**Implementation of the National Data Commissioner's advice function to support more efficient data sharing under the Scheme**

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#### Introduction

The Office of the National Data Commissioner (ONDC) is undertaking public consultation on the implementation of the Commissioner’s advice function under paragraph 43(aa) of the *Data Availability and Transparency Act 2022* (the Act). The purpose of this consultation is to gather feedback to refine the approach and ensure effective implementation.

#### Background

Under paragraph 43(aa) of the Act, the Commissioner is authorised to advise DATA Scheme entities on how the Scheme applies to the entity, or would apply to the entity, in particular circumstances. Implementation of this advice function aims to provide a mechanism for DATA Scheme entities to request advice on the operation of the DATA Scheme with regulatory standing. It seeks to provide an efficient process by providing a reliable and authoritative source of guidance for scheme entities to determine how the DATA Scheme can be used in their specific circumstances and in negotiating, drafting, and finalising data sharing agreements. The advice function complements existing public guidance which are general in nature by offering more specific advice that provides greater clarity on particular and novel issues.

#### Approach to the Advice Function

The following sets out an approach based on: (i) how the advice function is triggered, (ii) the nature of the advice provided under this function, and (iii) who can request advice and to whom the advice is made available.

**Trigger for Advice**

* The advice function will be triggered by a request from a data scheme entity or jointly from multiple entities.
* Requests can be submitted via an interface on the ONDC website and/or Dataplace, which will be accompanied by guidance on how to use the function.
* Detailed guidance on how to submit a request will be available on the ONDC website.

**Nature of Advice**

* The Commissioner will provide self-bound advice, meaning the Commissioner will provide a commitment in writing that no regulatory action will result against an entity acting in accordance with the advice, provided the circumstances that it is based on remain as specified.
  + This approach gives the advice clear regulatory standing within the bounds of existing legislation and enables data scheme entities to act with certainty about ONDC’s regulatory position.
* The advice provided will be an expression of the Commissioner’s understanding of the law, including the DAT Act and its subordinate legislation.
  + If the Commissioner subsequently becomes aware the law has been interpreted incorrectly in the advice, they may revise or withdraw the advice, in whole or in part.
  + Were this to occur, the Commissioner will not apply for the imposition of penalties specified under the Act to the extent non-compliance resulted from applying the Commissioner’s advice in good faith.

**Accessing Advice**

DATA Scheme entities consisting of data custodians, accredited data service providers (ADSPs) and accredited users will be able to request advice under the advice function. The key aspects of the advice function include:

* Advice can be sought by authorised officers, designated individuals, and anyone acting within the scope of their duties that requires use of the DATA Scheme.
* By default, advice will remain private to the requesting entity meaning that ONDC will not disclose it to another entity or make the advice public.
  + However, entities can choose to disclose their advice or request that it be made public by ONDC.
  + While other entities may be able draw on the regulatory principles or positions reflected in any advice, they will not be able to rely on the commitment from the Commissioner in relation to the advice, as advices are specific to the circumstances of the requesting entity.
* The ONDC may also draw on the broader regulatory principles or positions reflected in the advice to publish public guidance.

#### Process for Requesting Advice

1. **Submission**: Entities submit a request for advice through the designated interface on the ONDC website or Dataplace. The submission may include information on the timeframe within which the advice is being sought and reasons for this timeframe.
2. **Review**: The ONDC reviews the request to ensure it meets the criteria for the advice function.
   * The Commissioner may opt not to provide advice in response to a request from an entity. This may occur, for example, where the entity has not taken reasonable measures to understand the operation of the Scheme and draw on general guidance, including through engaging with the ONDC.
3. **Follow-up**: If necessary, the ONDC may seek additional information from requesting entities to assess whether the advice function is suitable for the request, to clarify the aspects of the request, and/or to inform understanding of the specific circumstances relevant to the request.
4. **Response**: The Commissioner provides a written response outlining how the DATA Scheme applies to the specific circumstances described in the request, and stating the nature of the advice and the Commissioner’s commitment.

Engagement between the requesting entity and the ONDC can commence prior to the submission of a request for advice, including to help refine the request, and continue while progressing through the subsequent steps. The ONDC will acknowledge requests within three days. Delivery timeframes for advice will vary depending on the complexity of the request, how quickly requesting entities are able to provide further information sought by the ONDC, and consideration of requests from entities regarding urgency of advice.

#### Consultation Questions

The ONDC invites feedback on the following questions:

1. Do you agree with the approach for operationalising the Commissioner’s advice function? If not, please provide reasons and suggest alternatives.
2. Will the operationalisation of the advice function through this approach support a more efficient use of the DATA Scheme?
3. What additional guidance or support would be helpful for entities using the advice function?
4. Are there any potential challenges or risks associated with the preferred approach that the ONDC should consider?
5. How can the ONDC ensure transparency and accountability in the provision of advice under the paragraph 43(aa) function?

#### Conclusion

The ONDC values the input of stakeholders in refining the implementation of the Commissioner’s advice function. Your feedback will help ensure that the advice function effectively supports the needs of DATA Scheme entities.

Please submit your responses to the consultation questions by 12pm, Thursday 30 January 2025 to information@datacommissioner.gov.au.