 National Data Commissioner

Division 2 Terms and conditions etc.

Section 52

1 **Division 2—Terms and conditions etc.**

2 **52 Appointment**

3 (1) The Commissioner is to be appointed by the Governor-General by
4 written instrument.

5 Note: The Commissioner may be reappointed: see section 33AA of the *Acts*
6 *Interpretation Act 1901*.

7 (2) A person may be appointed as the Commissioner only if the person
8 has appropriate qualifications, skills or experience to perform the
9 functions of the position.

10 **53 General terms and conditions of appointment**

11 (1) The Commissioner holds office for the period specified in the
12 instrument of appointment. The period must not exceed 5 years.

13 (2) The Commissioner holds office on a full-time basis.

14 (3) The Commissioner holds office on the terms and conditions (if
15 any), in relation to matters not covered by this Act, that are
16 determined by the Governor-General.

17 **54 Other paid work**

18 The Commissioner must not engage in paid work outside the duties
19 of the office without the Minister's approval.

20 **55 Remuneration**

21 (1) The Commissioner is to be paid the remuneration that is
22 determined by the Remuneration Tribunal. If no determination of
23 that remuneration by the Tribunal is in operation, the
24 Commissioner is to be paid the remuneration that is prescribed by
25 the rules.

26 (2) The Commissioner is to be paid the allowances that are prescribed
27 by the rules.

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National Data Commissioner and National Data Advisory Council **Chapter 4**

National Data Commissioner **Part 4.2**

Terms and conditions etc. **Division 2**

Section 56

- 1 (3) This section has effect subject to the *Remuneration Tribunal Act*
2 *1973*.

3 **56 Leave of absence**

- 4 (1) The Commissioner has the recreation leave entitlements that are
5 determined by the Remuneration Tribunal.
- 6 (2) The Minister may grant the Commissioner leave of absence, other
7 than recreation leave, on the terms and conditions as to
8 remuneration or otherwise that the Minister determines.

9 **57 Resignation**

- 10 (1) The Commissioner may resign the Commissioner's appointment
11 by giving the Governor-General a written resignation.
- 12 (2) The resignation takes effect on the day it is received by the
13 Governor-General or, if a later day is specified in the resignation,
14 on that later day.

15 **58 Termination of appointment**

- 16 The Governor-General may terminate the appointment of the
17 Commissioner:
- 18 (a) for misbehaviour; or
19 (b) if the Commissioner is unable to perform the duties of the
20 office because of physical or mental incapacity; or
21 (c) if the Commissioner:
22 (i) becomes bankrupt; or
23 (ii) applies to take the benefit of any law for the relief of
24 bankrupt or insolvent debtors; or
25 (iii) compounds with the Commissioner's creditors; or
26 (iv) makes an assignment of the Commissioner's
27 remuneration for the benefit of the Commissioner's
28 creditors; or
29 (d) is absent, except on leave of absence, for 14 consecutive days
30 or for 28 days in any 12 months; or

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Chapter 4 National Data Commissioner and National Data Advisory Council

Part 4.2 National Data Commissioner

Division 2 Terms and conditions etc.

Section 59

- 1 (e) fails, without reasonable excuse, to comply with section 29
2 of the *Public Governance, Performance and Accountability*
3 *Act 2013* (which deals with the duty to disclose interests) or
4 rules made for the purposes of that section; or
5 (f) engages, except with the Minister's approval, in paid work
6 outside the duties of the office (see section 54).

7 **59 Acting appointments**

- 8 (1) The Minister may, by written instrument, appoint a person to act as
9 the Commissioner:
10 (a) during a vacancy in the office of the Commissioner (whether
11 or not an appointment has previously been made to the
12 office); or
13 (b) during any period, or during all periods, when the
14 Commissioner:
15 (i) is absent from duty or from Australia; or
16 (ii) is, for any reason, unable to perform the duties of the
17 office.
18 Note: For rules that apply to acting appointments, see sections 33AB and
19 33A of the *Acts Interpretation Act 1901*.
- 20 (2) A person must not be appointed to act as the Commissioner unless
21 the person has appropriate qualifications, skills or experience, as
22 mentioned in subsection 52(2), to be appointed as the
23 Commissioner.

EXPOSURE DRAFT

1 **Part 4.3—National Data Advisory Council**
2

3 **60 Establishment and function of Council**

4 The National Data Advisory Council is established by this section,
5 and has the function of advising the Commissioner on the
6 following matters relating to sharing and use of public sector data:

- 7 (a) ethics;
8 (b) balancing data availability with privacy protection;
9 (c) trust and transparency;
10 (d) technical best practice;
11 (e) industry and international developments;
12 (f) any other matters.

13 **61 Membership of Council**

14 *Membership*

- 15 (1) The Council consists of the following members:
16 (a) the Commissioner;
17 (b) the Australian Statistician;
18 (c) the Information Commissioner;
19 (d) the Chief Scientist;
20 (e) at least 5, and no more than 8, other members appointed by
21 the Commissioner (the *appointed members*).

22 *Chair*

- 23 (2) The Commissioner may:
24 (a) designate himself or herself as the Chair of the Council; or
25 (b) by written instrument, designate an appointed member to be
26 the Chair, for the period specified in the instrument. That
27 period must not exceed 3 years.

EXPOSURE DRAFT

Chapter 4 National Data Commissioner and National Data Advisory Council

Part 4.3 National Data Advisory Council

Section 62

- 1 (3) At any time when a Chair is not designated under subsection (2),
2 the Council may designate a Chair itself from among the appointed
3 members.

4 **62 Appointment of members**

- 5 (1) The appointed members are to be appointed by the Commissioner
6 by written instrument, on a part-time basis.
- 7 (2) The Commissioner must ensure that appointed members are
8 persons with qualifications, skills or experience that will help the
9 Council perform its function.

10 **63 Term of appointment**

11 An appointed member holds office for the period specified in the
12 instrument of appointment. The period must not exceed 3 years.

13 **64 Remuneration and allowances**

- 14 (1) An appointed member is to be paid the remuneration that is
15 determined by the Remuneration Tribunal. If no determination of
16 that remuneration by the Tribunal is in operation, the member is to
17 be paid the remuneration that is prescribed by the rules.
- 18 (2) An appointed member is to be paid the allowances as are
19 prescribed by the rules.
- 20 (3) This section has effect subject to the *Remuneration Tribunal Act*
21 *1973*.

22 **65 Leave of absence**

23 The Commissioner may grant leave of absence to an appointed
24 member on the terms and conditions that the Commissioner
25 determines.

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1 **66 Disclosure of interests to Minister or Commissioner**

2 (1) The Commissioner must give written notice to the Minister of all
3 interests, pecuniary or otherwise, that the Commissioner has or
4 acquires and that conflict or could conflict with the proper
5 performance of the Commissioner's role as a member of the
6 Council.

7 (2) A member of the Council other than the Commissioner must give
8 written notice to the Commissioner of all interests, pecuniary or
9 otherwise, that the member has or acquires and that conflict or
10 could conflict with the proper performance of the member's office
11 as a member of the Council.

12 **67 Disclosure of interests to Council**

13 (1) A member of the Council who has an interest, pecuniary or
14 otherwise, in a matter being considered or about to be considered
15 by the Council must disclose the nature of the interest to a meeting
16 of the Council.

17 (2) The disclosure must be made as soon as possible after the relevant
18 facts have come to the member's knowledge.

19 (3) The disclosure must be recorded in the minutes of the meeting.

20 **68 Resignation of members**

21 (1) An appointed member may resign as a member by giving the
22 Commissioner a written resignation.

23 (2) The resignation takes effect on the day it is received by the
24 Commissioner or, if a later day is specified in the resignation, on
25 that later day.

26 **69 Termination of appointment of members**

27 The Commissioner may terminate the appointment of an appointed
28 member:

29 (a) for misbehaviour; or

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Chapter 4 National Data Commissioner and National Data Advisory Council

Part 4.3 National Data Advisory Council

Section 70

- 1 (b) if the member is unable to perform the duties of office
2 because of physical or mental incapacity; or
3 (c) if the member:
4 (i) becomes bankrupt; or
5 (ii) applies to take the benefit of any law for the relief of
6 bankrupt or insolvent debtors; or
7 (iii) compounds with the member's creditors; or
8 (iv) makes an assignment of the member's remuneration for
9 the benefit of the member's creditors; or
10 (d) the member is repeatedly absent, except on leave of absence;
11 or
12 (e) if the member's qualifications, skills or experience are no
13 longer relevant to the Council function or the member has
14 ceased to hold a professional role that was relevant to the
15 member's appointment.

16 **70 Other terms and conditions of members**

17 An appointed member holds office on the terms and conditions (if
18 any), in relation to matters not covered by this Act, that are
19 determined by the Commissioner.

20 **71 Procedures**

- 21 (1) The Council is to hold any meetings necessary for the performance
22 of its functions, and must meet at least twice every calendar year.
23 (2) Meetings of the Council may be convened by the Commissioner or
24 by the Chair.
25 (3) Except as mentioned above, the Council is to determine its own
26 procedures.

