**DRAFT EXPLANATORY STATEMENT**

**Issued by the authority of the National Data Commissioner**

***Data Availability and Transparency Act 2022***

***Data Availability and Transparency Amendment (No. 1) Code 2025***

**Purpose**

The purpose of this instrument is to prescribe additional requirements for data sharing agreements made under the *Data Availability and Transparency Act 2022* (the Act). These requirements ensure that if state or territory data is shared through a Commonwealth body who is a data custodian under the Act, the data sharing agreement explicitly recognises rights and obligations that a State or Territory body may have in respect of the data by specifying certain information about any conditions on sharing the data.

**Authority**

This instrument is made by the National Data Commissioner under section 126 of the Act. The instrument is a legislative instrument subject to disallowance.

**Background**

The Act established a new data sharing scheme (the DATA Scheme) for sharing safely Australian Government data with entities accredited under the scheme. Sharing can occur for projects that meet one or more of three data sharing purposes (the delivery of government services, informing government policy and programs, and research and development). Under the Act, most Australian Government departments and agencies that control Australian Government data are ‘data custodians’ of public sector data and may share the data they control with ‘accredited users’ under a data sharing agreement, subject to specific limitations and controls in the Act.

As data custodians under the Act, Commonwealth bodies may hold data obtained from a State or Territory body. While State or Territory bodies are not data custodians for the purposes of the Act, they may nevertheless be the custodians of the data they have provided to the Commonwealth in a more general sense. State or Territory bodies may also set the scope of a Commonwealth body’s right to deal in the data by imposing conditions on a Commonwealth body’s use of the data (including on the Commonwealth body’s ability to share the data).

For a data custodian to be authorised to share data with an accredited user, the project the sharing is part of must be covered by a registered data sharing agreement that is in effect and meets the requirements of the Act. These include the matters specified in section 19, which among other things requires an agreement to identify the parties to the agreement, to describe the relevant project and specify that the Act applies to the agreement, and to meet any applicable privacy obligations. In addition, subsection 19(16) requires compliance with any additional requirements that are specified in a data code.

Failure to comply with requirements in section 19 may result in sharing not being authorised by section 13 and collection and use not being authorised under section 13A, which can result in penalties for unauthorised sharing or unauthorised collection or use under sections 14 and 14A respectively.

In conjunction with the requirements for data sharing agreements, sharing data under the Act is barred in certain circumstances. These include sharing that would contravene or infringe a contract or agreement to which the data custodian of the data is a party (see subparagraph 17(3)(a)(ii) of the Act). Conditions on the use of data held by a data custodian can prevent the data custodian from sharing that data with another entity, or restrict the sharing to certain purposes or under certain arrangements.

**How the instrument operates**

The instrument applies where a data custodian shares data that it has obtained from a State or Territory body. Specifically, it applies to a data sharing agreement under which the source data is, or includes data that is state or territory data, and the data custodian of the source data obtained the data from a State or Territory body under a contract of agreement (a provisioning agreement).

The instrument requires the data sharing agreement to specify certain particulars to ensure that the rights of State or Territory bodies over data provided to a data custodian, and any obligations on data custodians in sharing such data, are explicitly recognised and protected in the agreement.

**Commencement**

This instrument commences the day after it is registered on the Federal Register of Legislation.

**Consultation**

In developing this instrument, the Office of the National Data Commissioner (ONDC) undertook a 5-week public consultation process on the instrument.

**Explanation of provisions**

**Section 1** provides that the name of the instrument is the *Data Availability and Transparency Amendment (No. 1) Code 2025*.

**Section 2** provides that the instrument commences the day after it is registered on the Federal Register of Legislation.

**Section 3** provides that the instrument is made under section 126 of the Act. Section 126 of the Act provides that the Commissioner may, by legislative instrument, make codes of practice about the data sharing scheme(data codes) including data codes setting out how the provisions of Chapters 2 and 3 of the Act are to be applied or complied with, and dealing with matters the Commissioner considers necessary or convenient to deal with for carrying out or giving effect to the data sharing scheme.

**Section 4** provides that each instrument that is specified in Schedule 1 to this instrument is amended or repealed as set out in the applicable items in the Schedule, and any other item in the Schedule to this instrument has effect according to its terms. This instrument specifies is the *Data Availability and Transparency Code 2022* (the Code).

**Item** **1** of the Schedule to the instrument repeals paragraph (p) of the note to section 4 of the Code and substitutes paragraphs (p) – (v). The note to section 4 lists a number of expressions used in the Code that are defined in the Act. These changes reflect the additional expressions in the Act that are used by the amendments inserted by the instrument.

**Item 2** inserts the definition of **state or territory data** in section 4 of the Code. It defines state or territory data to mean data collected, created or held by or on behalf of a State body or a Territory body.

This new definition is broadly consistent with the definition of ‘public sector data’ for Commonwealth bodies in the Act but does not include a requirement that data be lawfully collected. While this is an important element of the definition of public sector data, it also reflects a reasonable expectation that data custodians understand the basis on which they have collected data. In contrast, a data custodian will not always be in a position to determine the basis on which another entity (for example, a State body or Territory body) has collected data that is then provided to the data custodian.

