Law Council
OF AUSTRALIA

Review of AI and the Australian Consumer Law

The Treasury

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Introduction

1. The Law Council of Australia welcomes the opportunity to respond to the Treasury's Discussion Paper regarding the Review of artificial intelligence (**AI**) and the Australian Consumer Law (**ACL**).

Preliminary comments

2. As stated in the Discussion Paper, this Review builds upon a previous consultation undertaken by the Department of Industry, Science and Resources (**DISR**) in June 2023 on safe and responsible AI in Australia.[1] The Review is also intended to complement the September 2024 DISR consultation on introducing mandatory guardrails for AI in high-risk settings.[2]

3. More broadly, this Review is taking place within the context of consideration as to how tools and services that incorporate AI should be regulated in Australia, including:

   - the Parliamentary Joint Committee on Human Rights' inquiry into Australian's Human Rights Framework, and its report of May 2024;[3]
   - the Privacy Act Review Report and the subsequent Government response, in addition to the first tranche of reforms to the *Privacy Act 1988* (Cth) introduced to Parliament in September 2024;[4]
   - recommendations arising from the inquiry into the opportunities and impacts for Australia arising out of the uptake of AI technologies, currently being undertaken by the Select Committee on Adopting Artificial Intelligence, due to report by 26 November 2024;[5] and
   - the Parliamentary Joint Committee on Intelligence and Security's inquiry into the Cyber Security Legislative Package 2024.[6]

4. We also anticipate that a variety of action items and recommendations will arise from the Copyright and Artificial Intelligence Reference Group, established by the Commonwealth Attorney-General in December 2023.[7]

5. At present, two important precursor questions remain unanswered:

   (i) How should AI be defined for the purpose of regulation (i.e., precisely what will be regulated)?

   (ii) Should any such regulation occur by way of standalone legislation, or by integration into existing legislative frameworks?

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[1] Department of Industry, Science and Resources, *Supporting responsible AI: Discussion paper* (Web Page, 2024).
[2] Department of Industry, Science and Resources, *Introducing mandatory guardrails for AI in high-risk settings: proposals paper* (Web Page, 2024).
[3] Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (Report, May 2024)
[4] Attorney-General's Department, *Privacy Act Review Report* (February 2023); Commonwealth of Australia, *Government Response: Privacy Act Review Report* (September 2023); Privacy and Other Legislation Amendment Bill 2024 (Cth);
[5] Select Committee on Adopting Artificial Intelligence (Web Page, 2024).
[6] Parliamentary Joint Committee on Intelligence and Security, *Cyber Security Legislative Package 2024* (Web Page, 2024).
[7] Commonwealth Attorney-General's Department, *Copyright and Artificial Intelligence Reference Group* (Web Page, 2024).

6. The Discussion Paper does not engage with the definition question, and the key terminology in the document does not adequately assist. For instance, 'AI-enabled goods and services' are defined as 'goods and services which, when made available to consumers, involve a consumer directly interacting with an AI system'.[8] The Discussion Paper then goes on to define 'AI system' as:

> *A machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptiveness after deployment.*
>
> *The tools or techniques AI systems can employ vary widely and may include: machine learning, computer vision, natural language processing, expert systems and speech recognition.*[9]

7. This definition is potentially broad, and refers to systems that have been in existence for some time, such as machine learning. Other definitions in the Discussion Paper include 'AI model', 'Generative AI', and 'Large language model',[10] but it is not clear what technologies are of particular concern to the Treasury.

8. Moreover, we note that the Discussion Paper is predicated on the integrative approach to regulation being taken. We query the basis for that approach, given that the DISR has only recently concluded its mandatory guardrails consultation, which posed three options for implementation, namely:

   - **Option 1:** Adapting existing regulatory frameworks to include the proposed mandatory guardrails;
   - **Option 2 (*Preferred by the Law Council*):**[11] Introducing framework legislation, with associated amendments to existing legislation; or
   - **Option 3:** A whole-of-economy approach, through the introduction of a new AI-specific Act.[12]

9. We suggest that, until principle-based decisions are made on both of these precursor questions at a whole-of-government level, the 11 high-level questions posed in the Discussion Paper cannot be meaningfully answered. Our responses below are, therefore, subject to that limitation.

General position

10. The rapid advancement of AI technology presents significant opportunities and unique challenges in the consumer market.[13] The use and adoption of AI tools and services, while becoming widespread, is still in its infancy in the mass market. In Australia, the implications of the emergence of AI-enabled goods and services—particularly in sensitive areas, such as financial transactions—are still not fully

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[8] The Treasury, *Review of AI and the Australian Consumer Law* (Discussion Paper, October 2024) 17.
[9] Ibid.
[10] Ibid.
[11] Law Council of Australia, *Introducing mandatory guardrails for AI in high-risk settings: Proposals Paper* (Submission to the Department of Industry, Science and Resources, 9 October 2024) 16.
[12] Department of Industry, Science and Resources, *Introducing mandatory guardrails for AI in high-risk settings* (Proposals Paper, September 2024) 46-51.
[13] See Thijs Broekheizen et al., 'AI for managing open innovation: Opportunities, challenges, and a research agenda' (2023), *Journal of Business Research* 167(2).

understood.[14] For example, media reports in recent years indicate that banks are starting to utilise AI to assess loan applications,[15] raising questions about the transparency, fairness, and reliability of AI decision-making in financial services, as well as potential risks to consumer protection.

11. We note that the consumer protection role of the Australian Competition and Consumer Commission (**ACCC**) includes enforcing the ACL[16] to ensure that consumers and small businesses are protected from misleading and deceptive conduct, unconscionable conduct, unfair terms and conditions and unsafe products, and promoting fair trading.

12. However, as acknowledged by the ACCC in its fifth interim report to its Digital Platform Services Inquiry in November 2022, existing laws and enforcement models are not necessarily equipped to adequately address conduct that is harmful to consumers and businesses, when the conduct takes place in markets which include digital platform services.[17] In that report, the ACCC supported the introduction of a broad unfair trading practices prohibition.

13. In October 2024, the Government announced that it intends to prohibit unfair trading practices,[18] and we note that, on 15 November 2024, the Treasury released a Consultation Paper on the design of the prohibition.[19] This proposed reform, together with the other measures currently being considered to address a range of potential harms arising from AI technologies, should be taken into account in the course of this Review.

14. Concerns have been expressed to us that the current ACL provisions may not regulate AI effectively due to definitional uncertainty—for example, whether an AI-enabled 'good' or 'service' falls within the definitions of these terms under the ACL. While early judicial consideration may suggest that AI tools and services will fall within the scope of the existing provisions of the ACL,[20] there is still uncertainty. Notably, such definitional uncertainty is not unique to AI-enabled goods or services—definitional uncertainty also commonly arises in respect of other digital products, as well as traditional products involving multiple components (e.g., a mix of goods and services). Once definitional uncertainties are navigated (that is, does the supply involve goods or services, or both), the ACL contains a range of remedies of which consumers and businesses can avail themselves.