Chapter 5—Regulation and enforcement

Part 5.1—Introduction

72 Simplified outline of this Chapter

The Commissioner may accredit entities, impose and vary conditions of accreditation, and suspend or cancel accreditation, in accordance with the accreditation framework prescribed by the rules.

If a data scheme entity breaches this Act, another data scheme entity may complain to the Commissioner. A complaint will ordinarily result in an investigation by the Commissioner, which may in turn lead to enforcement action being taken by the Commissioner against the breaching data scheme entity.

The Commissioner may also conduct assessments from time to time to ensure data scheme entities are operating in accordance with the Act. If the Commissioner reasonably suspects a data scheme entity has breached the Act, the Commissioner may investigate the entity regardless of whether a complaint has been made.

The Commissioner has power to require persons to give information, and has monitoring and investigation powers in relation to certain provisions of this Act. The Commissioner may transfer matters to a more appropriate agency, which could include the police if an offence is involved.

There are a range of enforcement options available to the Commissioner, as follows:

- (a) making recommendations to a data scheme entity;
- (b) giving directions if satisfied a data scheme entity has breached the Act or in emergency situations;

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Chapter 5 Regulation and enforcement

Part 5.1 Introduction

Section 72

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- (c) issuing an infringement notice, or applying to a court for a pecuniary penalty order, if a data scheme entity contravenes a civil penalty provision;
- (d) accepting an enforceable undertaking in relation to any aspect of this Act;
- (e) applying to a court for an injunction if a data scheme entity has contravened, or is contravening or proposing to contravene, a civil penalty provision.

The provisions continue to apply in relation to former data scheme entities as set out in the Chapter.

1 **Part 5.2—Accreditation**
2

3 **73 Accreditation**

- 4 (1) The Commissioner may, in accordance with the accreditation
5 framework:
6 (a) accredit an entity (other than an excluded entity) as an ADSP
7 or an accredited user, or both; or
8 (b) suspend or cancel an entity's accreditation.

- 9 (2) The Commissioner may, in accordance with the accreditation
10 framework, impose conditions on, or vary the conditions of, an
11 entity's accreditation.

12 Note: The accreditation framework may also specify conditions that apply
13 by force of the accreditation framework (see paragraph 74(3)(c)).

- 14 (3) The Commissioner may, for reasons of security (within the
15 meaning of the *Australian Security Intelligence Organisation Act*
16 *1979*), including on the basis of an adverse or qualified security
17 assessment in respect of a person, do any of the following:

- 18 (a) refuse to accredit an entity;
19 (b) impose conditions on, or vary the conditions of, an entity's
20 accreditation;
21 (c) suspend or cancel an entity's accreditation.

- 22 (4) Unless the Commissioner otherwise determines, a decision to
23 cancel an entity's accreditation does not take effect if the entity has
24 not complied with a direction given by the Commissioner under
25 paragraph 98(1)(a) (direction for the purposes of ensuring that the
26 entity does not hold scheme data after the cancellation).

- 27 (5) An accredited entity continues to be an accredited entity, including
28 at any time while the entity's accreditation is suspended, until the
29 entity's accreditation is cancelled.

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Chapter 5 Regulation and enforcement

Part 5.2 Accreditation

Section 74

- 1 (6) Accreditation is granted on the basis that no compensation is
2 payable if conditions of accreditation are imposed or varied or the
3 accreditation is suspended or cancelled.

4 **74 Accreditation framework**

- 5 (1) The rules may prescribe an accreditation framework for the
6 purposes of this Act.
- 7 (2) The accreditation framework must provide for:
- 8 (a) criteria for accreditation that cover the following matters in
9 relation to entities that are or wish to become accredited:
- 10 (i) governance and administrative frameworks;
- 11 (ii) privacy and security of data;
- 12 (iii) security (within the meaning of the *Australian Security*
13 *Intelligence Organisation Act 1979*);
- 14 (iv) technical skills and capabilities; and
- 15 (b) circumstances in which the Commissioner may suspend or
16 cancel an entity's accreditation.
- 17 (3) The accreditation framework may also provide for:
- 18 (a) any or all of the following:
- 19 (i) criteria for accreditation covering any other matters the
20 Minister considers appropriate;
- 21 (ii) the kinds of entities that may be accredited under the
22 scheme (including foreign entities);
- 23 (iii) procedures, requirements and any other matters in
24 relation to becoming accredited, maintaining
25 accreditation and suspension and cancellation of
26 accreditation;
- 27 (iv) conditions of accreditation that apply to accredited
28 entities; and
- 29 (b) any other matters relating to accreditation of entities for the
30 purposes of the data sharing scheme.

31 Note: The accreditation framework may prescribe fees in relation to services
32 provided under the accreditation framework (see section 125).

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Regulation and enforcement **Chapter 5**

Complaints **Part 5.3**

Complaints **Division 1**

Section 75

1 **Part 5.3—Complaints**

2 **Division 1—Complaints**

3 **75 Making complaints**

- 4 (1) A data scheme entity may complain to the Commissioner if the
5 complainant reasonably believes that another entity breached this
6 Act while the other entity was a data scheme entity.
- 7 (2) An entity that ceased to be a data scheme entity no more than 12
8 months earlier may also complain to the Commissioner if the
9 complainant has the reasonable belief mentioned in subsection (1).
- 10 (3) A complaint must:
- 11 (a) specify the respondent (see section 76); and
- 12 (b) be made in an approved form (if any); and
- 13 (c) meet any requirements prescribed by a data code.
- 14 (4) This section has effect subject to section 81 in relation to a
15 representative complaint (see Division 2 of this Part).

16 **76 Respondents**

- 17 (1) If the complaint is about an entity that is a Commonwealth body,
18 the respondent is whichever of the following applies:
- 19 (a) if the Commonwealth body is a body corporate or an
20 individual—the Commonwealth body;
- 21 (b) if the Commonwealth body is unincorporated—the principal
22 executive of the Commonwealth body within the meaning of
23 section 37 of the *Privacy Act 1988*.
- 24 (2) If the complaint is about an entity that is not a Commonwealth
25 body, the respondent is the entity.

26 Note: See sections 110 and 111 for the treatment of certain entities that are
27 not legal persons.

EXPOSURE DRAFT

Chapter 5 Regulation and enforcement

Part 5.3 Complaints

Division 1 Complaints

Section 77

1 **77 Communicating with complainant**

2 (1) The Commissioner must, no later than 30 days after receiving a
3 complaint, give the complainant written notice setting out how the
4 Commissioner is dealing with, or intends to deal with, the
5 complaint.

6 (2) The Commissioner may, by written notice given to the
7 complainant, request the complainant to give the Commissioner,
8 within the period specified in the notice, further information in
9 connection with the complaint.

10 (3) If the Commissioner makes a request under subsection (2):

11 (a) the Commissioner need not take any further action in relation
12 to the complaint until the complainant complies with the
13 request; and

14 (b) if the request is made before the end of the 30 day period
15 mentioned in subsection (1)—the 30 day period mentioned in
16 that subsection is taken to start on the day the complainant
17 complies with the request.

18 (4) The Commissioner does not need to comply with subsection (1) of
19 this section if the Commissioner gives the complainant a notice
20 under subsection 79(2) (grounds for not dealing with complaints)
21 on or before the last day for complying with subsection (1).

22 **78 Dealing with complaints**

23 (1) If the Commissioner receives a complaint under section 75, the
24 Commissioner must:

25 (a) make any preliminary inquiries, of the complainant,
26 respondent or any other person, that the Commissioner
27 considers necessary for the purposes of determining whether
28 and how to deal with the complaint; and

29 (b) consider whether it would be appropriate to deal with the
30 complaint by conciliation and, if so, deal with it or arrange
31 for it to be dealt with in that way.

EXPOSURE DRAFT

Regulation and enforcement **Chapter 5**

Complaints **Part 5.3**

Complaints **Division 1**

Section 79

1 Note: If satisfied that it is not appropriate to deal with the complaint by
2 conciliation, or if the complaint has been conciliated but not resolved,
3 the Commissioner must start an investigation under section 88.

4 (2) Paragraph (1)(b) does not apply if the Commissioner is satisfied
5 that a ground exists for not dealing with the complaint (see section
6 79).

