

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Finance

Data Availability and Transparency (Consequential Amendments) Act 2022

Data Availability and Transparency (Consequential Amendments) Transitional Rules 2022

Purpose

The purpose of this instrument is to make transitional arrangements for the data sharing scheme established by the *Data Availability and Transparency Act 2022* (the Principal Act) by prescribing 6 Australian entities (as defined in the Principal Act) as transitional entities. These transitional entities are taken to be accredited data service providers (ADSPs) for the purposes of the Principal Act for a limited transition period.

Authority

This instrument is made by the Minister under section 4 of Schedule 3 to the *Data Availability and Transparency (Consequential Amendments) Act 2022* (the Consequential Amendments Act). The instrument is a legislative instrument for the purposes of the *Legislation Act 2003* and subject to disallowance under section 42 of that Act.

Background

The Principal Act establishes a data sharing scheme that, in specified circumstances, authorises the provision of controlled access to Australian Government data. Under the Principal Act, most Australian Government departments and agencies that control Australian Government data are ‘data custodians’, and may share the data they control with ‘accredited users’ under a data sharing agreement, subject to specific limitations and controls in the Principal Act. Data may be shared with accredited users directly, or through ADSPs, acting as intermediaries. ADSPs are entities that have particular expertise in data sharing and the provision of data services. An entity must be an ‘Australian entity’ to be eligible to apply for accreditation as an ADSP under the Principal Act. This means only Australian Government departments and agencies, State government departments and agencies, Territory government departments and agencies, the Commonwealth, a State or a Territory as a jurisdiction, or an Australian university may be accredited as users or ADSPs under the Principal Act.

The Principal Act establishes the statutory office of the National Data Commissioner (Commissioner). The Commissioner has responsibility for regulating the data sharing scheme established by the Principal Act, including by accrediting Australian entities as ADSPs, and Australian universities as users (the Minister has responsibility for accrediting Australian Government departments and agencies, State government departments and agencies and Territory government departments and agencies, and the Commonwealth, a State or a Territory as a jurisdiction, as users).

The data sharing scheme established by the Principal Act relies on the availability of ADSPs to perform certain data services, such as the complex data integration service. The scheme will not operate effectively in some circumstances if no entities are accredited as ADSPs when the data sharing under the scheme commences.

Entities may apply to the Commissioner for accreditation as ADSPs under the Principal Act from 1 August 2022 because of the operation of the application provision in subitem 1(1) of Schedule 2 to the Consequential Amendments Act. Because of the complexity involved in preparing applications for ADSP accreditation and the need for the Commissioner to thoroughly assess such applications, it could take a significant period of time for the Commissioner to accredit entities as ADSPs under the Principal Act, especially if there are a large number of applications.

Under current Commonwealth administrative arrangements, a total of 7 Australian Government departments and agencies and State government and Territory government bodies have been accredited as 'Accredited Integrating Authorities' (AIAs), following a rigorous assessment process. These bodies currently may perform data services in relation to Australian Government data that are broadly similar to the data services that will be performed by ADSPs under the data sharing scheme established by the Principal Act. The transitional arrangements given effect by this instrument enable 6 of the current AIAs to be taken to be ADSPs for the purposes of the Principal Act for a transition period.

One current AIA is an unincorporated joint venture. This AIA is not an Australian entity (as defined by the Principal Act) and cannot be prescribed as a transitional entity under Schedule 3 to the Consequential Amendments Act.

It is expected that, during the transition period (which must end no later than 30 July 2025), the 6 entities prescribed as transitional entities by this instrument (and hence taken to be ADSPs for the purposes of the Principal Act) will apply to the Commissioner to renew their accreditation as ADSPs. The Commissioner will assess any such applications under section 84 of the Principal Act to determine whether the applicant meets the criteria for ADSPs in section 77 of that Act.