**Item 3** renumbers Part 4 of the Code as Part 9.

**Item 4** renumbers section 24 of the Code as section 90.

**Item 5** renumbers section 25 of the Code as section 91.

The renumbering introduced by items 3 to 5 ensures that existing ‘miscellaneous’ provisions in the Code can continue to be located at the end of the Code. This allows the amendments to be introduced through a new Part 4, while allowing for future parts to be introduced into the Code before the miscellaneous provisions if it is necessary to do so in the future.

**Item 6** inserts **Part 4 – Requirements to be met by all data sharing agreements** after Part 3 of the Code. Part 4 sets out new sections 24 and 25 of the Code. Section 24 provides that the purpose of Part 4 is to set out additional requirements that a data sharing agreement must meet for the purposes of the Act. It states that the project the sharing is part of must be covered by a registered data sharing agreement that is in effect and meets the requirements of the Act, for an entity to be authorised to share data with another entity under the Act.

Section 25 prescribes the requirements that must be met, for the purposes of subsection 19(16) of the Act, by a data sharing agreement under which the source data is, or includes, data that is state or territory data. The amendments use the term ‘source data’, which is defined in the Act as the data that is to be shared under a data sharing agreement by a data custodian (see paragraph 19(3)(a) of the Act).

The requirements apply where the data custodian of the source data obtained the state or territory data from a State body or a Territory body (a ***state or territory data provider)*** under a contract or agreement (a ***provisioning agreement***).

This ensures the requirements apply to arrangements under which a data custodian obtains state or territory data directly from a state or territory data provider under a formal arrangement. The requirements also complement the ‘barring’ provisions in subparagraph 17(3)(a)(ii) of the Act, which prohibit data from being shared under the Act where doing so is prohibited by a contract or agreement to which the data custodian is a party. This approach means the requirements do not apply where a data custodian obtains data relating to a state or territory through other mechanisms (for example, under Commonwealth legislation or through private sector entities), reflecting that in such circumstances the state or territory will not have imposed conditions on the data custodian’s use of the data.

Where the above conditions are met, the requirements are that the data sharing agreement specify:

1. the state or territory data included in the source data; and
2. the state or territory data provider of the data; and
3. whether there are any conditions in the provisioning agreement related to the data custodian sharing the state or territory data; and
4. if there are such conditions, how the sharing of the source data under the agreement is consistent with those conditions.

These requirements apply even where there are no conditions imposed on the sharing of state or territory data. In such circumstances, it is still necessary for an agreement to provide details about the state or territory data, the state or territory data provider, and the fact there are no conditions.

Where there are conditions relating to state or territory data, they do not necessarily need to be strictly reproduced in the data sharing agreement. Instead, it is sufficient for the agreement to explain how it is consistent with any such conditions. However, if parties prefer to replicate conditions in a data sharing agreement, then doing so would ensure the agreement is consistent with those underlying conditions (because it would apply in a manner that is consistent with those conditions). Providing flexibility about how this requirement is satisfied is intended to ensure parties to a data sharing agreement have some discretion in meeting the requirements, reflecting that there may be sensitivities (including commercial sensitivities) with requiring conditions to be replicated in full in a data sharing agreement.

Where there are multiple sets of state or territory data or multiple state or territory data providers, an agreement must provide particulars of each of the data sets and providers.

The above requirements are all required to be satisfied when the provisioning agreement under which a data custodian obtained the state or territory data is a separate agreement to the data sharing agreement (for example, because the data had already been obtained prior to entering into the data sharing agreement, or the data sharing agreement is with different parties). However, there is nothing to prevent a data sharing agreement that authorises sharing under the Act to also cover other instances of sharing that occur outside of the Act. As such, it is possible for a single agreement to cover the provisioning of data from a state or territory provider to a data custodian, and the on-sharing of that data by the custodian (either back to the state or territory provider with other data, or to a third party).

In such cases, it would be redundant for the agreement to explain whether it is consistent with conditions on sharing that are contained in the agreement. As such, it is not necessary for a data sharing agreement to specify the matters relating to conditions if it is the same agreement as the provisioning agreement, and it already includes conditions relating to sharing the state or territory data.

**Item 7** inserts **Part 10—Application, saving and transitional provisions** and **Division 1—Application provisions relating to the Data Availability and Transparency Amendment Code (No. 1) 2025** at the end of the Code. Division 1 sets out sections 100 and 101. Section 100 provides that amending instrument means the *Data Availability and Transparency Amendment Code (No 1) 2025* for Division 1 purposes. Section 101 provides that the amendments made by Schedule 1 to the amending instrument apply in relation to data sharing agreements entered into on or after 1 July 2025.

This application rule grandfathers existing data sharing agreements and provides a transition period for agreements that are entered in to shortly after the new requirements commence. Agreements that are entered into during the transition period do not need to satisfy the new requirements. This is intended to allow Scheme participants a reasonable period to adjust to the new requirements.