



Submission to the Senate Finance and Public Administration Legislation Committee Inquiry into the Data Availability and Transparency Bill 2020

About Verifier

Verifier is a RegTech pioneer and thought leader in data-portability. We operate a Privacy Principle 12 data sharing network in Australia and we are currently in the final stages of becoming an Accredited Data Recipient in the Consumer Data Right regime. Historically our focus has been on private sector data sharing with consumers, using consent-based, privacy by design methodologies. Our newly formed public sector team, with a combination of public sector and data sharing expertise, is focused on supporting better service delivery within the public sector - both here in Australia and offshore.

About the Authors

Lisa Schutz is Verifier's founder and CEO. Verifier is a founding member of The RegTech Association. Lisa is a founding director of that organisation, formed in 2017, with the goal of establishing a centre of excellence in Australia for RegTech, for the benefit of the community and commerce. Lisa is also a member of both the Data Standards Body Advisory Committee for Banking and the Data Standards Body Advisory Committee for Energy - under the Consumer Data Right regime.

Debra Kruse is Verifier's Head of Legal and Commercial. Debra is an experienced lawyer whose expertise includes privacy law and the Consumer Data Right regime.

Lisa and Debra have spent significant time and effort in the consultation process leading to the Consumer Data Right regime and its application to Open Banking.

Verifier's submission

Verifier has previously made a submission to the Office of the National Data Commissioner (the **Commissioner**) with respect to the Exposure Draft of the Bill, and the Accreditation Framework Discussion Paper¹.

We appreciate the opportunity to make this submission to the Senate Finance and Public Administration Legislation Committee (**Committee**) inquiry into the Data Availability and Transparency Bill 2020 (Ct.) (the **Bill**) and the Data Availability and Transparency (**Consequential Amendments**) Bill 2020 (Cth) (the **Consequential Amendments Bill**).

In our view, the risk here is that consent and validation end up being implemented in a very 'old school' manner, and do not keep pace with evolving community expectations. This will ultimately defeat the goal of more (not less) data sharing. The truth is, individuals and businesses deserve transparency in practice. Powers under this Bill can be used to address this.

In Summary:

- A. We recognise the importance of encouraging and facilitating government data sharing, and we are generally supportive of the Bill and the Consequential Amendments Bill.
- B. We make no comments on the Consequential Amendments Bill.

¹ Verifier, Submission to Office of the National Data Commissioner (30 October 2020).



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- C. Our particular focus in this submission is on the service delivery objective, as this is where data must be used at the identified person level, and where the largest opportunities lie for public sector efficiency.
- D. We have some concerns about the standard of consent – see Section 2
- E. We believe there is a need for a digital first, presumption in terms of monitoring and supervision of consent and validation – see Section 3
- F. We would expect the Commissioner to play an ongoing, automated monitoring role in Data Sharing Agreements where personal information is shared – see Section 4

Verifier's comments on the Bill and the proposed data sharing scheme:

1. Consent, validation – meeting community expectations

The Bill does not contain clear guidance or a defined mechanism to support and monitor:

- (a) the consent requirements that apply to data sharing by **data custodians** (being Commonwealth bodies that 'control' public sector data and have 'the right to deal with that data'²) with **accredited users** (which data may be shared either directly or through an 'accredited data service provider' (**ADSP**)³; or
- (b) the requirement for validation of **output** (being data that is the result or product of data sharing authorised under Chapter 2 of the Bill that is generated by accredited users⁴) by the individual or business to whom the output data relates, when that data exits the data sharing scheme under clause 21 of the Bill.

In our view, as a result of the above, transparency in the proposed data sharing scheme may be diminished. The consequences are likely to be twofold:

- (a) a negative impact on community confidence in, and support for, the data sharing scheme – particular given the increasing community expectations with respect to transparency that have been heightened by the commencement of the high-profile 'Open Banking' data sharing scheme, and
- (b) making it more difficult for the Commissioner to maintain oversight of scheme data sharing activities.

