



30 June 2022

By Upload.

Dear Sir/Madam

Re: Australian Data Strategy

AFMA welcomes the opportunity to provide comment on the Australian Data Strategy.

We support the Government taking a holistic approach to data and data regulation. We agree that getting data right is important for the health of the economy and the welfare of all Australians, and it is timely for the Strategy to be developed.

Here follows a brief summary of our response to the key themes of the paper:

Maximising the value of data

In our view there is need for more work to develop a principled approach to data ownership, stewardship and custodianship. The current approach while well intentioned, is not compatible with the approach taken in the Consumer Data Right (CDR) and does not yet embed the type of protections that are appropriate to ensure continued open participation and confidence in the data economy. The framing used – ‘maximising the value of data’ is a call for outcomes but is not yet balanced with a proper consideration of the need to ensure principled treatment of data.

Trust and protection

AFMA supports the Government’s work on data protection. Our submissions elsewhere have made the case for increased intra- and international consistency of data security requirements and the need to continue a cooperative, supportive partnership with industry.

Enabling data usage

Consistent with our view on the need for a principled approach to data, the settings and processes associated with data management are not yet optimised to respect a principled approach to data. Further, there is scope for more efficient industry-based approaches to data standards.

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Need for a principled approach

In AFMA's view it is critical that the Government ensures a principled approach to data ownership, custodianship and stewardship. We remain concerned that a potentially excessive focus on outcomes or 'ends' – in this case, the benefits that could accrue from 'maximising the value' from data 'sharing', could result in a significant discounting of the costs of compromise to core tenets – the 'means'.

A principled approach requires that the approach to data stewardship recognises the appropriate ownership of data, and that where data has been required to be surrendered to government under regulatory compulsion for a particular regulatory purpose, that this does not mean that the data is now 'Government data'. It is not owned by the Government, but rather held in trust, therefore it is not appropriate to use it without permission for other purposes. The data remains the property of the firms and individuals that supplied the data and about which the data pertains and, as a general principle, further use for non-related purposes or further dissemination should require their authorisation. Another valid approach would be to independently collect the data for those unrelated purposes under separate regulatory or other requirements.

While the argument is made that there are protections in place before data can be used for unrelated purposes, such as in the Data Availability and Transparency DAT Scheme, these arrangements do not have sufficient recognition of the ownership of data and respect for the custodian and stewardship nature of the Government's involvement. Neither is the approach in the DAT scheme consistent with the CDR scheme's approach of respect for the ownership of data.

Further, when data is considered as property, the most relevant limitation on the powers of the Commonwealth in this regard is section 51 (xxxi) of the Constitution that, while phrased a grant of power, limits acquisition of property to 'just terms'. Even if personal data is not yet fully formed as property for the purposes of Section 51, it is appropriate for the Government to seek alignment of the scheme with the intent of this section both to ensure the spirit of the prohibition is adhered to and to position the scheme well for the future evolution of data rights.

Disseminating ('sharing') data collected for unrelated purposes risks damaging the fabric of legitimacy around the original data collection and the associated regulatory structures and relationships. It also introduces undesirable incentives for agencies not to go through a process that would require justification of the collection of data when it can be sourced through a 'sharing' arrangement.

Trust and protection

AFMA has made the case through numerous submissions on the benefits for increased intra- and international consistency of data protection standards. The current arrangements incentivise each regulator to create their own bespoke and incompatible requirements, in some cases determined through uncertain post hoc litigation processes, rather than using common international standards scaled to the particular application. This introduces complexities and inefficiencies. In some cases, notably CDR, it has resulted in lower security standards being applied to the same data depending on which type of entity (bank or non-bank) is holding the data. This is clearly undesirable.

Greater use of international standards, which have the advantage of continual updating from multiple parties are preferable to multiple, overlapping and inconsistent domestic standards.

Enabling data usage

As noted above, we believe more work is needed to construct a suitable structure to appropriately recognise data ownership and ensure that the legitimacy of mandated collection is not undermined.

Beyond this we agree that data standards are an important part of getting the most out of data. We suggest that there are likely to be efficiencies that can be found in an independent review of the Government's approach to the creation of data standards. Oftentimes mandated standards that are being developed by government duplicate work that is already underway and well-advanced in the private sector internationally. DPM&C could take the opportunity of the work on the Data Strategy to consider whether all these programs are necessary and whether some might be better moved to the private sector.

In regard to data localisation, we agree with the approach set out in the paper – data localisation should only be used where necessary and avoided where possible. Australia's interests are best served by an international approach that welcomes data mobility as a general rule.

Conclusion

We thank you for considering our comments in relation to the Australian Data Strategy. The financial markets and wholesale banking industry that AFMA represents is a data-based industry, and we look forward to continuing to work closely with the Government as it further develops the national approach to data.

Yours sincerely



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