ADSPs may only collect and use data under the data sharing scheme established by the Principal Act in accordance with conditions of accreditation. Section 30 of the Principal Act requires ADSPs to comply with conditions of accreditation. Subitem 2(2) of Schedule 3 of the Consequential Amendments Act enables the Minister to prescribe conditions of accreditation for transitional entities, and this instrument prescribes conditions of accreditation for 3 of the 6 entities that are prescribed as transitional entities. Subitem 2(2) of Schedule 3 of the Consequential Amendments Act provides that such conditions of accreditation are taken to have been imposed by the Commissioner under section 78 of the Principal Act, and the Commissioner may therefore vary or remove such conditions under the Principal Act, or impose additional conditions of accreditation.

During the applicable transition period, a transitional entity has the same obligations under the Principal Act as an entity accredited by the Commissioner as an ADSP. The Commissioner has regulatory oversight over transitional entities and, if required, the Commissioner may suspend or cancel the ADSP accreditation of a transitional entity under section 81 of the Principal Act. Subitem 2(3) of Schedule 3 to the Consequential

Amendments Act provides that, if the Commissioner cancels the ADSP accreditation of a transitional entity, the transition period for that transitional entity ends.

Commencement

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

Consultation

Consultation on the development of this Rule was undertaken in accordance with section 17 of the *Legislation Act 2003*.

The Office of the National Data Commissioner (ONDC) consulted all 7 current AIAs, the Australian Government Deputy Secretaries Data Group and the National Data Advisory Council (established by Part 4.3 of the Principal Act). These are the parties likely to be effected by the instrument and who hold relevant expertise on the data sharing scheme established by the Principal Act. All 6 entities prescribed as transitional entities by this instrument have advised that they are willing to accept the obligations of ADSPs under the Act and (where applicable) are agreeable to the conditions of accreditation imposed on them by this instrument.

The draft Rule was released for public consultation for four weeks commencing 12 August 2022, which included publishing the exposure draft on the Office of the National Data Commissioner's website and direct engagement with affected parties.

Regulation Impact Statement (RIS)

This instrument does not require a Regulatory Impact Statement. (OBPR Reference 22-02687).

Only Australian Government departments and agencies, State government departments and agencies, Territory government departments and agencies and Australian universities may be ADSPs under the data sharing scheme established by the Principal Act. This instrument prescribes 6 government departments or agencies (with their agreement) as transitional entities for a limited transition period to facilitate data sharing under the scheme established by the Principal Act. During this transition period, the transitional entities will be taken to be ADSPs under the Principal Act. The transitional arrangements in general terms continue previous accreditation arrangements for data service providers handling Australian Government data. This instrument is technical and machinery in nature. The instrument will not impact business activity and will have no, or minimal, compliance costs or competition impact.

Explanation of provisions

Section 1 provides that the name of the instrument is the *Data Availability and Transparency (Consequential Amendments) Transitional Rules 2022*.

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 Schedule 3 to the Consequential Amendments Act. Item 4 of this Schedule provides that the Minister may, by legislative instrument, make rules prescribing matters required or permitted to be prescribed by the Schedule. Items 1 and 2 of the Schedule provide that the Minister may prescribe Australian entities (as defined in the Principal Act) as transitional entities, and prescribe conditions of accreditation and the transition period for such transitional entities.

Section 4 provides for definitions of the *Commonwealth Social Services Department* (the Department of Social Services), the *DAT Act* (the Principal Act) and the *DAT (Consequential Amendments) Act* (the Consequential Amendments Act). Section 4 also explains that some terms used in the instrument are defined in the Principal Act. Important terms used in the instrument that are defined in the Principal Act are the *secure data access service*, the *de-identification data service*, the *complex data integration service*, *project*, *Commissioner*, *conditions of accreditation* and *ADSP*.

Section 5 prescribes 3 Australian Government agencies, one Australian Government department and 2 State government departments as *transitional entities*. Subitem 2(1) of Schedule 3 of the Consequential Amendments Act provides that, for the purposes of the Principal Act, a transitional entity is taken to be accredited as an ADSP during its transition period.