In sections 2, 3 and 4 of this submission, we make recommendations about how these consequences could be mitigated without requiring changes to the Bill.

² The Bill clause 11(2)

³ The Bill 2020 clause 13

⁴ The Bill 2020 clause 11(4)



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2. Consent requirements of the Bill – guidelines needed

Where personal information is included in data being shared, clause 16(2)(c) of the Bill requires data custodians to have obtained the individual's consent to the sharing – unless it is 'unreasonable or impracticable' to obtain consent.

The standard of consent, and the 'unreasonable or impractical' exception, is to be considered and determined in accordance with the *Privacy Act 1988* and guidance on consent that is published by the Office of the Australian Information Commissioner.

The proposed consent requirements of the Bill lag current community expectations about individuals' privacy and the right to control how their data is shared, used and disclosed. Those community expectations are likely to continue to increase, given the acceleration of the shift from old world processes to digital processes in both the private and public spheres. The Open Banking data sharing regime is a key example of a regime with rigorous consent requirements which will continue to evolve to keep pace with community expectations.

Verifier's recommendation with respect to consent

Clause 127 of the Bill empowers the Commissioner to make guidelines related to any aspect of the data sharing scheme and matters incidental to it, such as data release, management, and curation, technical matters and standards, and emerging technologies.

We recommend that the Commissioner issue guidance that reflects a default position that, notwithstanding the nature of any consent obtained at the time the data custodian collected the data, efforts should be made to obtain an active consent from the individual when the data custodian is considering sharing data under a Data Sharing Agreement. We recommend that such consent should also cover the sharing of output data created under the Data Sharing Agreement.

Guidance issued by the Commissioner should also address the 'unreasonable or impractical' exception' to ensure that it is only applicable in limited and clearly defined circumstances.

In our view, adopting an 'if not, why not?' principle to obtaining active, real-time consents will enhance transparency and trust in the data sharing scheme and will more closely reflect community expectations.

3. *Monitoring consent by Data Custodians and validation by Accredited Users – digital first, independence presumption for these 'control points'*

We recommend the Government considers the following data sharing scheme architecture options to enable data custodians and accredited users to ensure transparency, by enhancing validation and control point management of scheme data sharing and output exits - by tracking activity at these control points.

Option 1: Embed control points in service delivery 'user journeys'

The relevant control point is embedded in the overall service delivery user journey. Embedded control points will necessitate duplication of the same control point functionality in multiple service delivery situations, and likely add cost, complexity and difficulty to evolving these control points as expectations change. In this option there is no in-built independence.

Option 2: Control points with independence

RegTech offers the potential to support more transparent, lower cost, future proofed approaches for data custodians and accredited users. However, without guidance, the default position is likely to be



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option 1. We would urge the Commissioner to consider issuing guidance on approaches to control Points and challenge the prevailing assumption that DIY and 100% in-house is the right answer.

4. Supervision of Service Delivery Data Sharing Agreements – digital, non-sampling

In our view, transparency and trust in the data sharing scheme can also be enhanced by ensuring that monitoring and supervision of consents and validation at the control points is continuous, rigorous, and digital. We consider these consent and validation transactions should be seen as akin to an exchange of money – where receipts are produced to reflect the exchange. A 'receipt' for data transactions should be created to assist the Commissioner's exercise of oversight functions under the Bill. This could be achieved by monitoring consent and validation transactions - dashboard style like the Open Banking dashboards.

Ultimately, the stakeholders with respect to a Data Sharing Agreement are the data custodian, the accredited user, the Commissioner, and the individual or business about whom data is being shared. Planning and expecting automated transparency around control points would make achieving ongoing supervision, and exceptions monitoring would increase system trust and avoid the sense that while the Data Sharing Agreements are public, their use as it affects an **individual or business** is not.

Finally, we would be happy to discuss any aspect of our submission with you or your staff.

Sincerely
Lisa Schutz and Debra Kruse
Verifier