15. In addition to these challenges, we have received feedback raising concerns about an inconsistency between regulators, and an absence of unified guidelines to be observed by businesses offering AI-enabled goods and services.

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[14] See Lauren Solomon and Professor Nicholas Davis, *The State of AI Governance in Australia*, The University of Sydney Human Technology Institute (May 2023).
[15] See James Eyes, 'Banks warned using AI in loan assessments could "awaken a zombie"', *Australian Financial Review* (Online, 15 June 2021); Ron Shevlin, 'Pretty Soon, Your Loan Application Will Be Reviewed By A Robot', *Forbes* (16 August 2024).
[16] *Competition and Consumer Act 2010* (Cth) sch 2 ('Australian Consumer Law').
[17] Australian Competition and Consumer Commission ('ACCC'), *Digital Platform Services Inquiry* (Interim Report No. 5—Regulatory Reform, September 2022) 51.
[18] The Hon Anthony Albanese MP, the Hon Dr Jim Chalmers MP, and the Hon Stephen Jones MP, *Albanese Government to stop the rip offs from unfair trading practices* (Media Release, 16 October 2024).
[19] The Treasury, *Unfair trading practices—supplementary consultation paper* (Web Page, 15 November 2024).
[20] See *Competition and Consumer Commission v Master Wealth Control Pty Ltd (Penalty)* [2024] FCA 795 (Jackman J) [78]. Note that Jackman J's decision on this issue recalls existing principles requiring independent assessment of information or advice to be relied on by directors (see *Corporations Act 2001 (Cth)* s 189).

16. The Law Council has previously indicated a preference for a 'multi-faceted' approach to the regulation of AI, based on the following elements:

- an initial focus on the regulation of high-risk AI technology and applications;
- a strengthened and precautionary approach to AI regulation, where there is evidence that existing laws and regulations are insufficient to address the issues and harms arising;
- comprehensive regulatory reform to ensure that the use of automated decision making, including by the Australian Government, is transparent, capable of review, and consistent with administrative law principles; and
- consideration of the regulatory models adopted by other jurisdictions to determine an optimal and bespoke approach for Australia that reflects the nuances of Australia's pre-existing constitutional and regulatory framework, and unique local market environment.[21]

17. On that basis, we consider that reforms to the ACL—implementing provisions that are specifically targeted at the harms that may arise through the application of AI—may be needed to better protect consumers and businesses from harms that arise from the use of AI, but only where such harms are identified, and the current provisions of the ACL (and the proposed unfair trading practices amendments) are not capable of addressing such harms. It is important to emphasise that the ACL should remain confined to addressing real consumer harms, and any proposed amendments to the ACL must, therefore, have regard to this limited scope.

18. It would not be appropriate to import other policy objectives into the ACL. While there are genuine concerns about the broader implications of AI-enabled goods and services (such as misinformation, discrimination, and bias), there are other statutory regimes that more appropriately can address these harms.

19. Ultimately, any legislative response regulating AI technologies, including under the ACL, should be specific to identified harms arising from emerging uses of those technologies, particularly high-risk technology and applications that the current provisions of the ACL are not capable of addressing. However, caution must be exercised when targeting specific reforms at AI-enabled goods and services, given that entities may seek to take advantage of any gaps that arise.

20. A balance must continue to be struck between implementing legislation to protect consumers against harm arising from existing uses of these emerging technologies, and also protecting against the harm to society that will occur if consumers' innovative or creative use of those same technologies is restricted.

[21] See Law Council of Australia, *Safe and Responsible AI in Australia* (Submission to the Department of Industry, Science and Resources, 17 August 2023) 11; *Introducing mandatory guardrails for AI in high-risk settings: Proposals Paper* (Submission to the Department of Industry, Science and Resources, 9 October 2024) 15.

Managing risks to realise benefits

Question 1: How well adapted is the ACL to managing the risks of consumer harm of AI-enabled goods and services now and into the future?

21. The Discussion Paper states that there are competing views regarding the adequacy of the ACL to protect consumers from unfair and unsafe business practices when buying AI-enabled goods and services.[22]

22. We acknowledge that the ACL is principles-based and technology-neutral and, therefore, is capable of encompassing AI-enabled goods and services in a range of contexts. We also recognise that technology neutrality is an important guiding principle in developing regulatory frameworks with sufficient flexibility to adapt to rapid change without stifling innovation.

23. At present, there is no clear evidence that the ACL will not be able to be applied in its present form, or amended to adapt its application, to the new technologies, even if there are clear potential complexities, including:

    - the blurred distinction between 'goods' and 'services', in a context where different remedies are available under consumer guarantees, depending on whether the item supplied is a good or service;
    - questions of causation for harm following use of smart devices that have multiple interlocking digital components, including some that are capable of acting autonomously (entirely or in part);
    - questions of how to identify which parties are responsible for harm resulting from AI-generated content. In this regard, if there is found to be uncertainty, amendments to ACL definitions of 'supplier'/'supply' and 'manufacturer'/'manufacture' could expressly incorporate and adopt (with any necessary modification) terms such as 'deployer'' and 'developer', as these terms are intended to be used in the proposed mandatory guardrails for AI in high-risk settings;[23]
    - questions about who (if anyone, for the purpose of the ACL) is responsible for false or misleading representations generated by AI are likely to be more complex; and
    - the 'black box' nature of AI decision making, which could make providing evidence in support of—or opposition to—a proposition about an AI tool or service challenging.

24. On the other hand, AI decision-making, and the code underpinning it, may be more readily interrogated by regulators than human decision-making involving products supplied at scale, which involves a degree of judgment and decision-making freedom.

25. We welcome the courts working through these issues, as they arise, and note that early judicial consideration may suggest that AI tools and services will fall within the scope of the existing provisions of the ACL.[24] However, we have received feedback

[22] The Treasury, *Review of AI and the Australian Consumer Law* (Discussion Paper, October 2024) 5-7.
[23] Department of Industry, Science and Resources, *Safe and responsible AI in Australia: Proposals paper for introducing mandatory guardrails for AI in high risk settings* (Proposals Paper, September 2024).
[24] See *Competition and Consumer Commission v Master Wealth Control Pty Ltd (Penalty)* [2024] FCA 795 (Jackman J) [78]. Note that Jackman J's decision on this issue recalls existing principles requiring

from some of our membership that, in the interim, the ACL is not proving to be well-suited to managing the risks of consumer harm currently associated with AI, and that, unless amendments are made, the ACL will not be capable of managing the same into the future.

26. Others in our membership hold a contrary view—that the ACL *is* capable of managing the risks of consumer harm currently associated with AI, just as it has been demonstrated to be capable of managing the risks of consumer harm arising from other complex technologies that have emerged over the decades that the ACL (and its predecessors) have been in place.

