Law Council
OF AUSTRALIA

Harnessing data and digital technology: Interim Report

Productivity Commission

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The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

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Through this representation, the Law Council acts on behalf of more than 107,000 Australian lawyers.

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The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

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We also acknowledge contributions from the following Committees of the Law Council's Business Law Section:

- Digital Commerce Committee;
- Intellectual Property Committee; and
- Privacy Law Committee.

Introduction

1. The Law Council of Australia appreciates the opportunity to respond to the Interim Report published by the Productivity Commission in respect of its inquiry into harnessing data and digital technology.

2. The Interim Report identifies reform options to boost overall productivity in four policy areas, taking account of the unique nature of data and digital technology:

   (a) enabling the productivity potential of artificial intelligence (**AI**);[1]

   (b) new pathways to expand data access;[2]

   (c) supporting safe data access and use through outcomes-based privacy regulation;[3] and

   (d) enhancing reporting efficiency, transparency, and accuracy through digital financial reporting.[4]

3. This submission provides feedback on the seven draft recommendations in the Interim Report. The Law Council's position on each recommendation is summarised below:

   - **Recommendation 1.1: Productivity growth from AI will be built on existing legal foundations. Gap analyses of current rules need to be expanded and completed**
     - Support. A gap analysis would identify where existing laws may be inadequate to assure safe, responsible, and secure applications of AI, and investment in uplifting Australia's AI capability. Solutions to identified gaps should be framed in technology-neutral terms.

   - **Recommendation 1.2: AI-specific regulation should be a last resort**
     - Support. Current legislation should be expanded and, where necessary, new targeted legislation should be introduced, rather than seeking to explicitly regulate AI via a comprehensive 'AI Act'.

   - **Recommendation 1.3: Pause steps to implement mandatory guardrails for high-risk AI**
     - Do not support. Given the pace of technological change and the economy-wide embrace of AI, steps should continue to be taken to implement mandatory guardrails as a priority, in consultation with cross-disciplinary experts.

   - **Recommendation 2.1: Establish lower-cost and more flexible regulatory pathways to expand basic data access for individuals and businesses**
     - Support in part. The Consumer Data Right could provide a more coherent vehicle for expanding data access, and for organisations to share data in a consistent format, although the significant compliance costs that are currently deterring engagement will need to be addressed.

[1] Productivity Commission, *Harnessing data and digital technology* (Interim Report, August 2025) 9.
[2] Ibid 29.
[3] Ibid 51.
[4] Ibid 69.

- **Recommendation 3.1: An alternative compliance pathway for privacy**
  - Position reserved until further information is provided, as it is currently unclear how such a pathway would operate in practice, or interact with existing domestic and international privacy frameworks.

- **Recommendation 3.2: Do not implement a right to erasure**
  - Support. There is no evidence that an extension of existing rights is required, and there may be numerous unintended consequences if such a right is introduced.

- **Recommendation 4.1: Make digital financial reporting the default**
  - Support. Digital financial reporting is likely to make engagement with financial documents simpler, more streamlined, and more effective.

4. Regarding Information Request 1.1 (about the interaction between copyright and AI), we consider that, while the use of copyright works in AI training presents a novel challenge, Australia's existing copyright regime is unlikely to need major reform—noting the work currently being undertaken by the Attorney-General's Department (**AGD**) and the Copyright and AI Reference Group.[5] Any regulatory gaps, or refinements to licensing, can likely be addressed within the current framework, which has historically adapted to technological change without discarding established rights and principles.

5. Thank you again for the opportunity to contribute. We look forward to engaging with the Productivity Commission's Final Report, which is due to be provided to the Australian Government in December 2025.

[5] Attorney-General's Department, *Copyright and Artificial Intelligence Reference Group (CAIRG)* (2025).

Part 1: Enabling AI's productivity potential

6. Part 1 of the Interim Report contains the following three draft recommendations with respect to AI:

   - **Recommendation 1.1**: Productivity growth from AI will be built on existing legal foundations**.** Gap analyses of current rules need to be expanded and completed.[6]
   - **Recommendation 1.2:** AI-specific regulation should be a last resort.[7]
   - **Recommendation 1.3:** Pause steps to implement mandatory guardrails for high-risk AI.[8]

AI regulation

7. In recent years, the Law Council has contributed to several consultations on the use of AI in Australia, conducted by the Department of Industry, Science and Resources. In those consultations, we have expressed the view that, rather than regulating AI via an AI-specific Act, a multifaceted approach should be adopted.[9] Further, industry-specific legislation should only follow where there is evidence that existing laws and regulations are insufficient to address the issues arising in identified sectors.[10]

8. The Law Council's March 2025 Call to Parties, published in advance of the Federal Election, called for commitments to:

   - identifying and addressing areas where existing laws may be inadequate to assure safe, responsible, and secure applications of AI, and investment in uplifting Australia's AI capability;
   - ensuring any applicable framework, regulatory response or otherwise, is flexible, proportionate, targeted, and not duplicative; and
   - ensuring any AI or automated decision-making framework, regulatory or otherwise, is subject to shorter, accelerated review cycles than would ordinarily apply.[11]

9. The Law Council, therefore, supports the gap analysis process in draft recommendation 1.1, with solutions to identified gaps being framed in technology-neutral terms. While we expect that this may involve individual Commonwealth departments and agencies reviewing legislation for which they (or their Minister) have portfolio responsibility under the Administrative Arrangements Order,[12] this approach alone risks fragmentation and gaps in coverage. To ensure consistency, avoid inefficiencies, and maintain momentum across government, a central coordinating body will likely be required.

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[6] Productivity Commission, *Harnessing data and digital technology* (Interim Report, August 2025) 19.
[7] Ibid 20.
[8] Ibid 21.
[9] See Law Council of Australia, *Safe and responsible AI in Australia* (Submission to the Department of Industry, Science and Resources, 17 August 2023); *Introducing mandatory guardrails for AI in high-risk settings: Proposals Paper* (Submission to the Department of Industry, Science and Resources, 9 October 2024).
[10] Ibid.
[11] Law Council of Australia, *2025 Federal Election Call to Parties* (March 2025) 36-37.
[12] Department of the Prime Minister and Cabinet, *Administrative Arrangements Order* (13 May 2025).

10. While it is often assumed that humans remain fully in control of AI outputs, this may not always reflect reality. A review of regulatory gaps could usefully examine the concept of AI personhood, including whether the current legislative frameworks provide sufficient clarity around responsibility and liability. The review should also acknowledge that, while there is an assumption that AI may cause additional harms, AI also has the potential to reduce additional harms.

11. We also support using the existing regulatory framework to regulate AI, rather than implementing AI-specific legislation, consistent with draft recommendation 1.2. We maintain a position in support of the expansion of current legislation and, where necessary, new targeted legislation, rather than seeking to explicitly regulate AI via a comprehensive 'AI Act' at this early stage.[13]

12. It is important to distinguish between AI use and AI technology when considering regulation. It is AI use, rather than AI technology, that should be regulated using an adaptable set of principles for AI use. Often, AI use and deployment is specific to particular industries and organisations. For example, an AI application that is trained to identify early signs of melanomas will use different data sets for training compared to an AI model that automates routine data entry and document management, but the same set of principles is applicable to regulation in both contexts.

13. Consequently, the regulation of AI should be flexible enough to operate in differing contexts—while providing a uniform minimum standard for industries—to enhance consistency and certainty in this period of significant transition.

14. We also acknowledge the need to balance the protection of individual rights through regulation with innovation and investment into AI. To contribute to that balance, the main principles when deploying AI should be determined by the Australian Government by reference to Australia's international human rights obligations, and established mechanisms under which certain rights may be limited and others remain absolute. This approach will assist industries to establish and follow a shared set of community values about the use of AI. This should include not ruling out the possibility of prohibiting certain high-risk AI use cases.

Mandatory guardrails for high-risk AI

15. Many existing laws have the capacity to—and already—deal with data and technology use and misuse. For example, there are consumer laws (dealing with misleading and deceptive conduct), privacy laws (governing use of sensitive personal information including biometric information), corporations laws (imposing directors' duties requiring due care and skill), online safety laws, intellectual property rights laws, anti-discrimination laws and sector-specific laws. We appreciate, therefore, the Productivity Commission's view that steps to mandate guardrails for high-risk AI should be paused until the reviews of the gaps posed by AI to existing regulatory structures are completed.[14]

[13] 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).
[14] Productivity Commission, *Harnessing data and digital technology* (Interim Report, August 2025) 21-22.

16. However, given the pace of technological change and the economy-wide embrace of AI (albeit in many cases still being tested), we maintain the view that the introduction of regulations, or guardrails, that address high-risk AI and applications will be helpful and necessary in minimising harmful outcomes, both known and unknown.[15]

17. We have reservations about the proposal to pause steps to implement mandatory guardrails for high-risk AI and, on balance, we do not support draft recommendation 1.3. The substantial risks posed by the use of AI in certain areas justifies a strengthened and precautionary approach to AI regulation, including continuing work towards the implementation of mandatory guardrails to ensure adequate accountability, safety, and effectiveness.

18. In addition, there remains merit in banning AI practices that have an unacceptable level of risk. That is, where the risk cannot be mitigated, or the consequences of the practice pose unacceptable and irremediable harm to individuals and communities.[16] To ensure that innovation in AI is not simultaneously stifled, it has been suggested that bans of some AI practices could be implemented by way of subordinate legislation, to allow sufficient flexibility while AI continues to evolve. However, this will clearly depend on the subject matter and context. Any ban must contain sufficient certainty in the definition and interpretation of the prohibited practice, and clarity about why the risk is unacceptable.