Section 6 imposes conditions of accreditation as an ADSP on 3 of the 6 transitional entities. These conditions of accreditation limit the data services that may be provided by the transitional entities to which they apply, or the circumstances in which data services may be provided by such transitional entities. Subsection 19(11) of the Principal Act requires data sharing agreements to prohibit an ADSP that is party to the agreement from doing anything inconsistent with the conditions of accreditation imposed on, or applicable to, the ADSP. Section 30 of the Principal Act also requires an ADSP to comply with conditions of accreditation.

Subitem 2(2) of Schedule 3 to the Consequential Amendments Act provides that conditions of accreditation prescribed by section 5 of this instrument are taken to have been imposed by the Commissioner. This means that the Commissioner may vary or remove such conditions of accreditation, or impose additional conditions of accreditation, under Chapter 5 of the Principal Act.

Section 7 prescribes the transition period for the 6 transitional entities.

The transition period for all 6 transitional entities commences on the day that this instrument commences.

The transition period for all transitional entities must end no later than 30 July 2025. Subitem 2(3) of Schedule 3 to the Consequential Amendments Act provides that the transition period for a transitional entity must end no later than the end of the period 40 months that began on the day that the Consequential Amendments Act received the Royal Assent. The Consequential Amendments Act received the Royal Assent on 31 March 2022, so the transition period for a transitional entity must end no later than the end of 30 July 2025. The transition period for a transitional entity may end earlier than 30 July 2025 if, before that day, the entity applies to the Commissioner seeking renewal of its ADSP accreditation and the Commissioner decides to renew the entity's ADSP accreditation under

Chapter 5 of the Principal Act, or if the Commissioner decides to cancel the entity's ADSP accreditation under Chapter 5 of the Principal Act.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Data Availability and Transparency (Consequential Amendments) Transitional Rules 2022

This instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

This instrument makes transitional arrangements for the data sharing scheme established by the *Data Availability and Transparency Act 2022* (the Principal Act) by prescribing 6 Australian entities (as defined in the Principal Act) as transitional entities. These transitional entities are taken to be accredited data service providers (ADSPs) for the purposes of the Principal Act for a limited transition period.

The Principal Act establishes a data sharing scheme that, in specified circumstances, authorises the provision of controlled access to Australian Government data. Under the Principal Act, most Australian Government departments and agencies that control Australian Government data are ‘data custodians’, and may share the data they control with ‘accredited users’ under a data sharing agreement, subject to specific limitations and controls in the Principal Act. Data may be shared with accredited users directly, or through ADSPs, acting as intermediaries. ADSPs are entities that have particular expertise in data sharing and the provision of data services. Only Australian Government departments and agencies, State government departments and agencies, Territory government departments and agencies, the Commonwealth, a State or a Territory as a jurisdiction and Australian universities (as defined in the Principal Act) may be accredited as users or ADSPs under the Principal Act.

The Principal Act establishes the statutory office of the National Data Commissioner (Commissioner). The Commissioner has responsibility for regulating the data sharing scheme established by the Principal Act, including by accrediting Australian entities as ADSPs.

The data sharing scheme established by the Principal Act relies on the availability of ADSPs to perform certain data services, such as the complex data integration service. The scheme will not operate effectively in some circumstances if no entities are accredited as ADSPs when the data sharing under the scheme commences.

Entities may apply to the Commissioner for accreditation as ADSPs under the Principal Act from 1 August 2022 because of the operation of the application provision in subitem 1(1) of Schedule 2 to the Consequential Amendments Act. Because of the complexity involved in preparing applications for ADSP accreditation and the need for the Commissioner to thoroughly assess such applications, it could take a significant period of time for the

Commissioner to accredit entities as ADSPs under the Principal Act, especially if there are a large number of applications.

Under current Commonwealth administrative arrangements, a total of 7 Australian Government departments and agencies and State government and Territory government bodies have been accredited as 'Accredited Integrating Authorities' (AIAs), following a rigorous assessment process. These bodies currently may perform data services in relation to Australian Government data that are broadly similar to the data services that will be performed by ADSPs under the data sharing scheme established by the Principal Act. The transitional arrangements given effect by this instrument enable 6 of the current AIAs to be taken to be ADSPs for the purposes of the Principal Act for a transition period, which must end no later than 30 July 2025.