27. Given the unprecedented capacity for AI to transform the consumer landscape, a recalibration of consumer protection laws may be warranted to address any emerging gaps that the ACL does not currently address. Where there is uncertainty about the potential application of the ACL to AI-enabled goods and services, education and regulatory guidance plays an important role.

28. Furthermore, the absence of clear regulations articulating what constitutes the responsible use of AI, and businesses' obligations regarding AI, means that industries are largely bound only by their internal policies that are largely voluntary and rely only on general regulatory frameworks.[25] There is also an absence of guidance from regulators, including the ACCC, about the transparency required from corporations that offer AI-enabled goods and services.

29. This lack of clarity limits consumers' choices, compelling them to engage with these offerings without fully understanding their implications. As a result, serious concerns arise about consumer autonomy and informed decision making.[26]

30. Relatedly, there is a significant disconnect between how consumers think their data (including their personal information) should be, or is being, handled by businesses, and how it is actually handled.[27] In particular, consumers are often unaware that their data is being used to train—and subsequently deploy—AI for commercial purposes.

31. In our October 2024 submission to the DISR in response to its Proposals Paper about mandatory guardrails for AI in high-risk settings, we expressed the view that:

> *On balance, we do not consider a comprehensive AI-specific Act is required at this early stage. However, the gradual introduction of regulations that address high-risk AI and applications, having social utility, will be helpful in minimising risks, both known and unknown.*[28]

32. We maintain the view that the gradual introduction of regulations, across various sectors, is appropriate. Consideration of additional ACL safeguards should also be cognisant of existing and developing frameworks. For instance, expanded regulation of commercial practices that misuse personal or sensitive data collected by AI-integrated products may transect existing privacy and cybersecurity legislation.

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independent assessment of information or advice to be relied on by directors (see *Corporations Act 2001 (Cth)* s 189).

[25] See Law Council of Australia, *Safe and Responsible AI in Australia* (Submission to the Department of Industry, Science and Resources, 17 August 2023).

[26] See Francina Cantatore and Brenda Marshall, 'Safeguarding Consumer Rights in a Technology Driven Marketplace' (2021), *Adelaide Law Review* 42(2).

[27] ACCC, *Digital Platforms Inquiry* (Final Report, June 2019) 3.

[28] Law Council of Australia, *Introducing mandatory guardrails for AI in high-risk settings: Proposals Paper* (Submission to the Department of Industry, Science and Resources, 9 October 2024) 16.

Moreover, there are various potentially overlapping legislation reviews, and legislative reform proposals, currently underway, including:

- the ACCC Digital Platform Services Inquiry 2020–2025, particularly Interim Report No. 5 that recommended an economy-wide prohibition on unfair trading practices and strengthening of the unfair contract terms laws,[29] to which the Government has provided in-principle support;[30]
- the Treasury's October 2024 consultation on Consumer Guarantees and Supplier Indemnification under the ACL;[31]
- the Treasury's November 2024 consultation on Unfair Trading Practices;[32] and
- various bills currently before the Parliament, including:
  - the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024, introduced into the Parliament on 12 September 2024;
  - the Privacy and Other Legislation Amendment Bill 2024, introduced into the Parliament on 12 September 2024; and
  - the Cybersecurity Legislative Package, comprising of the Cyber Security Bill 2024, the Intelligence Services and Other Legislation Amendment (Cyber Security) Bill 2024, and the Security of Critical Infrastructure and Other Legislation Amendment (Enhanced Response and Prevention) Bill 2024, introduced into the Parliament on 9 October 2024.

Question 2: Does the ACL protect consumers of AI-enabled goods and services to the same extent as consumers of traditional goods and services covered by the ACL?

33. As we articulated in our 2023 submission to the DISR on safe and responsible AI in Australia, there are currently general and specific provisions in the ACL that provide mechanisms to protect businesses and consumers that appear to be capable of applying to AI-enabled goods and services, including the following:[33]

    (a) Section 18 of the ACL prohibits businesses from engaging in misleading or deceptive conduct in trade or commerce. Additionally, sections 29 and 33 to 36 prohibit businesses from engaging in various forms of false, misleading, or deceptive conduct in connection with the supply of goods or services. The prohibitions on misleading conduct have been successfully used to pursue misleading algorithmic decision making.[34]

    (b) Sections 20 and 21 of the ACL prohibit businesses from engaging in unconscionable conduct when dealing with other businesses or their customers. Unconscionable conduct means conduct that is so harsh it goes against good conscience.

[29] ACCC, *Digital Platform Services Inquiry* (Interim Report No. 5—Regulatory Reform, September 2022) 64 [Recommendation 1].
[30] The Treasury, *Government Response to ACCC Digital Platform Services Inquiry* (December 2023) 1.
[31] The Treasury, *Consumer Guarantees and Supplier Indemnification under Consumer Law* (Web Page, 2024).
[32] The Treasury, *Unfair trading practices—supplementary consultation paper* (Web Page, 15 November 2024).
[33] Law Council of Australia, *Safe and Responsible AI in Australia* (Submission to the Department of Industry, Science and Resources, 17 August 2023) 31-33.
[34] See, e.g., *Australian Competition and Consumer Commission v Trivago N.V.* [2020] FCA 16 (20 January 2020).

(c) Section 23 of the ACL provides that a term of a standard form consumer contract or small business contract that is unfair is void. Since November 2023, amendments to the unfair contract terms regime have made the use of unfair contract terms illegal and introduced significant penalties for breach of these provisions. These provisions could apply to terms and conditions on which AI applications are offered to consumers or small businesses, preventing terms that are unfair (such as limitations on liability or exclusion of liability for losses caused or contributed by the provider's negligence or recklessness, or opaque requirements to consent to data use/disclosure that may cause detriment to the user).

(d) Sections 51 to 63 of the ACL contain consumer guarantees that apply to the supply of goods and services. These provisions would apply to AI applications to the extent they are goods or services supplied to a consumer in Australia. Relevantly:

(i) the definition of 'goods' in subsection 2(1) includes 'computer software';[35]

(ii) the definition of 'services' in subsection 2(1) includes any 'benefits … that are, or are to be, provided, granted or conferred in trade or commerce';

(iii) under section 3, a person is a consumer if they have acquired goods for less than $100,000 (or a greater amount prescribed) or the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption;

(iv) the consumer guarantees relating to acceptable quality, fitness for purpose, supply of goods by description and due care and skill would appear capable of applying to at least some AI applications; and

(v) as noted in the Discussion Paper,[36] the ACL contains various remedies for breach of the consumer guarantees.

(e) Provisions of Part 3-3 of the ACL (relating to safety of consumer goods and product related services) would also appear to be capable of applying to some AI applications. 'Consumer goods' are goods either intended to be used, or of a kind likely to be used, for personal, domestic or household use or consumption (see subsection 2(1) of the ACL).