19. It may be instructive to refer to the AI practices that are prohibited under the *European Union Artificial Intelligence Act* (**EU AI Act**) for their incompatibility with individual and collective rights and fundamental values, such as the rule of law.[17] AI practices that are prohibited under Article 5 of the EU AI Act include:

    (a) Subliminal techniques that can materially distort a person's behaviour by impairing their ability to make an informed decision in a way that causes, or is reasonably likely to cause, them significant harm.

    (b) Exploiting the vulnerabilities of a person or specific groups of people (for example, due to their age, disability or economic situation) which can materially distort their behaviour in a way that causes, or is reasonably likely to cause, them significant harm.

    (c) Social scoring systems based on known, inferred, or predicted personality characteristics which cause detrimental or unfavourable treatment that is disproportionate, or used in a way that is unrelated to the context in which the data was originally collected.

    (d) Risk assessment systems that assess the risk of a person committing a crime or re-offending (except in support of a human assessment based on verifiable facts).

    (e) Indiscriminate or untargeted web-scraping for the purposes of creating or enhancing facial recognition databases.

    (f) Emotion recognition systems in the workplace or educational institutions (except for medical or safety reasons).

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[15] 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] Ibid.
[17] See Law Council of Australia, *Rule of Law Principles* (Policy Statement, March 2011).

(g) Biometric categorisation systems used to infer characteristics, such as race, political opinions, or religion.

(h) Real-time, remote biometric identification systems in publicly accessible spaces for the purpose of law enforcement except—subject to safeguards and within narrow exclusions—searching for victims of abduction, preservation of life, and finding suspects of certain criminal activities. 'Real-time' must mean live or near-live material, to avoid short recording delays circumventing this prohibition.

20. We consider, therefore, that steps should continue to be taken to implement mandatory guardrails as a priority, in consultation with cross-disciplinary experts.

Copyright and AI

21. While the Interim Report does not contain any draft recommendations on the interaction between copyright and AI, it contains several information requests on this issue.

General comments

22. The articulation of clear policy objectives is important when considering reform proposals generally, particularly in the context of the Interim Report. This is to ensure that any proposals are properly targeted, and can be evaluated based on the intended policy settings, while mitigating unintended or undesirable consequences.

23. In addition to clear policy objectives, the Law Council encourages the Productivity Commission to adopt a principles-driven, evidence-based approach to assessing potential new copyright exceptions, particularly in relation to AI.

24. Outside of exceptions, the Productivity Commission should review other work already being undertaken in the copyright and AI arena more generally, including by the AGD and the Copyright and AI Reference Group. This exercise should consider responses collated by AGD about whether there are any specific copyright-related AI transparency issues on which the Government should consider urgent action through AGD's work on copyright law and AI.[18] Some of these may fall outside of the scope of the transparency proposals included in the Government's September 2024 proposals paper for introducing mandatory guardrails for AI in high-risk settings[19] but nevertheless warrant consideration.

25. The approach in the Interim Report focuses, in the first instance, on AI without addressing the broad range of products that fall under the AI descriptor. Identification of the relevant AI systems that may give rise to consideration of potential new exceptions is important to ensure that the policy response is targeted and appropriate. Further, the Interim Report does not address the wide range of products protected by copyright, including creative content, collections of data, and software.

[18] Attorney-General's Department, *Summary of transparency discussion paper responses* (February 2025). The summary of responses, albeit with a small sample, concluded in the context of copyright and AI outputs that there is 'general support for transparency requirements for AI, implemented on a whole of economy basis, although the technology sector support is conditional on a narrower application' (page 1) and 'there is broad support for transparency requirements on AI outputs' (page 2).

[19] Department of Industry, Science and Resources, *Safe and responsible AI in Australia: Proposals paper for introducing mandatory guardrails for AI in high-risk settings* (September 2024).

26. Copyright law appears to have been presented in the Interim Report as a potential obstacle to the productive use of AI in Australia, including building and training AI models.[20] As a first step, the Productivity Commission should identify the policy, and evidence, that underpins this position.

27. Copyright is often said to involve a balance between the interests of creators and users, where creators are given certain exclusive rights, from which there are exceptions. Exceptions to the rights of copyright owners can be divided into:

- free exceptions;
- fair dealing exceptions (which are free, but conditional on fairness); and
- paid exceptions or statutory licences.

28. Any proposal to reform copyright law must undertake this balancing process by identifying the policy rationale that would justify permitting users to have uncompensated access to copyright material, in derogation from the copyright owner's exclusive rights.

Assumptions about productivity and AI

29. The Interim Report appears to assume that the use or development of AI will necessarily increase productivity in all markets, including in markets where copyright plays an important role in facilitating the reward for creators and copyright licensing. The evidential support for this assumption is not disclosed in the Interim Report.