ADSPs may only collect and use data under the data sharing scheme established by the Principal Act in accordance with conditions of accreditation. Section 30 of the Principal Act requires ADSPs to comply with conditions of accreditation. Subitem 2(2) of Schedule 3 of the Consequential Amendments Act enables the Minister to prescribe conditions of accreditation for transitional entities, and this instrument prescribes conditions of accreditation for 3 of the 6 entities that are prescribed as transitional entities. Subitem 2(2) of Schedule 3 of the Consequential Amendments Act provides that such conditions of accreditation are taken to have been imposed by the Commissioner under section 78 of the Principal Act, and the Commissioner may therefore vary or remove such conditions under the Principal Act, or impose additional conditions.

During the applicable transition period, a transitional entity has the same obligations under the Principal Act as an ADSP as an entity accredited by the Commissioner as an ADSP. The Commissioner has regulatory oversight over transitional entities and, if required, the Commissioner may suspend or cancel the ADSP accreditation of a transitional entity under Chapter 5 of the Principal Act. Subitem 2(3) of Schedule 3 to the Consequential Amendments Act provides that, if the Commissioner cancels the ADSP accreditation of a transitional entity, the transition period for that transitional entity ends.

Human rights implications

This instrument engages the right to protection from arbitrary or unlawful interference with privacy, because the Principal Act authorises ADSPs (including transitional entities) to collect and use personal information (as defined in the *Privacy Act 1988*) in certain limited circumstances.

The right to protection from arbitrary or unlawful interference with privacy is recognised in Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR). This right encompasses the right to respect for informational privacy, including the right to respect the storing, use and sharing of private and confidential information.

The right to privacy is also recognised in Article 16 of the *Convention on the Rights of the Child*, which states that no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

All data sharing under the Principal Act must be consistent with the *Privacy Act 1988* because sharing that is inconsistent with the *Privacy Act 1988* is barred by subsection 17(5) of the Principal Act.

The Principal Act imposes a range of protections in relation to data shared under the Act, including personal information shared under the Act. A transitional entity taken to be an ADSP may only collect and use shared data as authorised by section 13B of the Principal Act. A transitional entity may only collect and use personal information under the Principal Act as an ADSP if it is subject to privacy obligations in relation to the information (paragraph 13B(e) and section 16E of the Principal Act). Personal information may only be shared under the Principal Act if the sharing is consistent with the privacy protections in sections 16A and 16B of that Act. These protections set out the requirements for consent regarding the sharing of personal information, prohibit any personal information from being shared, stored, or accessed outside Australia, and ensure that any de-identified data remains de-identified.

The effect of this instrument is that 6 government departments and agencies may operate as ADSPs under the Principal Act without the Commissioner having assessed these departments and agencies as meeting the accreditation criteria in section 77 of the Principal Act. There are a number of mitigations for this risk. The transition period for each transitional entity cannot extend beyond 30 July 2025. Each transitional entity is an Australian Government or a State government department or agency that has been assessed under non-statutory arrangements as being suitable to perform data services in relation to Australian Government data. The Commissioner has regulatory oversight over transitional entities and, if necessary the Commissioner may suspend or cancel the ADSP accreditation of a transitional entity, or vary or impose additional conditions of accreditation on the ADSP accreditation of a transitional entity.

The transitional arrangements implemented by this instrument reduce risks to privacy because they enable departments and agencies with a high level of expertise in data sharing and the provision of data services to act as intermediaries in the data sharing scheme established by the Principal Act. If this instrument was not made, there would be no ADSPs in the data sharing scheme established by the Principal Act until Australian entities were accredited as ADSPs by the Commissioner. This would mean that departments and agencies with high levels of expertise would not be able to act as intermediaries in data sharing projects under the Principal Act in the short term, which in some cases may increase risks, including privacy risks.

Conclusion

This instrument is consistent with human rights because any limitation on the right to protection from arbitrary or unlawful interference with privacy is reasonable, necessary and proportionate.

Senator the Hon. Katy Gallagher, Minister for Finance