(f) Part 3-4 of the ACL (relating to information standards) would also appear to be capable of applying to some AI applications. This Part is not limited to consumer goods or services supplied to consumers. Section 134 empowers the Minister to create information standards which can require the provision of specified information. This Part outlines the consequences of not adhering to such standards.

[35] The application of the ACL to downloadable computer software was considered in *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196.
[36] The Treasury, *Review of AI and the Australian Consumer Law* (Discussion Paper, October 2024) 11-14.

(g) Part 3-5 of the ACL (relating to liability of manufacturers for goods with safety defects) could also be applicable in some circumstances—for example, if the AI application in question is a 'good' and it has a 'safety defect' that causes injury to an individual. 'Manufacturer' has a broad meaning under section 7 of the ACL, which would appear to be capable of applying to suppliers and developers of AI applications. Goods have a safety defect if their safety is not such as persons generally are entitled to expect (section 9 of the ACL). However, it is not a requirement that goods are entirely free from risk.

34. Despite the technology-neutral language of the ACL and its principles-based approach, we acknowledge that some of these protections may not be applicable in all instances, given the rapid evolution of AI technology. Specifically, as new AI capabilities emerge, traditional and existing consumer protections may not fully address specific risks, such as bias in AI algorithms or unforeseen consequences of AI decision-making. For example, we have received feedback that 'software' should be replaced with a more appropriate term (e.g., 'software platform') to recognise that internet browsers can act as a client platform for web applications, especially in the consumer space.

35. Some features of AI-enabled goods and services—including opacity, autonomous behaviour, and complexity pose challenges to determining where responsibility for a breach of the ACL should ultimately lie, and what the applicable enforcement mechanisms are.

36. We have received feedback that the characteristics, outlined below, are contributing to the difficulty in applying the ACL to AI systems presently. This difficulty could result in less protection to consumers of these products, compared with the protections enjoyed by consumers of traditional goods and services. For example, it may be more difficult for consumers to meet the burden of proof required to commence an action under the ACL.

37. On the other hand, our Business Law Section's (**BLS**) Competition and Consumer Committee is of the view that the technology-neutral, principles-based ACL provisions are capable of applying to these characteristics, and considers that if consumers or small businesses find it difficult to apply the ACL to AI-enabled goods or services, the focus should be on education (as outlined below).

Complexity of ownership and liability

38. AI systems often operate with levels of autonomy that traditional products and services do not have. This raises unique legal questions about accountability when AI-generated outputs result in discriminatory results, or consumer dissatisfaction. However, as the Air Canada case that is outlined in the Discussion Paper shows, where a business chooses to use AI technology to perform some of its functions, that entity remains responsible for the outcomes of that use of technology.[37]

39. The various components of digital goods, such as hardware and digital content, may be sold separately. AI-powered technologies may also be offered as intangible services alone.

[37] The Treasury, *Review of AI and the Australian Consumer Law* (Discussion Paper, October 2024) 7; Ashley Belanger, 'Air Canada must honor refund policy invented by airline's chatbot', Ars Technica (Online, 17 February 2024).

40. Whether an AI system is characterised as a product or service, numerous parties may be involved in its production and supply. Multi-layered and time-limited contractual and licensing arrangements create further complexity and risk.

41. These factors can impede the tracing of the source of a defect or malfunction, and the attribution of liability. Suppliers and manufacturers may need to invest in accountability features within their products, which could lead to a re-evaluation of design priorities and cost structures that are highly relevant to the choices of suppliers and manufacturers today.

42. If the product or service fails, consumers may believe that they are required to interact with various parties in the supply chain, including merchants, hardware manufacturers, software designers, and internet service providers. However, under the consumer guarantees, the consumer needs only to deal with the supplier of the AI-enabled good or service. Transparency as to the identity of the supplier is already covered by the current ACL provisions.

43. Engagement with a business, and the ability to exercise consumer guarantee rights, may be further frustrated where AI-enabled service chatbots have been deployed as the consumer interface, and connection with the appropriate human representative cannot be made. We submit that consumers should be able to request a contact telephone number in such circumstances. This issue is not unique to AI-enabled services, and the Government's October 2024 announcement that it intends to take action where a business makes it difficult for a consumer to contact them, when they have a product or service, would appear to address this issue.

Interconnected and dynamic nature of AI systems

44. Because of the ability of AI systems to self-learn and develop, the concepts of 'defect' and 'fault' must now be considered in an environment that extends beyond the point at which the product is placed on the market, and is within the direct control of the manufacturer and supplier.

45. In addition, AI-enabled goods and services may be dependent on software upgrades for continued functionality, effectively tying the consumer to the provider in an ongoing relationship. A particular product may also rely upon add-on components that are exclusive to the provider.

46. Unpredictability of performance, following such upgrades, makes it difficult to identify fault, as it is unclear how far the concept of defect might extend along the supply chain following purchase by a consumer.

47. There is also a concern that the current defences under the ACL that are available to manufacturers may not be appropriate for AI-enabled goods and services. For instance, the defence that the safety defect did not exist at the time that a good was supplied reflects a traditional position that the manufacturers retain little or no ongoing control over the goods that they supply, which is not always the case for AI-enabled goods and services. Nonetheless, we acknowledge that this is an issue that arises today in respect of software and software upgrades, for example, in online gaming products that consumers use on an ongoing basis and which is dealt with effectively under the current ACL provisions.[38]

[38] See, for example, *Australian Competition and Consumer Commission (ACCC) v Sony Interactive Entertainment Network Europe Ltd* (2020) 381 ALR 531; *Australian Competition and Consumer Commission (ACCC) v Valve Corp (No 3)* (2016) 337 ALR 647.

48. The unexpected behaviour and outputs of some AI-enabled products also presents safety risks that are heightened for vulnerable consumers. We comment further on these issues in response to Question 6.

Question 3: Does the ACL impact the choices of suppliers and manufacturers of AI-enabled goods and services differently to other suppliers and manufacturers?

49. We consider that the ACL does impact the choices of suppliers and manufacturers of AI-enabled goods and services, and it should do so, due to deterrent penalties associated with breaches of the ACL provisions of unconscionable conduct, misleading and deceptive conduct, and unfair contract terms.

50. Automated or algorithmic decision-making and data-driven inferencing present advantages in their ability to enhance efficiency, personalise product and service delivery, and streamline processes such as applications, payments, and complaints. However, the invisibility, information asymmetry, and opacity surrounding these processes may create—and in some cases, exacerbate—vulnerabilities for consumers, making them susceptible to exploitation through unfair practices, and posing new challenges for consumer protection.[39]

51. On a cost-benefit analysis, consumers and businesses who are aware of their rights under the ACL are more likely to engage suppliers and manufacturers who are able to provide clarification on the protection—or specific redress—available for the consumers, as opposed to suppliers who are not able to clarify their processes.