7 **79 Grounds for not dealing with complaints**

- 8 (1) A ground exists for not dealing with a complaint if any of the
9 following applies:
- 10 (a) the Commissioner is satisfied that the respondent has not
11 breached and is not breaching the Act;
 - 12 (b) the complainant fails to satisfy the Commissioner that:
 - 13 (i) the complainant has complained about the breach to the
14 respondent; or
 - 15 (ii) it would not be appropriate for the complainant to do so;
 - 16 (c) the complainant has complained about the breach to the
17 respondent before complaining to the Commissioner and the
18 Commissioner is satisfied that:
 - 19 (i) the respondent has dealt, or is dealing, adequately with
20 the complaint; or
 - 21 (ii) the respondent has not had an adequate opportunity to
22 deal with the complaint;
 - 23 (d) the complaint was made more than 12 months after the
24 complainant first reasonably believed the respondent
25 breached this Act;
 - 26 (e) the complaint is frivolous, vexatious, misconceived, lacking
27 in substance or not made in good faith;
 - 28 (f) an investigation, or further investigation, of the breach is not
29 warranted having regard to all the circumstances;
 - 30 (g) the complainant has not responded, within the period
31 specified by the Commissioner, to a request for information
32 in relation to the complaint;
 - 33 (h) the breach is being dealt with, or would be more effectively
34 or appropriately dealt with, by an external dispute resolution
35 scheme recognised under section 117;
-

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Chapter 5 Regulation and enforcement

Part 5.3 Complaints

Division 1 Complaints

Section 80

- 1 (i) the breach is the subject of an application under another
2 Commonwealth law, or a State or Territory law, and the
3 subject matter of the complaint has been, or is being, dealt
4 with adequately under that law;
- 5 (j) another Commonwealth law, or a State or Territory law,
6 provides a more appropriate remedy for the breach that is the
7 subject of the complaint (including where the Commissioner
8 has formed the opinion mentioned in section 93 (transfer of
9 matters to appropriate authority));
- 10 (k) the complainant has withdrawn the complaint.
- 11 (2) If the Commissioner decides at any time to cease dealing with a
12 complaint because a ground exists for not dealing with the
13 complaint, the Commissioner must give written notice of the
14 Commissioner's decision, and the reasons for it, to:
- 15 (a) the complainant; and
16 (b) if the Commissioner has notified the respondent of the
17 complaint—the respondent.

18 **80 Admissibility of things said or done in conciliation**

- 19 If a complaint is dealt with by conciliation, evidence of anything
20 said or done in the course of the conciliation is not admissible in
21 any legal proceedings relating to the complaint or the matters that
22 are the subject of the complaint, unless:
- 23 (a) the complainant and respondent otherwise agree; or
24 (b) the thing was said or done in the course of committing an
25 offence or contravening a civil penalty provision.

EXPOSURE DRAFT

Regulation and enforcement **Chapter 5**

Complaints **Part 5.3**

Representative complaints **Division 2**

Section 81

1 **Division 2—Representative complaints**

2 **81 Conditions for making a representative complaint**

- 3 (1) A representative complaint may be made under section 75 only if:
- 4 (a) the class members have complaints against the same entity;
- 5 and
- 6 (b) all the complaints are in respect of, or arise out of, the same,
- 7 similar or related circumstances; and
- 8 (c) all the complaints give rise to a substantial common issue of
- 9 law or fact.
- 10 (2) A representative complaint made under section 75 must:
- 11 (a) describe or otherwise identify the class members (it is not
- 12 necessary for this purpose to name them or specify how
- 13 many there are); and
- 14 (b) specify the nature of the complaints made on behalf of the
- 15 class members; and
- 16 (c) specify the nature of the relief sought; and
- 17 (d) specify the questions of law or fact that are common to the
- 18 complaints of the class members.
- 19 (3) A representative complaint may be made without the consent of
- 20 class members.

21 **82 Commissioner may determine that a complaint is not to continue**

22 **as a representative complaint**

- 23 (1) The Commissioner may, on application by the respondent or on the
- 24 Commissioner's own initiative, determine that a complaint should
- 25 no longer continue as a representative complaint.
- 26 (2) The Commissioner may make the determination only if satisfied
- 27 that it is in the interests of justice to do so for any of the following
- 28 reasons:
- 29 (a) the costs that would be incurred if the complaint were to
- 30 continue as a representative complaint are likely to exceed

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Chapter 5 Regulation and enforcement

Part 5.3 Complaints

Division 2 Representative complaints

Section 83

- 1 the costs that would be incurred if each class member made a
2 separate complaint;
- 3 (b) the representative complaint will not provide an efficient and
4 effective means of dealing with the complaints of the class
5 members;
- 6 (c) the complaint was not brought in good faith as a
7 representative complaint;
- 8 (d) it is otherwise inappropriate that the complaints be pursued
9 by means of a representative complaint.
- 10 (3) If the Commissioner makes the determination, the complaint may
11 be continued by the complainant, or by any other class member, as
12 a complaint on the complainant's or class member's own behalf
13 against the respondent.

83 Additional rules applying to the determination of representative complaints

- 14
- 15
- 16 (1) The Commissioner may, on application by a class member, replace
17 the complainant with another class member, if it appears to the
18 Commissioner that the complainant is not able adequately to
19 represent the interests of the class members.
- 20 (2) A class member may, by notice in writing to the Commissioner,
21 withdraw from a representative complaint:
- 22 (a) if the complaint was made without the consent of the
23 member—at any time; or
- 24 (b) otherwise—at any time before the Commissioner begins to
25 hold an inquiry into the complaint.
- 26 Note: If a class member withdraws from a representative complaint that
27 relates to a matter, the former class member may make a complaint
28 under section 75 that relates to the matter.
- 29 (3) The Commissioner may at any stage direct that notice of any
30 matter be given to a class member or class members.

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Regulation and enforcement **Chapter 5**

Complaints **Part 5.3**

Representative complaints **Division 2**

Section 84

1 **84 Amendment of representative complaints**

2 If the Commissioner is satisfied that a complaint could be dealt
3 with as a representative complaint if the class of persons on whose
4 behalf the complaint is made is increased, reduced or otherwise
5 altered, the Commissioner may amend the complaint so that the
6 complaint can be dealt with as a representative complaint.

7 **85 Class member for representative complaint not entitled to lodge**
8 **individual complaint**

9 A person who is a class member for a representative complaint is
10 not entitled to lodge a complaint in respect of the same subject
11 matter.

EXPOSURE DRAFT

Chapter 5 Regulation and enforcement

Part 5.4 Assessments and investigations

Section 86

1 **Part 5.4—Assessments and investigations**

2

3 **86 Assessments**

4 (1) The Commissioner may, from time to time, assess whether conduct
5 that an entity engages or engaged in while it is or was a data
6 scheme entity is consistent with the requirements of this Act.

7 (2) The Commissioner may conduct an assessment in any manner the
8 Commissioner considers appropriate.

9 (3) The Commissioner may, for the purposes of an assessment, obtain
10 information from any person, and make any inquiries, the
11 Commissioner considers appropriate.

12 Note: The Commissioner may require a person to give information or
13 documents for the purposes of the Commissioner's functions under
14 this Part (see section 91), and may exercise powers under the
15 Regulatory Powers Act to monitor compliance with certain provisions
16 of this Act (see section 95).

17 (4) If the Commissioner invites submissions in relation to an
18 assessment, the Commissioner must have regard to any
19 submissions made in response to the invitation.

20 **87 Notices of assessment**

21 (1) The Commissioner must give an entity written notice before
22 starting, and on completion of, an assessment of the operations of
23 the entity.

24 (2) The notice given before starting the assessment must specify the
25 intended scope of the assessment.

26 **88 Investigations**

27 (1) The Commissioner must investigate conduct engaged in by an
28 entity, so far as it relates to a complaint made about the entity
29 under section 75, if:

EXPOSURE DRAFT

- 1 (a) the Commissioner has considered under paragraph 78(1)(b)
2 whether it would be appropriate to deal with the complaint by
3 conciliation; and
4 (b) either of the following applies:
5 (i) the Commissioner is satisfied that it is not appropriate to
6 do so;
7 (ii) the complaint has been dealt with but not resolved by
8 conciliation.
- 9 (2) The Commissioner may investigate conduct engaged in by an
10 entity while it is or was a data scheme entity if the Commissioner
11 reasonably suspects that the entity has breached this Act.
- 12 (3) An investigation may be conducted while the entity is, or after it
13 has ceased to be, a data scheme entity.
- 14 (4) The Commissioner may cease an investigation at any time if the
15 Commissioner is satisfied that a ground exists for not dealing with
16 the complaint (if any) to which the investigation relates (see
17 section 79).
- 18 (5) The Commissioner may conduct an investigation in any manner
19 the Commissioner considers appropriate.
- 20 (6) The Commissioner may, for the purposes of an investigation,
21 obtain information from any person, and make any inquiries, the
22 Commissioner considers appropriate.
- 23 Note: The Commissioner may require a person to give information or
24 documents for the purposes of an investigation (see section 91), and
25 may exercise powers under the Regulatory Powers Act to investigate
26 breaches of certain provisions of this Act (see section 96).
- 27 (7) If the Commissioner invites submissions in relation to an
28 investigation, the Commissioner must have regard to any
29 submissions made in response to the invitation.

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Chapter 5 Regulation and enforcement

Part 5.4 Assessments and investigations

Section 89

1 **89 Determination on completion of investigation**

2 (1) If the Commissioner completes an investigation of the operations
3 of an entity under this Part, the Commissioner must make a written
4 determination setting out:

5 (a) the Commissioner's opinion as to whether the entity has
6 breached this Act, or is breaching or proposing to breach this
7 Act, and the reasons for that opinion; and

8 (b) if the Commissioner is satisfied that the entity has breached
9 this Act, or is breaching or proposing to breach this Act—an
10 indication of any action the Commissioner has decided to
11 take in relation to the entity's accreditation, or under Part 5.5
12 (regulatory powers and enforcement) of this Act or the
13 Regulatory Powers Act as it applies in relation to this Act.

