



Director
AI and Consumer Law Review Unit
Market Conduct Division
Treasury
Langton Cres
Parkes ACT 2600

12 November 2024

Dear Sir/Madam,

Arca submission on the Review of AI and the Australian Consumer Law

Thank you for the opportunity to provide a submission as part of the Review of AI and the Australian Consumer Law.

Arca is the peak industry association for businesses using consumer information for risk and credit management. Our Members include banks, mutual ADIs, finance companies and fintech credit providers, as well as all of the major credit reporting bodies (CRBs) and, through our Associate Members, many other types of related businesses providing services to the industry. Arca's Members collectively account for well over 95% of all consumer lending in Australia.

We welcome the forward-looking approach to considering the potential impacts of Artificial Intelligence (AI). As the review rightly identifies, AI is a fast-evolving class of technologies which may have significant impacts on a range of economic activities. As a note of caution, the nature of AI means that the review currently being undertaken should not be treated as a one-time only exercise. Rather, the interaction between AI and the regulatory framework (whether new or existing laws) should regularly be considered (and potentially be embedded into the standard process to develop new laws).

We note that the fundamental principles that underpin the Australian Consumer Law (ACL) are not in scope of the Review. We agree with that approach as we consider that there is no readily apparent reason why the ACL would not generally apply to AI enabled goods and services.

We do wish to draw attention to a recent change to the consumer protection laws that demonstrates the additional complexity that may be created for AI enabled goods and services by the interaction between the ACL and other consumer protection laws (in this case, the Privacy Act).

The Privacy and Other Legislation Amendment Bill 2024 (which was passed on 6 November) would require improved disclosure in relation to the use of automated decision-making ('additional APP disclosure'); where such automated decision making is likely to involve the use of AI in the future (even if not currently so). [Arca's submission to the Senate Legal and Constitutional Affairs Committee](#) noted our support for the policy intent of that proposal.

However, we identified some concern regarding the lack of clarity for how specific the relevant disclosures need to be. In the absence of such clarity, we noted the following:

- In the absence of guidance, entities may focus on reducing their legal risk by making their disclosures as complete as possible, reducing their likely effectiveness as lengthy disclosures can be confusing and are often unread by consumers. Under this approach we note the disclosures would be very lengthy: credit algorithms can use hundreds of pieces of information as inputs.
- In the absence of more detail or guidance, APP entities will likely take different approaches to how much information to disclose – divergence in industry practice around disclosure will increase consumer confusion and uncertainty.
- There are good policy reasons – beyond the burden on consumers of engaging with long, complex disclosures – to avoid very detailed descriptions of automated decision making in the credit context.

The application of the ACL to those additional APP disclosures, particularly the misleading and deceptive conduct provisions, would heighten the risks identified by us in relation to the proposed Privacy Act changes. That is, the potential legal sanctions under the ACL that may apply to the additional APP disclosures would increase the potential for entities to take divergent (and unhelpful) approaches of either making the disclosures:

- overly long to avoid suggestions of misleading by omission; or
- too concise to limit the risk of including content that is subsequently considered misleading (noting the complexity of AI enabled systems may make it very difficult to explain their operation to consumers in simple language).

The fact that there are different agencies with oversight for the relevant regulatory regimes – i.e. ASIC/ACCC for the ACL and the OAIC for the Privacy Act – increases the potential for confusion and inconsistent regulatory expectations.

In the context of the Privacy Act reforms, we have recommended greater clarity be provided through both the law and the accompanying explanatory materials. At this stage, we do not know how the Committee have responded to our concerns and recommendations.

For the purposes of this review, we recommend that the impact of the ACL be expressly considered when making changes to other regulatory frameworks that are designed to apply to AI enabled goods or services or, as with the Privacy Act reforms, are likely to apply to AI enabled goods or services. This will help to ensure that the combined effect of the ACL and those laws is consistent and does not result in unintended outcomes; including entities taking an overly conservative approach to the implementation of those other laws due to the additional regulatory risk created by the ACL (particularly as the regulation of AI enable products and services is – like the products themselves – likely to be dynamic and quickly evolving).

Contact

If you have any questions about this submission, please feel free to contact me.

Yours sincerely,

Michael Blyth

General Manager – Policy & Advocacy