52. We caution that, while the scope of the ACL to regulate AI-enabled goods and services remains uncertain, and given the data-driven nature of AI, some developers may seek to take advantage of new and evolving opportunities to manipulate data for commercial gain. We also note that the current ACL provisions have been proven to be capable of applying to misleading algorithmic outputs, with substantial penalties imposed as a result.[40]

53. We note that commercial conduct designed to influence consumer behaviour and exploit psychological biases—known as 'choice architecture'— can be harmful if it influences consumers to:

> *… purchase unneeded or unsuitable products, spend more than they want to, receive poor-value items or service, choose an inferior seller or platform, or spend less time or effort searching for alternatives.*[41]

54. In a regulatory environment if there is doubt that AI-enabled goods and services are caught by the ACL, and because of the potential for AI to amplify these practices, it is easier to opportunistically 'distort consumers' free and well-informed decision-making processes',[42] for instance, when presented with false impressions or

[39] Kayleen Manwaring, 'Emerging information technologies: challenges for consumers' (2017), *Oxford University Commonwealth Law Journal* 17, 265.
[40] See, for example *Trivago N.V. v Australian Competition and Consumer Commission* [2020] FCAFC 185; *Australian Competition and Consumer Commission (ACCC) v Uber BV* [2022] FCA 1466; *Australian Competition and Consumer Commission v iSelect Ltd* [2020] FCA 1523.
[41] UK Competition & Markets Authority, *Evidence review of Online Choice Architecture and consumer and competition harm* (Companion Paper, 5 April 2022).
[42] Christof Koolen, 'Consumer Protection in the Age of Artificial Intelligence: Breaking Down the Silo Mentality Between Consumer, Competition, and Data' (2023), *European Review of Private Law* 2(3) 448.

deceptive interface designs. These matters are discussed further below, in response to Question 6.

55. Some of our members have expressed concerns that the ACL does not currently present an effective barrier to commercial practices, such as the development and supply of manipulative AI that is potentially harmful to consumers. We also note the broader economic impact of unregulated manipulative AI, which has been said to create market inefficiencies, requiring consumers to deploy resources they otherwise would not.[43] However, we note that manipulative choice architecture, and other forms of dark patterns, are intended to be captured by the proposed unfair trading practices prohibition.[44]

Question 4: Do the current or anticipated uses of AI-enabled goods and services present risks that reveal gaps in consumer protection under the ACL?

56. The current or anticipated uses of AI-enabled goods and services present risks that may reveal gaps in consumer protection under the ACL. These risks arise from the unique characteristics of AI technologies and their impact on consumer rights, and we refer to our responses above in that respect.

57. AI systems often operate and make decisions in ways that are not easily understood by consumers, and to some extent, suppliers. This complexity makes it challenging for consumers to understand how a product or service was created, and how it works. Some of our members are concerned that the ACL's requirement for transparency may not fully encompass the intricacies of AI algorithms, leaving consumers vulnerable to misleading representations or unexpected outcomes.

58. Other members, including members of our BLS Competition and Consumer Committee, consider that the Court's decisions in matters concerning representations to consumers based on algorithms demonstrate that the ACL is capable of addressing these concerns. They are of the view that, to the extent that consumers or suppliers do not understand the complexity of AI-enabled goods and services, and the application of the ACL, this is a matter best addressed (at least initially) by education.

59. In addition, as mentioned above, the autonomous nature of AI may introduce difficulties in determining liability when harm occurs.[45] Traditional consumer protection laws are designed with clear lines of accountability, but when an AI system seemingly makes decisions independently, it complicates the identification of responsible parties. This has the potential to leave consumers without remedy if they experience harm or dissatisfaction from an AI-enabled product.

60. We also note that:

- many AI systems rely on extensive data collection and processing, raising significant concerns about consumer privacy and data security. While the ACL provides some protections, it may not adequately address the specific risks associated with data misuse, especially given the evolving regulatory landscape around data privacy in Australia;

[43] Tegan Cohen, 'Regulating Manipulative Artificial Intelligence' (2023) *Scripted* 20(1) 236.
[44] The Treasury, *Unfair trading practices—supplementary consultation paper* (Web Page, 15 November 2024).
[45] See Digital Platform Regulators Forum, *Safe and responsible AI in Australia* (Submission to the Department of Industry, Science and Resources, 11 September 2023) [4.14].

- the ACL does not regulate privacy or data use, and we are not submitting that it should. However, ACL protections and data protection laws, particularly disclosure requirements under the Privacy Act, need clearer alignment to enable consumers to make informed choices and to ensure comprehensive consumer safeguards;[46] and
- AI systems can inadvertently perpetuate, or amplify, biases present in their training data, leading to discriminatory outcomes.[47] The ACL is capable of addressing algorithmic bias, as demonstrated by the Court decisions referred to above. However, if consumers do not understand this, because the ACL does not explicitly address the implications of algorithmic bias, consumers are potentially exposed to unfair treatment without being aware that there is appropriate legal recourse.

61. Further, we have received feedback that the exclusion of financial products from the ACL means that different regulatory bodies, such as the ACCC and the Australian Securities and Investments Commission (**ASIC**), may construe regulation differently, potentially leading to inconsistent consumer protection standards. This fragmentation can create confusion for consumers and hinder effective enforcement.

62. In this respect, the Law Institute of Victoria (**LIV**) supports the creation of a 'one stop shop' for consumer and financial services regulation in respect of AI. The LIV is of the view that the emergence of AI provides an opportunity for a coordinated approach to benefit consumers by one dedicated AI regulator in this domain. Whilst the Law Council does not have a settled view on the preferred regulatory model, we would be pleased to consult our membership further on this matter, should that be of assistance to the Treasury.

Addressing uncertainty

Question 5: Is the application of the ACL to AI-enabled goods and services uncertain? If so, how and what impact does this uncertainty have on consumers, manufacturers and suppliers?

63. As has been described throughout this submission, there is some uncertainty about the application of the ACL to AI-enabled goods and services. The sophisticated algorithms that often underpin these products can be difficult even for industry experts to appreciate. This complexity raises questions about how existing ACL provisions on transparency, fairness, and accountability apply to these goods and services.

