12 November 2024

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

via email: AIACLReview@tresury.gov.au

Dear Director

Discussion Paper: Review of AI and the Australian Consumer Law

The Institute of Public Accountants (IPA) is one of the three professional accounting bodies in Australia, having been established in 1923, and represents over 50,000 accountants, business advisers, academics, and students throughout Australia and internationally. Three-quarters of the IPA's members work in or are advisers to small business and Small to Medium Enterprises (SMEs).

The IPA welcomes the opportunity to comment on the review of AI and the Australian Consumer Law (ACL) Discussion Paper (DP). Accordingly, we offer the following comments.

The current use of AI-enabled products and services (ranging from smart home devices, automotive, education and training, entertainment, business solutions and, transportation and logistics) is prevalent and embedded in our economy. Their use is likely to increase with increases in AI capabilities.

IPA concurs with the DP's observation that AI systems used to generate AI-enabled products and services are variable and result in the goods and services being less "controllable" and change the risks to consumers compared to traditional goods and services. We are of the view that consumers should have the same consumer protection rights for traditional and AI-enabled goods and services covered by ACL. However, the existing legislative framework was not designed with AI in mind. As such, the current ACL needs to be modernised to provide a better framework to assist consumers in managing the risks of harm of AI-enabled goods and services now and into the future.

In terms of managing the risks associated with AI-enabled products and services, consumers need to be able to readily identify the risks and assess the likelihood and consequence of a risk event occurring for AI-enabled goods and services.

As the degree of reliance on AI emerges in many consumer goods and services, many consumers are not aware of the degree to which goods and services rely on AI and, in particular, the level of personal data collected and shared. Disclosure of risks and the use of a consumer's personal data, is often hidden in fine print. Consumers are unable to make a conscious decision at the time of purchase as to whether or not they wish to accept and manage the associated risks related to AI-enabled goods and services. Consequently, clear and transparent disclosure of these matters needs to be provided to consumers at the time of acquisition and, where there are changes, during the life of the product or service. Providers of AI-enabled goods and services must take responsibility for any breaches of privacy resulting from the disclosure of consumer data that a consumer has not consciously authorised.

Further, there is a need for each product or service provider in the value chain of an AI-enabled good or service to be able to understand where AI has been used in a component part they are adopting as part of their value-added good or service.

Additionally, the DP states that the opacity of AI systems and the potential difficulty in predicting AI system behaviour may increase the risk of false and misleading representations of the AI-enabled products and services, and this might be challenging for less sophisticated businesses. This is particularly pertinent to IPA members who operate in the SME sector who are likely to fall within the "less sophisticated businesses" category.

Therefore, there needs to be a fair and equitable system to assign responsibility to the vendor that has provided a deficient, not fit-for-purpose component, which has contributed to a good or service not meeting the requirements of the ultimate consumer. This will go some way to removing barriers to remediation for consumers in the value chain including end users.

Existing ACL can be applied to allocate liability, at least as a framework. For example, manufacturers and suppliers can include liability clauses in contracts, specifying the extent of their responsibility in case of an AI failure. However, such clauses must comply with ACL provisions to be enforceable. With respect to product liability, manufacturers can be held liable for defects in goods, which may include AI products if they are deemed unsafe or malfunction due to design or manufacturing flaws. There may need to be deeming provisions of this type to establish clearer liability frameworks around accountability. However, this can be balanced with encouraging transparency about how AI systems work and their limitations, which can also help allocate liability. If users are adequately informed, they may bear some responsibility for misuse.

Manufacturers and suppliers may be able to obtain insurance to cover potential liabilities arising from the use of their AI products. This can help allocate financial risk and provide compensation to affected consumers, though affordable insurance coverage would depend on the insurance market.

IPA acknowledges that recent amendments to [Voluntary AI Safety Standards](#) and [Australia's AI Ethics Principles](#) are good starting points to assist consumers in managing risks to realise benefits. However, challenges remain for Australian consumers where AI-enabled goods or services are provided by jurisdictions where lesser requirements prevail. IPA also supports

embedding cyber security into software development practices through a co-designed voluntary code of practice for app store operators and app developers. We also acknowledge and support the Australian Government's approach to consider options for mandatory guardrails for AI in high-risk settings.

IPA is of the view that to achieve the intended objective of the DP's review of whether the ACL remains fit-for purpose in an evolving AI-enabled landscape to protect consumers and support the responsible users of AI by businesses:

- It is imperative that changes to the ACL are addressed quickly, as AI-enabled products and services are already widely used and embedded in each individual and business and yet unclear as to what their rights and obligations are with their use. Therefore, we urge the Government to expedite its reviews and consultations so the necessary legislative changes can be made, along with developments of education material for consumers and suppliers to understand and apply the changes.

- The regulation of AI needs a coordinated approach to minimise the potential AI-related consumer harms.

- In terms of the approach of the existing ACL, we acknowledge the ACL contains a combination of specific rules and principles-based standards that are technology neutral. Ideally this approach should be adopted to incorporate the protections of AI-enabled products and services. For instance, ACL prohibits deceptive or misleading conduct, which can be relevant in cases where AI products do not perform as advertised. If an AI service fails to deliver expected results due to misleading marketing, consumers may also have grounds for a claim. ACL protects consumers from unconscionable or unfair practices, which could be crucial in situations where AI products exploit users' vulnerabilities or lack transparency.

- However, we are not convinced this approach is practicable given the unique characteristics of AI augmenting the risks that result in the AI-enabled products and services being less "controllable" than traditional goods and services. Consideration should therefore be given to departing from the technology neutral approach – whilst legislation may be more principles-based, consideration could be given to more specific regulation for AI-enabled products and services, which can be more readily updated. A separate section for AI would make it easier for users of the legislation to understand and implement requirements.

It is instructive to refer to international developments, especially the EU Artificial Intelligence Act https://artificialintelligenceact.eu. We note that AI systems are categorised based on risk levels with commensurate obligations, with the majority of obligations falling on the developer for high-risk AI systems. The EU has recently updated the product liability rules to include the digital economy by extending the definition of "product" to digital manufacturing files and software. "Also, online platforms can be held liable for a defective product sold on their platform just like any other economic operators if they act like one". Refer to, www.consilium.europa.eu

In the United States, both at state and federal levels of government, frameworks are being developed. One example is the collaboration between the private and public sectors,

National Institute of Standards and Technology (NIST) which has developed a framework to better manage risks to individuals, organizations, and society associated with AI. "The NIST AI Risk Management Framework (AI RMF) is intended for voluntary use and to improve the ability to incorporate trustworthiness considerations into the design, development, use, and evaluation of AI products, services, and systems".   Refer to, AI Risk Management Framework | NIST

Other countries, including the United Kingdom, Canada and China have developed or are developing similar frameworks.

Countries worldwide are recognizing the need to address the unique challenges posed by AI. While some are developing comprehensive legal frameworks, others are updating existing laws to incorporate AI considerations, or both. As the technology and its uses continue to evolve, international collaboration may become essential to establish best practices and ensure consumer protection across borders. This is especially the case given that some jurisdictions, such as the EU, impose obligations on businesses operating or selling within its borders even if they are not legally domiciled in the EU.

Should you require additional information or have queries, please contact Vicki Stylianou on mob. 0419 942 733 or at vicki.stylianou@publicaccountants.org.au.

Yours faithfully

V. Styl

Vicki Stylianou
Group Executive Advocacy & Professional Standards
Institute of Public Accountants