14 Note: The Commissioner must give the determination to the entity and may
15 give it to the complainant (see subsection 90(3)).

16 (2) The Commissioner may make the determination publicly available,
17 in any manner, and for any period (including indefinitely), the
18 Commissioner considers appropriate.

19 (3) The Commissioner may, in writing, vary or revoke the
20 determination.

21 (4) A determination made under subsection (1) is not a legislative
22 instrument.

23 **90 Notices relating to investigation**

24 (1) The Commissioner must give an entity written notice before
25 starting an investigation of the operations of the entity.

26 (2) The notice must specify the intended scope of the investigation.

27 (3) On completion of the investigation, the Commissioner:

28 (a) must give the entity the determination made under section 89
29 in relation to the investigation; and

30 (b) if the investigation relates to a complaint—may also give the
31 complainant that determination.

EXPOSURE DRAFT

Regulation and enforcement **Chapter 5**
Assessments and investigations **Part 5.4**

Section 90

- 1 (4) If the Commissioner varies or revokes the determination, the
2 Commissioner must give the variation or revocation to the entities
3 that were given the determination under subsection (3).

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Chapter 5 Regulation and enforcement

Part 5.5 Regulatory powers and enforcement

Section 91

1 **Part 5.5—Regulatory powers and enforcement**
2

3 **91 Power to require information and documents**

4 (1) If the Commissioner reasonably believes that a person has
5 information or a document relevant to an investigation under
6 section 88, or to any other of the Commissioner's regulatory
7 functions set out in section 44, the Commissioner may, by written
8 notice given to the person, require the person to give the
9 Commissioner the information or document, within the period
10 specified in the notice.

11 Note: There are limits on the information and documents that may be
12 required (see section 92).

13 (2) If:
14 (a) a person is given a notice under subsection (1); and
15 (b) the notice relates to an investigation under section 88;
16 the person must comply with the notice.

17 Civil penalty: 300 penalty units.

18 (3) A person commits an offence if:
19 (a) the person is given a notice under subsection (1); and
20 (b) the notice relates to an investigation under section 88; and
21 (c) the person fails to comply with the notice.

22 Penalty: Imprisonment for 12 months.

23 (4) If the person gives the Commissioner a document in compliance
24 with the notice, the Commissioner:
25 (a) may take possession of, and may make copies of, or take
26 extracts from, the document; and
27 (b) may retain possession of the document for any period
28 necessary for the purposes of the investigation; and
29 (c) must, during that period, permit any person who would be
30 entitled to inspect the document if it were not in the

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1 Commissioner's possession to inspect the document at any
2 reasonable time.

3 (5) The person is not excused from complying with the notice on the
4 ground that giving the information or document would disclose a
5 communication protected against disclosure by legal professional
6 privilege.

7 (6) The fact that a person is not excused from complying with the
8 notice on the ground mentioned in subsection (5) does not
9 otherwise affect a claim of legal professional privilege that anyone
10 may make in relation to that information or document.

11 **92 Limits on power to require information and documents**

12 *Excluded entities*

13 (1) A notice under subsection 91(1) must not require a person to give
14 information or a document that is held by, or that originated with
15 or was received from, an excluded entity.

16 *Public interest certificate*

17 (2) A notice under subsection 91(1) must not require a person to give
18 information relating to a matter, or to give a document, specified in
19 a certificate given to the Commissioner under subsection (3) of this
20 section.

21 (3) The Attorney-General may give the Commissioner a certificate
22 stating that, in the opinion of the Attorney-General, giving
23 information in relation to a specified matter, or giving a specified
24 document, would be contrary to the public interest because it
25 would do any of the following:

26 (a) prejudice the security, defence or international relations of
27 Australia;

28 (b) involve the disclosure of communications between a Minister
29 of the Commonwealth and a Minister of a State or Territory,
30 being a disclosure that would prejudice relations between the
31 Commonwealth government and the government of a State or
32 Territory;

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Chapter 5 Regulation and enforcement

Part 5.5 Regulatory powers and enforcement

Section 93

- 1 (c) involve the disclosure of deliberations or decisions of the
2 Cabinet or of a Committee of the Cabinet;
- 3 (d) involve the disclosure of deliberations or advice of the
4 Executive Council;
- 5 (e) prejudice the conduct of an investigation or inquiry into
6 crime or criminal activity that is currently being pursued, or
7 prejudice the fair trial of any person;
- 8 (f) disclose, or enable a person to ascertain, the existence or
9 identity of a confidential source of information in relation to
10 the enforcement of the criminal law;
- 11 (g) prejudice the effectiveness of the operational methods or
12 investigative practices or techniques of agencies responsible
13 for the enforcement of the criminal law;
- 14 (h) endanger the life or physical safety of any person.

15 *Parliamentary privilege*

- 16 (4) Nothing in section 91 affects the privileges and immunities of a
17 House of the Parliament, a member of a House of the Parliament or
18 a committee within the meaning of the *Parliamentary Privileges*
19 *Act 1987*.

20 **93 Transfer of matters to appropriate authority**

- 21 If, at any time while dealing with a matter under this Act
22 (including a complaint), the Commissioner forms the opinion that
23 the matter:
- 24 (a) is capable of being dealt with by an agency or body to which
25 the Commissioner is authorised to disclose information under
26 section 94; and
- 27 (b) could be more effectively or conveniently dealt with by that
28 agency or body;
- 29 the Commissioner may cease to deal with the matter and request
30 the other agency or body to deal with the matter instead.
- 31 Note: The Commissioner may give the agency or body any relevant
32 information under section 94.

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Regulation and enforcement **Chapter 5**
Regulatory powers and enforcement **Part 5.5**

Section 94

1 **94 Authorisation for Commissioner to disclose and receive**
2 **information**

3 *Disclose*

- 4 (1) The Commissioner may disclose, or authorise a member of the
5 staff mentioned in section 46 to disclose, information (including
6 personal information) to an agency or body specified in
7 subsection (2) if:
- 8 (a) the information was collected by the Commissioner or staff
9 member in the course of performing functions under this Act;
10 and
 - 11 (b) the Commissioner is satisfied that the information will assist
12 the agency or body to perform any of its functions or exercise
13 any of its powers.
- 14 (2) The agencies and bodies are the following:
- 15 (a) the Information Commissioner;
 - 16 (b) a State body, or a Territory body, whose functions include
17 functions that correspond to those of the Information
18 Commissioner;
 - 19 (c) the Commonwealth Ombudsman;
 - 20 (d) a State body, or a Territory body, whose functions include
21 functions that correspond to those of the Commonwealth
22 Ombudsman;
 - 23 (e) the Australian Securities and Investments Commission;
 - 24 (f) the Australian Competition and Consumer Commission;
 - 25 (g) a regulatory authority of a foreign country whose functions
26 include functions that correspond to those of a person
27 mentioned in paragraph (a), (c), (e) or (f);
 - 28 (h) the Australian National Audit Office;
 - 29 (i) the Australian Federal Police;
 - 30 (j) the police force, or police service, of a State or Territory;
 - 31 (k) AUSTRAC (within the meaning of the *Anti-Money*
32 *Laundering and Counter-Terrorism Financing Act 2006*);
 - 33 (l) the Australian Security Intelligence Organisation;
 - 34 (m) the Inspector-General of Intelligence and Security;
-

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Chapter 5 Regulation and enforcement

Part 5.5 Regulatory powers and enforcement

Section 95

1 (n) an agency or body prescribed by the rules for the purposes of
2 this paragraph.

3 *Receive*

4 (3) The Commissioner, or a member of the staff mentioned in section
5 46, is authorised to receive information disclosed by an agency or
6 body specified in subsection (2) for the purposes of assisting the
7 Commissioner or staff member to perform any of their functions or
8 exercise any of their powers.

9 **95 Monitoring powers**

10 *Monitoring powers*

11 (1) The following provisions of this Act are subject to monitoring
12 under Part 2 of the Regulatory Powers Act:
13 (a) a civil penalty provision;
14 (b) subsections 14(2) and (4) (offences for unauthorised sharing,
15 collection and use) and subsection 91(3) (failure to comply
16 with notice given under subsection 91(1));
17 (c) a provision of Chapter 3 (responsibilities of data scheme
18 entities).

19 Note: Part 2 of the Regulatory Powers Act creates a framework for
20 monitoring whether a provision is being complied with. It includes
21 powers of entry and inspection.

22 *Information subject to monitoring*

23 (2) Information given in compliance or purported compliance with a
24 provision of this Act is subject to monitoring under Part 2 of the
25 Regulatory Powers Act.

26 Note: Part 2 of the Regulatory Powers Act creates a framework for
27 monitoring whether the information is correct. It includes powers of
28 entry and inspection.