64. In addition, when an AI decision adversely affects a consumer, such as denying a loan or providing poor advice, the question of accountability can be challenging. Even if they have been notified that an AI system is being used, consumers may struggle to identify who is responsible for these decisions, creating uncertainty regarding their rights under the ACL or through ASIC-enforced instruments. In principle, this is no different to understanding who is responsible for decisions in the traditional products setting, and could be addressed—at least initially—through

[46] See Law Council of Australia, *Government response to the Privacy Act Review Report* (Submission to the Attorney-General's Department, 13 April 2023); *Privacy and Other Legislation Amendment Bill 2024* (Submission to the Senate Legal and Constitutional Affairs Legislation Committee, 22 October 2024).
[47] See Law Council of Australia, *Safe and Responsible AI in Australia* (Submission to the Department of Industry, Science and Resources, 17 August 2023) 29-30; *Positioning Australia as a leader in digital economy regulation—Automated decision making and AI regulation—Issues Paper* (Submission to the Department of the Prime Minister and Cabinet, 3 June 2022).

education about the applicability of the existing ACL provisions, and by way of the proposed unfair trading practices reforms, should they be implemented.

65. As consumers become more familiar with AI, their expectations regarding transparency and fairness in financial products may evolve. The ACL cases and guidance do not yet fully capture these expectations, leading to uncertainty about how companies should adapt their practices.

Impacts on stakeholders

Consumers

66. The uncertainty in the application of the ACL could leave consumers vulnerable. They may not fully understand their rights when interacting with AI-driven products, especially regarding usage of their personal data, algorithmic decision making, and the potential for bias. This lack of clarity can erode trust and hinder consumers from making informed choices.

Manufacturers and suppliers

67. For financial institutions and technology providers, ambiguity surrounding the applicability of ACL to AI-enabled goods and services could complicate product development and compliance efforts.

68. Companies may face increased legal risks and liability without clear guidelines on how to ensure their AI systems comply with consumer protection laws. This uncertainty may lead to a cautious approach in deploying innovative AI solutions, potentially stifling competition and growth in the sector.

Market dynamics

69. Beyond its impact on consumers, manufacturers, and suppliers, the uncertainty surrounding the application of the ACL to AI in financial products may disrupt market dynamics. If consumers lack confidence in AI-driven offerings due to unclear protections, they may prefer traditional financial products, thereby hindering the adoption of more innovative solutions. Manufacturers may also limit their AI offerings, fearing regulatory repercussions, thereby restricting technological innovation and advancement.

Question 6: How might uncertainty in relation to AI-enabled goods and services be addressed within Australia's consumer protection framework?

70. In the time available to respond to this consultation, we have not had sufficient opportunity to meaningfully consult our membership and reach a settled Law Council view as to a preferred pathway to address the potential gaps and uncertainty in the application of the ACL to AI-enabled goods and product-related services. Nonetheless, we have outlined several potential measures below.

71. The Law Council does not purport to express a preference with respect to these proposals. Rather, we raise them for the Treasury's consideration, and we would be pleased to subsequently engage with our membership about the merits and implications of any of these proposals if that would be of use to the Treasury.

Amendments to the ACL and enhancement of regulatory oversight

72. The rapid advancement of technology often outpaces the ability of existing laws to adapt, creating a 'regulatory lag' that can leave consumers inadequately protected against novel risks. For instance, as AI capabilities evolve, the types of consumer harm may also change, requiring ongoing legislative updates that the ACL may struggle to keep pace with.

73. The Government should consider whether there is a need to amend the ACL by tailoring specific legislative provisions, and accompanying regulations, to address the unique challenges posed by AI-enabled goods and services. This could include more stringent safety assessments, transparency requirements, and accountability measures specific to AI, building upon the protections that are currently embedded in the ACL, if there are clearly demonstrated harms that the current ACL provisions (and the proposed unfair trading practices amendments) are not capable of addressing.

74. We reiterate that the ACL should remain confined to addressing real consumer harms. Any proposed amendments to the ACL must have regard to this limited scope. Measures that seek to target other potential harms caused by AI should occur by way of changes to other statutory regimes, rather than being imported into the ACL.

75. Further to this, the ACCC and other relevant bodies, such as ASIC (as it has in respect to credit regulation) could issue detailed guidelines to manufacturers, suppliers, and consumers, that explain how existing and new laws apply to AI-enabled goods and services. This measure could assist stakeholders to understand their rights and responsibilities, reducing the ambiguity that presently exists.

76. In issuing regulatory guidelines, the ACCC and other relevant bodies (or, as the LIV has suggested, a standalone regulator) could then also establish and oversee clear frameworks for accountability in AI decision-making. This approach could help to proactively identify and address potential biases or malfunctions.

77. The drafting of any such guidelines should occur by the Government (and its various agencies) engaging with AI experts, consumer advocates, and industry stakeholders, to ensure that this development can enhance the effectiveness of applicable legislation, including the ACL. This collaborative approach would also assist in identifying emerging risks and informing regulatory responses.

Mandatory product safety standards

78. As stated in the Discussion Paper, there are currently no mandatory AI-specific safety standards for consumer goods or services, and the Treasury is assessing whether current safety standards (including the Voluntary AI Safety Standard[48]) effectively guarantee the safe and responsible use of AI-enabled goods and services.[49]

79. The consumer protection regime would benefit from the introduction of product safety standards for AI-enabled items including safety-by-design principles and clear instructions and warnings. These measures would be advantageous, given that the

[48] Department of Industry, Science and Resources, *Voluntary AI Safety Standard* (Web Page, September 2024).
[49] The Treasury, *Review of AI and the Australian Consumer Law* (Discussion Paper, October 2024) 8.

incorporation of AI into consumer products can affect safety by way of a software malfunction or other data input error that might cause a malfunction.

80. One area of growing risk, where mandatory product safety standards may substantially mitigate consumer harm, is the rise in exploitative use of technology against victim-survivors of domestic and family violence. For example, safety standards could prescribe clear and simple settings explanations, product warnings, and functionality to locally override remote activation.[50]

81. It is timely that the ACCC has announced emerging technology as one of its product safety priorities for 2024–25.[51] We consider that the ACCC's work on this priority area be considered during the Government's review of AI and the ACL.

Prohibition on unfair trading practices

82. As we noted earlier in our submission, the Government has provided in-principle support to a new economy-wide unfair trading practices prohibition and the strengthening of unfair contract terms laws, as recommended by the ACCC,[52] and the Treasury's consultation on the design of the prohibition on unfair trading practices has commenced. This proposal is intended to capture harmful conduct and practices that might otherwise fall outside of the prohibition on misleading and deceptive conduct under section 18 of the ACL, and other ACL prohibitions.

83. Whilst we observe that the ACCC has had considerable success enforcing breaches of the misleading conduct prohibition by online businesses that have utilised obscure data collection and algorithmic practices,[53] we understand that concerns have been raised about the ACL's ability to capture unfair or manipulative practices, such as the use of dark patterns.[54] AI-powered augmentation of dark patterns could increase the potential for undue influence of consumer decision-making..

Rebuttable presumption as to legal liability

84. In its 2021 Final Report into Human Rights and Technology, the Australian Human Rights Commission recommended:

> *The Australian Government should introduce legislation that provides a rebuttable presumption that, where a corporation or other legal person is responsible for making a decision, that legal person is legally liable for the decision regardless of how it is made, including where the decision is automated or is made using artificial intelligence.*[55]

85. Implementation of this proposal could facilitate the making of claims in liability cases where, as discussed above in response to Question 2, proving a defect and/or liability is more complex for AI-enabled goods and services.

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[50] See Lesley Nutall, *Five Technology Design Principles to Combat Domestic Abuse*, IBM (Online, 17 July 2020); eSafety Commissioner, *Tech-based domestic and family violence* (Web Page, 2024).
[51] ACCC, *Product safety priorities* (Web Page, 2024).
[52] The Treasury, *Government Response to ACCC Digital Platform Services Inquiry* (December 2023) 1.
[53] See, e.g., ACCC, *Service Seeking to pay penalty for misleading online 'customer' reviews* (Media Release, 22 July 2020); *Trivago to pay $44.7 million in penalties for misleading consumers over hotel room rates* (Media Release, 22 April 2022).
[54] For example, ACCC, *Digital Platform Services Inquiry* (Interim Report No. 5—Regulatory Reform, September 2022) 67-69.
[55] Australian Human Rights Commission, *Human Rights and Technology* (Final Report, March 2021) [Recommendation 11].

86. We have previously indicated support for this proposal, but continue to note that this clarification of liability needs to be accompanied by a clear and cost-effective mechanism for recourse or review of such decisions.[56] Closer examination of this proposal is warranted, particularly in light of recent international developments with the adoption of analogous (but broader) presumptions and principles of causation.[57]

87. We note the reference in the Discussion Paper to the European Union's (**EU**) proposed AI Liability Directive that includes a 'presumption of causality' principle, requiring a causal link to be presumed where a number of conditions are met, shifting the onus on the manufacturer to demonstrate that no causal link exists.[58] This is materially different from the rebuttable presumption as to legal liability that is set out above, and for that reason, we do not support the proposed EU principle at this time.

Education

88. There is a significant gap in consumer understanding about how to enforce rights as a consumer who has been harmed by the misuse of AI technologies.

89. The Government could investigate providing educational programs, aimed at informing consumers about their rights regarding AI-enabled goods and services. This could include resources about how AI works, potential risks, and how to seek recourse if issues arise. Any such programs must be readily accessible to the general public, including typically marginalised cohorts, such as older persons, First Nations Peoples, culturally and linguistically diverse individuals, people living with disability, and those who live outside of metropolitan areas.

90. Whilst the challenges arising from the interaction between AI-enabled goods and services and the ACL cannot be solved solely by educating consumers, providing clear, accessible information that helps consumers understand AI technologies could be of significant assistance in ensuring that consumers are aware of their rights under the ACL.

Accessing remedies

Question 7: Are the remedies for a breach of the ACL appropriate for consumers of AI-enabled goods and services?

91. We refer to our responses to Questions 1 and 2 and reiterate our observation that the Treasury has recently publicly consulted on consumer guarantees and supplier indemnification,[59] to address existing challenges experienced by consumers and small businesses in obtaining remedies for consumer guarantee failures.

92. Some concerns have been expressed by our members about the extent to which remedies under the ACL may be effective for AI products comprised of elements that

[56] Law Council of Australia, Human rights and technology (Submission to the Australian Human Rights Commission, 21 April 2020) 17-18.
[57] Norton Rose Fulbright, *Artificial intelligence and liability: Key takeaways from recent EU legislative initiatives* (Online, July 2024).
[58] The Treasury, *Review of AI and the Australian Consumer Law* (Discussion Paper, October 2024) 14; European Commission, *Proposal for a Directive of the European Parliament and of the Council on adopting non-contractual civil liability rules to artificial intelligence* (28 September 2022).
[59] The Treasury, *Consumer Guarantees and Supplier Indemnification under Consumer Law* (Web Page, 2024).

may be characterised as both 'goods' and 'services'. This is because different remedies are available under consumer guarantees depending on whether the item supplied is a good or a service.[60] In addition, consumer guarantees may not apply to goods purchased for re-supply, or for use or transformation in manufacturing or production. In principle, these challenges also apply in respect of non-AI products that involve digital products (e.g., online content), or a combination of goods and services.

93. It may be appropriate to consider definitional clarifications to accommodate these variables.

Question 8: Are there barriers to consumers of AI-enabled goods and services accessing appropriate remedies under the ACL?

94. We agree that there may be barriers, and refer to our responses to Questions 1, 2, and 7 in this respect. We also make some additional comments below.

Overseas businesses and complex ownership arrangements

95. Whilst we note the unfair contracts and consumer guarantee provisions of the ACL have extraterritorial application,[61] in practice, we understand that it can be difficult to secure a repair, replacement or refund from an overseas business.[62] We also note that this issue is not confined to AI-enabled goods or services.

96. In response to Question 2, we identified obstacles to engagement with suppliers of AI systems that may have complex ownership arrangements. We have also noted the use of AI tools by some organisations as the customer interface. Apart from the inherent unreliability of this consistently evolving technology, including hallucinations and shutdowns, we have received feedback from our membership that there is an increasingly limited ability for consumers to retrieve the requisite evidence of their interactions with—and decisions made by—suppliers via these points of contact.

97. We suggest that the potential need for mechanisms to facilitate and trace consumer interactions with businesses trading in these items (including those located overseas) are examined in the course of developing appropriate remedies for consumers.

Lack of understanding of AI and consumer rights

98. A significant and ongoing barrier that consumers of AI-enabled goods and services may face in accessing appropriate remedies under the ACL is a general lack of understanding of AI and consumer rights.

99. As highlighted throughout this submission, the complex nature of AI systems typically leads to a lack of transparency about how decisions are made, making it difficult (if not impossible) for consumers to understand the basis for issues they encounter. When the decision-making processes are opaque, it can be especially challenging for consumers to demonstrate how they have been harmed, such as in instances of suspected error or algorithmic bias. This can result in individuals

[60] *Australian Consumer Law* s 261 (supply of goods), s 269 (supply of services).
[61] *Competition and Consumer Act 2001* (Cth) s 5, which extends the application of the ACL to conduct outside of Australia by entities engaging in conduct outside of Australia when they carry on business in Australia.
[62] The ACCC has acknowledged its limited capacity to assist. See ACCC, *Consumer rights and guarantees* (Web Page, 2024).

choosing not to engage in processes for lodging complaints or seeking remedies, as such processes can be cumbersome and ill-suited to addressing the complexities of AI-related issues.

100. Other consumers may not be aware of their rights at all, or even if they are aware of their rights, they may not know that their rights have been violated, because they may not have the necessary information and knowledge to make such assessment. These issues could be addressed by education and regulatory guidelines, as outlined above.