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Regulation and enforcement **Chapter 5**
Regulatory powers and enforcement **Part 5.5**

Section 96

1 *Related provisions, authorised applicant, authorised person,*
2 *issuing officer, relevant chief executive and relevant court*

- 3 (3) For the purposes of Part 2 of the Regulatory Powers Act, as that
4 Part applies in relation to the provisions mentioned in
5 subsection (1) and the information mentioned in subsection (2):
6 (a) there are no related provisions; and
7 (b) the Commissioner is an authorised applicant; and
8 (c) the Commissioner is an authorised person; and
9 (d) any judicial officer within the meaning of the Regulatory
10 Powers Act is an issuing officer; and
11 (e) the Commissioner is the relevant chief executive; and
12 (f) each of the following is a relevant court:
13 (i) the Federal Court;
14 (ii) the Circuit Court;
15 (iii) a court of a State or Territory that has jurisdiction in
16 relation to matters arising under this Act.

17 *Person assisting*

- 18 (4) An authorised person may be assisted by other persons in
19 exercising powers or performing functions or duties under Part 2 of
20 the Regulatory Powers Act in relation to the provisions mentioned
21 in subsection (1) and the information mentioned in subsection (2).

22 **96 Investigation powers**

23 *Provisions subject to investigation*

- 24 (1) The following provisions of this Act are subject to investigation
25 under Part 3 of the Regulatory Powers Act:
26 (a) a civil penalty provision;
27 (b) an offence against this Act;
28 (c) a provision of Chapter 3 (responsibilities of data scheme
29 entities).

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Chapter 5 Regulation and enforcement

Part 5.5 Regulatory powers and enforcement

Section 97

- 1 Note 1: Part 3 of the Regulatory Powers Act creates a framework for
2 investigating whether a provision has been contravened. It includes
3 powers of entry, search and seizure.
- 4 Note 2: The meaning of *offence against this Act* is extended by the definition
5 in section 9.

6 *Related provisions, authorised applicant, authorised person,*
7 *issuing officer, relevant chief executive and relevant court*

- 8 (2) For the purposes of Part 3 of the Regulatory Powers Act, as that
9 Part applies in relation to evidential material that relates to a
10 provision mentioned in subsection (1):
- 11 (a) there are no related provisions; and
 - 12 (b) the Commissioner is an authorised applicant; and
 - 13 (c) the Commissioner is an authorised person; and
 - 14 (d) any judicial officer within the meaning of the Regulatory
15 Powers Act is an issuing officer; and
 - 16 (e) the Commissioner is the relevant chief executive; and
 - 17 (f) each of the following is a relevant court:
 - 18 (i) the Federal Court;
 - 19 (ii) the Circuit Court;
 - 20 (iii) a court of a State or Territory that has jurisdiction in
21 relation to matters arising under this Act.

22 *Person assisting*

- 23 (3) An authorised person may be assisted by other persons in
24 exercising powers or performing functions or duties under Part 3 of
25 the Regulatory Powers Act in relation to evidential material that
26 relates to a provision mentioned in subsection (1).

27 **97 Recommendations**

28 If the Commissioner completes an assessment or investigation,
29 under Part 5.4, of the operations of a data scheme entity, the
30 Commissioner may give the entity written recommendations about
31 any action the Commissioner considers the entity should take in
32 relation to matters covered by the assessment or investigation.

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98 Directions

- 1
2 (1) The Commissioner may give a data scheme entity a written
3 direction:
4 (a) if the Commissioner intends to cancel the entity's
5 accreditation—for the purposes of ensuring that the entity
6 does not hold scheme data after the cancellation; or
7 (b) in either of the following situations:
8 (i) the Commissioner is satisfied that the entity has not
9 acted consistently with this Act;
10 (ii) the Commissioner is satisfied that giving the entity a
11 direction under this section is necessary to properly
12 address an emergency or a high risk situation.
- 13 (2) The direction may require the entity to do, or cease doing,
14 specified actions for the purposes mentioned in paragraph (1)(a) or
15 for the purpose of addressing the situation mentioned in
16 paragraph (1)(b) or ensuring that it does not occur again.
- 17 (3) The entity must comply with the direction.
- 18 Civil penalty: 300 penalty units.
- 19 (4) A direction under subsection (1) is not a legislative instrument.

99 Civil penalty provisions

Enforceable civil penalty provisions

- 20
21
22 (1) Each civil penalty provision of this Act is enforceable under Part 4
23 of the Regulatory Powers Act.
24 Note: Part 4 of the Regulatory Powers Act allows a civil penalty provision to
25 be enforced by obtaining an order for a person to pay a pecuniary
26 penalty for the contravention of the provision.
- 27 (2) However, an authorised applicant may not apply under section 82
28 of the Regulatory Powers Act for an order that a person pay a
29 pecuniary penalty in relation to a contravention of a civil penalty
30 provision of this Act unless the Commissioner has made a
31 determination under section 89 of this Act setting out the

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Chapter 5 Regulation and enforcement

Part 5.5 Regulatory powers and enforcement

Section 100

1 Commissioner's opinion that the person has contravened the
2 provision.

3 *Authorised applicant and relevant court*

- 4 (3) For the purposes of Part 4 of the Regulatory Powers Act:
- 5 (a) the Commissioner is an authorised applicant in relation to the
6 civil penalty provisions in this Act; and
- 7 (b) each of the following is a relevant court in relation to the
8 civil penalty provisions of this Act:
- 9 (i) the Federal Court;
- 10 (ii) the Circuit Court;
- 11 (iii) a court of a State or Territory that has jurisdiction in
12 relation to the matter.

13 **100 Infringement notices**

14 *Provisions subject to an infringement notice*

- 15 (1) A civil penalty provision of this Act is subject to an infringement
16 notice under Part 5 of the Regulatory Powers Act.

17 Note: Part 5 of the Regulatory Powers Act creates a framework for using
18 infringement notices in relation to provisions.

- 19 (2) However, an infringement officer may not give a person an
20 infringement notice under section 103 of the Regulatory Powers
21 Act in relation to a contravention of a civil penalty provision of this
22 Act unless the Commissioner has made a determination under
23 section 89 of this Act setting out the Commissioner's opinion that
24 the person has contravened the provision.

25 *Infringement officer and relevant chief executive*

- 26 (3) For the purposes of Part 5 of the Regulatory Powers Act:
- 27 (a) the Commissioner is an infringement officer in relation to the
28 provisions mentioned in subsection (1); and
- 29 (b) the Commissioner is the relevant chief executive in relation
30 to the provisions mentioned in subsection (1).

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Regulation and enforcement **Chapter 5**
Regulatory powers and enforcement **Part 5.5**

Section 101

1 *Single infringement notice may deal with more than one*
2 *contravention*

- 3 (4) Despite subsection 103(3) of the Regulatory Powers Act, a single
4 infringement notice may be given to a person in respect of:
5 (a) 2 or more alleged contraventions of a provision mentioned in
6 subsection (1); or
7 (b) alleged contraventions of 2 or more provisions mentioned in
8 subsection (1).

9 However, the notice must not require the person to pay more than
10 one amount in respect of the same conduct.

11 **101 Enforceable undertakings**

12 *Enforceable provisions*

- 13 (1) The provisions of this Act are enforceable under Part 6 of the
14 Regulatory Powers Act.

15 Note: Part 6 of the Regulatory Powers Act creates a framework for
16 accepting and enforcing undertakings relating to compliance with
17 provisions.

18 *Authorised person and relevant court*

- 19 (2) For the purposes of Part 6 of the Regulatory Powers Act:
20 (a) the Commissioner is an authorised person in relation to the
21 provisions of this Act; and
22 (b) each of the following is a relevant court in relation to the
23 provisions of this Act:
24 (i) the Federal Court;
25 (ii) the Circuit Court;
26 (iii) a court of a State or Territory that has jurisdiction in
27 relation to the matter.

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Chapter 5 Regulation and enforcement

Part 5.5 Regulatory powers and enforcement

Section 102

1 *Enforceable undertaking may be published on the Commissioner's*
2 *website*

3 (3) An authorised person in relation to a provision mentioned in
4 subsection (1) may make an undertaking given in relation to the
5 provision publicly available.

6 **102 Injunctions**

7 *Enforceable provisions*

8 (1) The following provisions of this Act are enforceable under Part 7
9 of the Regulatory Powers Act:

- 10 (a) a civil penalty provision;
11 (b) a provision of Chapter 3 (responsibilities of data scheme
12 entities).

13 Note: Part 7 of the Regulatory Powers Act creates a framework for using
14 injunctions to enforce provisions.

15 (2) However, an authorised person may not apply under section 121 of
16 the Regulatory Powers Act for an injunction in relation to conduct
17 in contravention of a civil penalty provision of this Act unless the
18 Commissioner has made a determination under section 89 of this
19 Act setting out the Commissioner's opinion that the person has
20 contravened, is contravening or is proposing to contravene the
21 provision.

22 *Authorised person and relevant court*

- 23 (3) For the purposes of Part 7 of the Regulatory Powers Act:
24 (a) the Commissioner is an authorised person in relation to the
25 provisions mentioned in subsection (1); and
26 (b) each of the following is a relevant court in relation to the
27 provisions mentioned in subsection (1):
28 (i) the Federal Court;
29 (ii) the Circuit Court;
30 (iii) a court of a State or Territory that has jurisdiction in
31 relation to matters arising under this Act.

1 **Chapter 6—Other matters**

2 **Part 6.1—Introduction**
3

4 **103 Simplified outline of this Chapter**

5 Some of the administrative aspects of the data sharing scheme are
6 set out in this Chapter.

7 Administrative decisions made by the Commissioner are
8 reviewable by the Administrative Appeals Tribunal.

9 The following kinds of legislative instruments may be made for the
10 purposes of the data sharing scheme:

- 11 (a) data codes made by the Commissioner;
- 12 (b) rules made by the Minister;
- 13 (c) regulations made by the Governor-General.

14 The Commissioner may also make the following non-legislative
15 instruments:

- 16 (a) guidelines;
- 17 (b) registers making certain information about accredited
18 entities and the mandatory terms in data sharing
19 agreements publicly available;
- 20 (c) instruments recognising external dispute resolution
21 providers and approving forms.

22 Some other matters of detail are also set out in this Chapter.

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Chapter 6 Other matters

Part 6.2 Review of decisions

Section 104

1 **Part 6.2—Review of decisions**
2

3 **104 Reviewable decisions**

4 (1) A decision made by the Commissioner in the exercise of any of the
5 Commissioner's regulatory functions set out in section 44 is a
6 *reviewable decision*.

7 (2) Despite subsection (1), the following are not *reviewable decisions*:
8 (a) a decision made under subsection 73(3) for reasons of
9 security that relate to a foreign entity;
10 (b) a decision under section 93 (transfer of matters to appropriate
11 authority);
12 (c) a decision under section 94 (authorisation for Commissioner
13 to disclose and receive information).

14 **105 Applications for reconsideration of decisions made by delegates
15 of the Commissioner**

16 (1) If a person is affected by a reviewable decision made by a delegate
17 of the Commissioner, the person may apply to the Commissioner
18 for reconsideration of the decision.

19 (2) The application must:
20 (a) be in an approved form (if any); and
21 (b) set out the reasons for the application.

22 (3) If the rules prescribe a fee for making an application under this
23 section, the application is taken not to have been made unless the
24 fee is paid.

25 **106 Reconsideration by the Commissioner**

26 (1) If an application is made under subsection 105(1) for
27 reconsideration of a reviewable decision, the Commissioner must:
28 (a) reconsider the decision; and

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Section 107

- 1 (b) affirm, vary or revoke the decision.
- 2 (2) The Commissioner's decision on reconsideration of a decision has
3 effect as if it had been made under the provision under which the
4 original decision was made.
- 5 (3) The Commissioner must give the applicant a written notice stating
6 the Commissioner's decision on the reconsideration.
- 7 (4) Within 28 days after making the decision on the reconsideration,
8 the Commissioner must give the applicant a written statement of
9 the Commissioner's reasons for the decision.
- 10 (5) If the Commissioner's functions under this section are performed
11 by a delegate of the Commissioner, the delegate who reconsiders
12 the reviewable decision:
- 13 (a) must not have been involved in making the reviewable
14 decision; and
- 15 (b) must hold a position, or perform duties, of at least the same
16 level as the delegate who made the reviewable decision.
- 17 Note: The Commissioner may delegate functions and powers to certain APS
18 employees in the Department (see sections 46 and 49).

19 **107 Deadline for reconsideration**

- 20 (1) The Commissioner must make a decision on reconsideration of a
21 decision within 90 days after receiving an application for
22 reconsideration.
- 23 (2) The Commissioner is taken, for the purposes of this Part, to have
24 made a decision affirming the original decision if the
25 Commissioner has not informed the applicant of the
26 Commissioner's decision on the reconsideration before the end of
27 the period of 90 days.

28 **108 Review by the Administrative Appeals Tribunal**

- 29 Applications may be made to the Administrative Appeals Tribunal
30 to review a reviewable decision if either of the following apply:
31 (a) the decision was made personally by the Commissioner;
-

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Chapter 6 Other matters

Part 6.2 Review of decisions

Section 108

1
2

(b) the decision has been affirmed or varied under paragraph
106(1)(b).

1 **Part 6.3—Treatment of certain entities**
2

3 **109 Treatment of Commonwealth bodies, State bodies and Territory**
4 **bodies**

5 (1) This Act applies to an entity that is a Commonwealth body, a State
6 body or a Territory body, as if it were a person (if it otherwise is
7 not), but with the changes set out in this section.

8 (2) If this Act authorises or requires the entity to engage in conduct,
9 the conduct may be engaged in on behalf of the entity by a person
10 who is an employee, agent, officer or member of the entity, if
11 engaging in the conduct is within the scope of the person's
12 employment or authority.

13 Note: *Officer* is defined in section 9.

14 (3) In determining whether the entity has breached this Act:
15 (a) conduct engaged in on behalf of the entity by a person who is
16 an employee, agent, officer or member of the entity acting
17 within the scope (actual or apparent) of the person's
18 employment or authority is taken to have been engaged in by
19 the entity; and
20 (b) if it is necessary to establish intention, knowledge or
21 recklessness, or any other state of mind, of the entity, it is
22 sufficient to establish the intention, knowledge or
23 recklessness, or other state of mind, of the person mentioned
24 in paragraph (a).

25 Note: The Crown is not liable to be prosecuted for an offence (see
26 subsection 5(2)), but some of the entities to which this section applies
27 are not part of the Crown.

28 (4) Despite paragraph (3)(a), the entity does not contravene a civil
29 penalty provision of this Act, or commit an offence against this
30 Act, because of conduct of a person that the entity is taken to have
31 engaged in, if the entity establishes that it took reasonable
32 precautions and exercised due diligence to avoid the conduct.

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Chapter 6 Other matters

Part 6.3 Treatment of certain entities

Section 110

1 (5) Part 2.5 of the *Criminal Code*, and section 97 of the Regulatory
2 Powers Act, do not apply in relation to a body corporate to which
3 this section applies.

4 Note: Part 2.5 of the *Criminal Code* and section 97 of the Regulatory
5 Powers Act deal with responsibility of bodies corporate for offences
6 and civil penalties.

7 **110 Treatment of partnerships and unincorporated associations**

8 (1) This Act applies to an entity that is a partnership or an
9 unincorporated association as if it were a person, but with the
10 changes set out in this section.

11 (2) An obligation that would otherwise be imposed on the entity by
12 this Act is imposed on each responsible individual for the entity
13 instead, but may be discharged by any of the responsible
14 individuals.

15 (3) An offence against this Act that would otherwise be committed by
16 the entity is taken to have been committed by each responsible
17 individual for the entity who, at the time the offence was
18 committed:

19 (a) did the relevant act or made the relevant omission; or

20 (b) aided, abetted, counselled or procured the relevant act or
21 omission; or

22 (c) was in any way knowingly concerned in, or party to, the
23 relevant act or omission (whether directly or indirectly and
24 whether by any act or omission of the responsible
25 individual).

26 (4) This section applies to a contravention of a civil penalty provision
27 in a corresponding way to the way in which it applies to an
28 offence.

29 (5) A change in the composition of the entity does not affect the
30 continuity of the entity for the purposes of this Act.

31 (6) An individual is a *responsible individual* for an entity if:

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Section 111

- 1 (a) for a partnership—the individual is a partner in the
2 partnership; or
3 (b) for an unincorporated association—the individual is a
4 member of the association’s committee of management.
- 5 (7) This section does not apply to an entity to which section 109
6 applies.

111 Treatment of trusts

- 7 (1) This Act applies to a trust as if it were a person, but with the
8 changes set out in this section.
9
- 10 (2) If the trust has a single trustee:
11 (a) an obligation that would otherwise be imposed on the trust by
12 this Act is imposed on the trustee instead; and
13 (b) an offence against this Act that would otherwise be
14 committed by the trust is taken to have been committed by
15 the trustee.
- 16 (3) If the trust has 2 or more trustees:
17 (a) an obligation that would otherwise be imposed on the trust by
18 this Act is imposed on each trustee instead, but may be
19 discharged by any of the trustees; and
20 (b) an offence against this Act that would otherwise be
21 committed by the trust is taken to have been committed by
22 each trustee, at the time the offence was committed, who:
23 (i) did the relevant act or made the relevant omission; or
24 (ii) aided, abetted, counselled or procured the relevant act or
25 omission; or
26 (iii) was in any way knowingly concerned in, or party to, the
27 relevant act or omission (whether directly or indirectly
28 and whether by any act or omission of the member).
- 29 (4) This section applies to a contravention of a civil penalty provision
30 in a corresponding way to the way in which it applies to an
31 offence.

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Chapter 6 Other matters

Part 6.3 Treatment of certain entities

Section 111

- 1 (5) This section does not apply to an entity to which section 109
2 applies.