Inappropriate dispute resolution forum for vulnerable consumers

101. We understand from our Legal Practice Section's Australian Consumer Law Committee (**ACLC**) that State and Territory tribunals continue to have backlogs, are non-specialist (in that they have jurisdiction over disputes concerning a wide variety of subject matters beyond the ACL), and may require consumers to seek leave to be legally represented. In this way, the current dispute resolution forum is, in itself, a barrier to vulnerable consumers being able to enforce their rights under what is a complex set of consumer protection laws.

102. In addition, the cost of making a meritorious application is often prohibitive. For example, one of the most common consumer disputes raised with advocates by vulnerable consumers relates to defective vehicles. For any chance of achieving a remedy, applicants are required to produce expert evidence, which may come at a substantial financial cost that vulnerable consumers can seldom afford.

103. The ACLC recommends that consideration be given to the creation of a specialist ombudsman to deal exclusively with complaints under the ACL, such as is done by Australian Financial Complaints Authority (**AFCA**) for the consumer protection provisions mirroring those in the ACL, but in relation to the provision of financial products and services.

104. Further, the ACLC suggests that consideration be given to an industry-wide digital platform ombudsman scheme to assist to resolve disputes and develop systemic reforms, as has been recommended by the Telecommunications Industry Ombudsman.[63]

Question 9: Are the existing mechanisms contained in the ACL appropriate for distributing liability among manufacturers and suppliers of AI-enabled goods and services?

105. As outlined in our response to Question 2, the existing mechanisms contained in the ACL may not be appropriate for distributing liability among manufacturers and suppliers of AI-enabled goods and services.

106. Given how broad the definition of 'manufacturer' is under section 7 of the ACL manufacturers may be concurrently liable to consumers for breaches of consumer guarantees under the ACL, and this liability cannot be excluded.[64] This position was confirmed by Finn J in *Leeks v FXC Corporation*.[65]

[63] See Cynthia Gebert, *DM is the new text message, yet there's nowhere to go with our social media complaints*, Telecommunications Industry Ombudsman (Web Page, 25 July 2024).
[64] *Australian Consumer Law* s 144.
[65] [2002] FCA 72.

107. However, questions surrounding accountability, as it relates to AI-enabled goods and services, are yet to be unravelled. Whilst automated decision making and data-driven inferencing present opportunities for corporations to tailor the choices for their consumers, the system may be deemed solely responsible for learning the preferences of the consumers, and feeding it through those consumers, without the knowledge of the individuals or corporations who created (or are deploying) those AI systems. In other cases, the humans who created the AI system may be deemed partially or fully responsible for the harm.

108. As such, determining who is responsible for harms that arise from AI-enabled goods and services is yet to be fully understood and, therefore, may pose some difficulties for consumers seeking redress.

Other issues

Question 10: What other issues not raised in this discussion paper relating to the application of the ACL to AI-enabled goods and services should be considered?

109. Generally, small businesses have fewer resources than larger developers to create customised plans for mitigating risks when applying AI technologies in the creation of goods or services for commercial supply.

110. Small businesses may adopt generalised guidelines, such as Standards Australia ISO/IEC 4200:2023 (AI management systems) and the Voluntary AI Safety Standard. However, consumers would benefit from further guidance targeted at small business developers to proactively encourage compliance with the ACL.

Question 11: Are there international developments in consumer protection law and policy to which Australia should have particular regard when considering the application of the ACL to AI-enabled goods and services?

111. We draw the Treasury's attention to the following developments in consumer protection law and policy in international jurisdictions:[66]

- In the EU:
  - the *Artificial Intelligence Act* (**EU AI Act**) was published in the EU Official Journal in July 2024—the first comprehensive horizontal legal framework for the regulation of AI systems across the EU. The EU AI Act was entered into force across all 27 EU Member States on 1 August 2024, and the enforcement of the majority of its provisions will commence on 2 August 2026; and
  - the product liability regime has been updated, including revisions to the *Product Liability Directive* and the introduction of the *AI Liability Directive*, to ensure appropriate consumer protections for users of AI systems.[67]

[66] See Carter Ledyard, *The AI Regulatory Puzzle—From the EU to the U.S.* (Web Page, 12 November 2024).
[67] Norton Rose Fulbright, *Artificial intelligence and liability: Key takeaways from recent EU legislative initiatives* (Online, July 2024).

- Canada is expected to regulate AI at the federal level through the *Artificial Intelligence and Data Act*, which forms part of Bill C-27, a bill that also includes amendments to the *Consumer Privacy Protection Act* (an update to the current federal privacy law) and the *Personal Information and Data Protection Tribunal Act.*
- The United States have adopted several measures.[68]
  - There is Federal Trade Commission enforcement activity currently occurring and, specifically, 'Operation AI Comply', targeting the use and sale of AI technology in deceptive or unfair ways.[69]
  - The *Colorado Act Concerning Consumer Protections in Interactions with Artificial Intelligence Systems*, enacted in May 2024 and commencing 1 February 2026, will impose new consumer rights and obligations on developers and deployers of AI systems, including notification, correction, and appeal rights. Violations of the law will constitute unfair and deceptive trade practices under the *Colorado Consumer Protection Act.*[70]
  - The *Oregon Consumer Privacy Act*, the state's first omnibus consumer privacy law, commenced on 1 July 2024 and sets out rules for profiling and automated decision-making (generally following the *Virginia Consumer Data Protection Act*).
  - The *Montana Consumer Data Privacy Act* commenced on 1 October 2024, creating certain transparency requirements around profiling and enabling individuals to opt-out of 'profiling in furtherance of automated decisions that produce legal or similarly significant effects' concerning the consumer. Similar legislation has recently been enacted in the states of Delaware and New Hampshire.
  - The Tennessee *Ensuring Likeness, Voice and Image Security Act* that commenced on 1 July 2024 mandates the performance of data protection assessment in connection with profiling, where profiling presents a reasonable foreseeable risk of:
    a. unfair or deceptive treatment of, or unlawful disparate impact on consumers;
    b. financial, physical, or reputational injury to consumers;
    c. physical or other intrusion upon the solitude or seclusion, or private affairs or concerns of consumers; or
    d. other substantial injury to consumers.

112. Regardless, we caution against promptly importing concepts from these new (and largely untested) international developments into the ACL that, as a technology neutral, principles-based regime, has demonstrated its flexibility over decades. As such, we reiterate that the ACL should only be amended if there are demonstrated harms that its existing provisions, and the provisions of other relevant regimes in Australia, are incapable of addressing.

[68] See BCLP, *US State-by-State AI Legislation Snapshot* (Web Page, 2024).
[69] United States Federal Trade Commission, *FTC Announces Crackdown on Deceptive AI Claims and Schemes* (Media Release, 25 September 2024).
[70] See Marian Waldmann Agarwal and Marijn Storm, *Navigating New Frontiers: Colorado's Groundbreaking AI Consumer Protection Law* (Online, 31 May 2024).