Part 6.4—Data sharing scheme instruments

112 Data codes

- (1) The Commissioner may, by legislative instrument, make codes of practice about the data sharing scheme (*data codes*).
- (2) Without limiting what a data code may do, it may do any of the following:
 - (a) set out actions that may be taken by data scheme entities in order to comply with Chapters 2 and 3;
 - (b) deal with the management of complaints and impose additional requirements in relation to making and dealing with complaints;
 - (c) deal with any other matters the Commissioner considers relevant to the data sharing scheme.
- (3) A data code that is inconsistent with the regulations or rules has no effect to the extent of the inconsistency, but a data code is taken to be consistent with the regulations and rules to the extent that the data code is capable of operating concurrently with them.

113 Guidelines

- (1) The Commissioner may make written guidelines in relation to matters for which the Commissioner has functions under this Act.

Note: Data scheme entities must have regard to the guidelines when engaging in conduct for the purposes of this Act (see section 26).
- (2) The guidelines may include principles and processes relating to:
 - (a) any aspect of the data sharing scheme; and
 - (b) any matters incidental to the data sharing scheme, including:
 - (i) data release; and
 - (ii) data management and curation; and
 - (iii) technical matters and standards; and
 - (iv) emerging technologies.

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Part 6.4 Data sharing scheme instruments

Section 114

1 (3) The Commissioner may publish the guidelines in any manner the
2 Commissioner considers appropriate.

3 (4) Guidelines made under subsection (1) are not a legislative
4 instrument.

5 **114 Register of ADSPs**

6 (1) The Commissioner must maintain a register of ADSPs.

7 (2) The register must contain the following details for each ADSP:

8 (a) the name of the ADSP;

9 (b) contact details for the ADSP;

10 (c) the data services the ADSP is accredited to perform.

11 (3) The register may contain any other information in relation to
12 ADSPs that the Commissioner considers appropriate.

13 (4) The register may be maintained in any form the Commissioner
14 considers appropriate.

15 (5) The Commissioner must make the register publicly available, but
16 may omit any details the Commissioner is satisfied are not
17 appropriate to make publicly available.

18 (6) The register is not a legislative instrument.

19 **115 Register of accredited users**

20 (1) The Commissioner must maintain a register of accredited users.

21 (2) The register must contain the following details for each accredited
22 user:

23 (a) the name of the accredited user;

24 (b) contact details for the accredited user.

25 (3) The register may contain any other information in relation to
26 accredited users that the Commissioner considers appropriate.

- 1 (4) The register may be maintained in any form the Commissioner
2 considers appropriate.
- 3 (5) The Commissioner must make the register publicly available, but
4 may omit any details the Commissioner is satisfied are not
5 appropriate to make publicly available.
- 6 (6) The register is not a legislative instrument.

7 **116 Register of data sharing agreements**

- 8 (1) The Commissioner must maintain a register of data sharing
9 agreements.
- 10 (2) The register must contain the following details for each data
11 sharing agreement:
12 (a) the mandatory terms;
13 (b) if a mandatory term is varied—the term as varied.
- 14 (3) The register may contain any other information in relation to data
15 sharing agreements that the Commissioner considers appropriate.
- 16 (4) The register may be maintained in any form the Commissioner
17 considers appropriate.
- 18 (5) The Commissioner must make the register publicly available, but
19 may omit any details the Commissioner is satisfied are not
20 appropriate to make publicly available.
- 21 (6) The register is not a legislative instrument.

22 **117 Recognition of external dispute resolution schemes**

- 23 (1) The Commissioner may, by written notice, recognise an external
24 dispute resolution scheme for:
25 (a) a data scheme entity or a class of data scheme entities; or
26 (b) a specified purpose.
- 27 (2) In considering whether to recognise an external dispute resolution
28 scheme, the Commissioner:

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Part 6.4 Data sharing scheme instruments

Section 118

- 1 (a) must take the following aspects of the scheme into account:
- 2 (i) accessibility;
- 3 (ii) independence;
- 4 (iii) fairness;
- 5 (iv) accountability;
- 6 (v) efficiency;
- 7 (vi) effectiveness; and
- 8 (b) may take into account any other matter the Commissioner
- 9 considers relevant.
- 10 (3) The Commissioner may:
- 11 (a) specify a period for which the recognition of an external
- 12 dispute resolution scheme is in force; and
- 13 (b) make the recognition of an external dispute resolution
- 14 scheme subject to specified conditions, including conditions
- 15 relating to the conduct of an independent review of the
- 16 operation of the scheme; and
- 17 (c) vary or revoke:
- 18 (i) the recognition of an external dispute resolution
- 19 scheme; or
- 20 (ii) the period for which the recognition is in force; or
- 21 (iii) a condition to which the recognition is subject.
- 22 (4) A notice under subsection (1) is not a legislative instrument.

118 Approved forms

24 The Commissioner may, by writing, approve a form for the

25 purposes of a provision of this Act, the rules or a data code.

119 Rules

- 27 (1) The Minister may, by legislative instrument, make rules
- 28 prescribing matters:
- 29 (a) required or permitted by this Act to be prescribed by the
- 30 rules; or

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Section 120

1 (b) necessary or convenient to be prescribed for carrying out or
2 giving effect to this Act.

3 Note: The accreditation framework is included in the rules (see section 74).

4 (2) To avoid doubt, the rules may not do the following:

5 (a) create an offence or civil penalty;

6 (b) provide powers of:

7 (i) arrest or detention; or

8 (ii) entry, search or seizure;

9 (c) impose a tax;

10 (d) set an amount to be appropriated from the Consolidated
11 Revenue Fund under an appropriation in this Act;

12 (e) directly amend the text of this Act.

13 (3) Rules that are inconsistent with the regulations have no effect to
14 the extent of the inconsistency, but rules are taken to be consistent
15 with the regulations to the extent that the rules are capable of
16 operating concurrently with the regulations.

17 **120 Regulations**

18 The Governor-General may make regulations prescribing matters:

19 (a) required or permitted by this Act to be prescribed by the
20 regulations; or

21 (b) necessary or convenient to be prescribed for carrying out or
22 giving effect to this Act.

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Part 6.5 Other matters

Section 121

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121 Disclosure of scheme data in relation to information-gathering powers

(1) A data scheme entity is authorised to disclose scheme data held by the entity if the disclosure is:

- (a) to a person who has the power to require the disclosure of information under a law covered by subsection (2) for the purposes of exercising the person's functions in relation to this Act or the data sharing scheme; or
- (b) to a person who requires the disclosure of the scheme data under a law of the Commonwealth or a State or Territory for the purposes of giving effect to this Act or the data sharing scheme; or
- (c) to a court or tribunal that orders or directs the disclosure of the scheme data in the course of proceedings relating to this Act or the data sharing scheme.

Note: Data scheme entities must not share scheme data otherwise than as authorised under section 13 or subsection (1) of this section (see section 14).

(2) The following laws are covered by this subsection:

- (a) the *Auditor-General Act 1997*;
- (b) the *Ombudsman Act 1976*;
- (c) a law of the Commonwealth to the extent that the law requires or authorises the use or disclosure of information for the purposes of performing the Information Commissioner's functions in relation to the data sharing scheme.

1 **122 Geographical jurisdiction of civil penalty provisions and**
2 **offences**

3 *Geographical jurisdiction of offences and civil penalty provisions*

4 (1) A person does not contravene a civil penalty provision of this Act,
5 or commit an offence against this Act, unless at least one of the
6 following paragraphs applies in relation to the conduct constituting
7 the alleged contravention or offence:

8 (a) the conduct, or a result of the conduct, occurs wholly or
9 partly in Australia, or on board an Australian aircraft or
10 Australian ship;

11 (b) for conduct alleged to constitute an ancillary contravention—
12 the conduct, or a result of the conduct, that would constitute
13 the primary contravention to which the ancillary
14 contravention relates would have occurred wholly or partly in
15 a place covered by paragraph (a);

16 (c) for conduct alleged to constitute an ancillary offence—the
17 conduct, or a result of the conduct, that would constitute the
18 primary offence to which the ancillary offence relates was
19 intended by the person to occur wholly or partly in a place
20 covered by paragraph (a);

21 (d) the conduct occurs wholly outside Australia and the person
22 engaging in the conduct is an Australian entity.

23 *Defence for primary contravention or primary offence*

24 (2) Despite subsection (1), a person does not contravene a civil penalty
25 provision of this Act, or commit an offence against this Act, if:

26 (a) the alleged contravention or offence is a primary
27 contravention or primary offence; and

28 (b) the conduct constituting the alleged contravention or offence
29 occurs wholly in a foreign country, but not on board an
30 Australian aircraft or Australian ship; and

31 (c) the person is not an Australian entity; and

32 (d) there is not in force, in the foreign country or the part of the
33 foreign country where the conduct constituting the alleged
34 contravention or offence occurred, a law creating a pecuniary

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Section 122

1 or criminal penalty for conduct corresponding to the conduct
2 constituting the alleged contravention or offence.

3 *Defence for ancillary contravention or ancillary offence*

4 (3) Despite subsection (1), a person does not contravene a civil penalty
5 provision of this Act, or commit an offence against this Act, if:

6 (a) the alleged contravention or offence is an ancillary
7 contravention or ancillary offence; and

8 (b) for conduct constituting an alleged contravention—the
9 conduct constituting the primary contravention to which the
10 alleged contravention relates, or a result of that conduct,
11 occurs, or would have occurred, wholly in a foreign country,
12 but not on board an Australian aircraft or Australian ship; and

13 (c) for conduct constituting an alleged offence—the conduct
14 constituting the primary offence to which the alleged offence
15 relates, or a result of that conduct, occurs, or was intended by
16 the person to occur, wholly in a foreign country, but not on
17 board an Australian aircraft or Australian ship; and

18 (d) the person is not an Australian entity; and

19 (e) there is not in force, in the foreign country or the part of the
20 foreign country where the conduct constituting the alleged
21 contravention or offence occurred, a law creating a pecuniary
22 or criminal penalty for conduct corresponding to the conduct
23 constituting the primary contravention or primary offence to
24 which the alleged contravention or offence relates.

25 (4) A person who is alleged to have contravened a civil penalty
26 provision of this Act and who wishes to rely on subsection (2) or
27 (3) bears an evidential burden (within the meaning of the *Criminal*
28 *Code*) in relation to the matters set out in the subsection.

29 (5) For the purposes of the application of subsection 13.3(3) of the
30 *Criminal Code* to an offence against this Act, subsections (2) and
31 (3) of this section are taken to be exceptions provided by the law
32 creating the offence.

33 Note: This means that a defendant bears an evidential burden in relation to
34 the matters in subsections (2) and (3).

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- (6) Division 14 of the *Criminal Code* (standard geographical jurisdiction) does not apply in relation to an offence against this Act (this section applies instead).
- (7) A reference in this section to a result of conduct is a reference to a result that is an element of the civil penalty provision or offence.
- (8) For the purposes of this section and without limitation, if a person sends, or causes to be sent, an electronic communication or other thing:
- (a) from a point outside Australia to a point in Australia; or
 - (b) from a point in Australia to a point outside Australia;
- that conduct is taken to have occurred partly in Australia.
- (9) A **point** includes a mobile or potentially mobile point, whether on land, underground, in the atmosphere, underwater, at sea or anywhere else.

123 Authorised officers

- (1) An individual specified in the following table for a kind of data scheme entity is an **authorised officer** for a data scheme entity of that kind.

Note: See paragraph 18(1)(b) (entry into data sharing agreement).

Authorised officers

Item	Kind of data scheme entity	Individuals who are authorised officers
1	Any of the following: <ul style="list-style-type: none">(a) a Department;(b) an Executive Agency within the meaning of the <i>Public Service Act 1999</i>;(c) a Statutory Agency within the meaning of the <i>Public Service Act 1999</i>	The following: <ul style="list-style-type: none">(a) the Agency Head within the meaning of the <i>Public Service Act 1999</i>;(b) an employee in the entity who is authorised in writing by the Agency Head to enter data sharing agreements on behalf of the entity

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Authorised officers		
Item	Kind of data scheme entity	Individuals who are authorised officers
		for the purposes of this Act
2	Any of the following: (a) a corporate Commonwealth entity within the meaning of the <i>Public Governance, Performance and Accountability Act 2013</i> ; (b) a Commonwealth company within the meaning of the <i>Public Governance, Performance and Accountability Act 2013</i>	The following: (a) the chief executive officer (however described) of the entity; (b) an individual determined in accordance with the rules
3	A person who is a prescribed authority within the meaning of paragraph (c) or (d) of the definition of <i>prescribed authority</i> in subsection 4(1) of the <i>Freedom of Information Act 1982</i> and not covered by item 1 or 2	The following: (a) the person; (b) a person authorised in writing by the person to enter data sharing agreements on behalf of the person for the purposes of this Act
4	A body corporate not covered by item 1 or 2	The following: (a) the chief executive officer (however described) of the body corporate; (b) a director of the body corporate; (c) an employee of the body corporate who is authorised in writing by the person mentioned in paragraph (a) to enter data sharing agreements on behalf of the body corporate for the purposes of this Act
5	A partnership or unincorporated association not covered by item 1 or 2	A responsible individual for the entity (see subsection 110(6))
6	A trust not covered by item 1 or 2	The following: (a) a trustee of the trust; (b) a person authorised in writing by

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Authorised officers

Item	Kind of data scheme entity	Individuals who are authorised officers
		the trustees of the trust to enter data sharing agreements on behalf of the trust for the purposes of this Act
7	An entity not covered by any other item	An individual determined in accordance with the rules

1

- 2 (2) However, if the rules prescribe different authorised officers for a
3 kind of data scheme entity covered by the table, the individuals
4 prescribed by the rules are authorised officers of that kind of data
5 scheme entity instead of the individuals set out in the table.

124 Annual report

- 6
- 7 (1) After the end of each financial year, the Commissioner must
8 prepare and give a report to the Minister, for presentation to the
9 Parliament, on the Commissioner's activities during the financial
10 year.
- 11 (2) The report must include the following in relation to the financial
12 year:
- 13 (a) information about legislative instruments and guidelines
14 made by the Commissioner under this Act;
- 15 (b) information about activities undertaken for the purposes of
16 the regulatory functions set out in section 44;
- 17 (c) a description of any efforts made by the Commissioner to
18 assist data scheme entities to comply with the requirements
19 of the data sharing scheme;
- 20 (d) a statement of the following:
- 21 (i) the number of requests received by data custodians of
22 public sector data for sharing of data under this Act and
23 information about the reasons for requests being agreed
24 to or refused;
- 25 (ii) the number of data sharing agreements made;

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- 1 (iii) the number of entities accredited;
2 (iv) the number of accredited entities as at the end of the
3 financial year;
4 (e) information about the activities of the National Data
5 Advisory Council;
6 (f) information about the number of APS employees made
7 available to the Commissioner as mentioned in section 46;
8 (g) a report on financial matters, including a discussion and
9 analysis of the financial resources available to the
10 Commissioner in the financial year and how they were used.

11 Note: The Commissioner may require data scheme entities to give
12 information and assistance for the purposes of preparing the report
13 (see section 33).

- 14 (3) The report may include any other information relating to the
15 operation of the data sharing scheme that the Commissioner
16 considers appropriate.
17 (4) The report must be given to the Minister by the 15th day of the
18 fourth month after the end of the financial year, or by the end of
19 any further period granted under subsection 34C(5) of the *Acts*
20 *Interpretation Act 1901*.

21 **125 Charging of fees by Commissioner**

- 22 (1) The rules may prescribe fees to be charged by the Commissioner
23 for services provided by or on behalf of the Commissioner in
24 performing or exercising functions or powers under this Act, the
25 rules or the data codes.
26 (2) Without limiting subsection (1), the rules may provide for the
27 amount of a fee to be the cost incurred by the Commonwealth in
28 arranging and paying for another person to perform functions or
29 exercise powers.
30 (3) A fee prescribed by the rules is payable to the Commonwealth.
31 (4) The rules may make provision for:
32 (a) when and how fees are payable;

- 1 (b) any other matters in relation to fees including exemptions,
2 refunds and remissions.
- 3 (5) If a fee is payable for a service, the service need not be provided
4 while the fee remains unpaid. The rules may provide for the
5 extension of any times for providing services accordingly.

6 **126 Commonwealth not liable to pay a fee**

- 7 (1) The Commonwealth is not liable to pay a fee that is payable under
8 this Act. However, it is the Parliament's intention that the
9 Commonwealth should be notionally liable to pay such a fee.
- 10 (2) The Finance Minister may give such written directions as are
11 necessary or convenient for carrying out or giving effect to
12 subsection (1) and, in particular, may give directions in relation to
13 the transfer of money within an account, or between accounts,
14 operated by the Commonwealth.
- 15 (3) Directions under subsection (2) have effect, and must be complied
16 with, despite any other Commonwealth law.
- 17 (4) In subsections (1) and (2), *Commonwealth* includes a
18 Commonwealth entity (within the meaning of the *Public*
19 *Governance, Performance and Accountability Act 2013*) that
20 cannot be made liable to taxation by a Commonwealth law.

21 **127 Periodic reviews of operation of Act**

- 22 (1) The Minister must cause periodic reviews of the operation of this
23 Act to be undertaken.
- 24 (2) The first review must:
25 (a) start no later than 3 years after the commencement of this
26 section; and
27 (b) be completed within 12 months or a longer period agreed by
28 the Minister.
- 29 (3) Subsequent reviews must:

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- 1 (a) start no later than every 10 years after the commencement of
2 this section; and
3 (b) be completed within 12 months or a longer period agreed by
4 the Minister.
- 5 (4) The Minister must cause a written report about each review to be
6 prepared. A review is taken to be completed when the Minister is
7 given the report about the review.
- 8 (5) The Minister must cause a copy of the report about each review to
9 be laid before each House of the Parliament within 15 sitting days
10 of that House after the Minister receives the report.