30. We note that the Productivity Commission has been tasked with 'providing independent research and advice to Government on economic, social and environmental issues affecting the welfare of Australians'.[21] It follows that any derogation of Australian copyright law should be squarely focused on whether the welfare of Australians—not international stakeholders, and not AI systems—would be improved. This is particularly true where that derogation is likely to provide greater benefits to the suppliers of AI systems (who, at least to date, are most often based outside of Australia) at the expense of Australian data creators (currently protected by status quo copyright law).

31. To the extent that copyright is a consideration, we note that copyright industries are a broad group of creators and owners, in different markets. As a result, a one-size-fits-all approach is unlikely to be the most suitable way to maintain an appropriate balance of rights.

32. Copyright law recognises that different sets of rights and exceptions may be necessary. Similarly, there are different types of data, and many different types of AI. It follows that this should lead to the identification of the different use cases for certain exceptions, as opposed to exceptions that apply to all copyright material or all users indiscriminately.

33. The increasingly prolific use and training of AI, as observed in the Interim Report, suggests that there are few barriers to the use of AI in Australia in practice, even under existing copyright laws.[22] This reality supports the need for a more nuanced approach to identifying which AI-related applications or innovations are being prevented by copyright law, and the policy options for addressing the issues.

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[20] Productivity Commission, *Harnessing data and digital technology* (Interim Report, August 2025) 24-28.
[21] Productivity Commission, *How we contribute* (2025).
[22] Productivity Commission, *Harnessing data and digital technology* (Interim Report, August 2025) 25.

34. Potentially negative outcomes from the use of AI should also be considered by the Productivity Commission when evaluating potential new copyright exceptions. For example, the Interim Report does not consider the implications of:

- widespread ingestion of copyright material without compensation;
- the infringing outputs from AI systems; or
- the impact on the moral rights of authors and creators.

35. More broadly, AI poses other risks and potential negative outcomes that should be considered by the Productivity Commission as part of this inquiry, beyond the 'real efficiency and productivity gains'[23] that the Interim Report refers to. For example, the Interim Report states that 'teachers are using AI models as an education tool'.[24] However, educational institutions are simultaneously grappling with the widespread use of AI by students, rendering traditional assessment methods ineffective and undermining testing standards.[25]

36. Similarly, the Interim Report states that 'law firms use "large language models" for evidence review and preliminary drafting'.[26] However, legal practices (and their staff) must also navigate challenges associated with the use of AI—especially generative AI (**GenAI**)—including the production of 'hallucinated' content, loss of control of material entered into the program, risks to the integrity of evidence put to the Court, and the increasing use of GenAI by self-represented parties.[27]

37. The Law Council supports further investigation as to whether Government investment in, or support for, improved data markets or data-matching services would more effectively address copyright as a barrier to AI development, rather than simply weakening creator rights by introducing new exceptions to existing copyright laws.

Reforms to the copyright regime

1.1(a): Are reforms to the copyright regime (including licensing arrangements) required? If so, what are they and why?

38. Copyright owners and users will have different perspectives on whether reforms to the copyright regime are needed in relation to AI. While AI presents a novel challenge regarding the usage of copyright works, Australia's existing copyright regime currently regulates its use in that context. Copyright laws have responded to previous changes in technology, and any consideration of reform does not need to remove established rights and principles.

39. There remains a lack of clarity as to how intellectual property rights are impacted by the use of AI systems. Unlicensed AI training is currently the subject of complex litigation in other jurisdictions, especially in the United States.[28] Courts are well-placed to clarify how existing copyright, licensing, and contract laws apply to AI. The

[23] Ibid 9.
[24] Ibid.
[25] See, e.g., Stuart Cumming and Cale Matthews, *Universities, schools react to student use of generative AI programs including ChatGPT*, ABC News (24 June 2024); Janelle Miles, *What is ChatGPT and why are schools and universities so worried about students using AI to cheat?*, ABC News (24 January 2023).
[26] Productivity Commission, *Harnessing data and digital technology* (Interim Report, August 2025) 9.
[27] See Law Council of Australia, *Artificial intelligence use in the Federal Court of Australia* (Submission to the Federal Court of Australia, 16 June 2025).
[28] See Roomy Khan, *AI Training Data Dilemma: Legal Experts Argue for 'Fair Use'*, Forbes (4 October 2024); David McIntosh, Yam Schaal and Maureen Greason, *Does Training an AI Model using Copyrighted Works Infringe the Owners' Copyright? An Early Decision Says, "Yes."*, Ropes & Grey (6 March 2025).

outcomes of those proceedings may influence the approach taken by the owners of AI platforms to the acquisition of training data worldwide. However, we expect that, in many instances, the unlicensed use of copyright materials to train GenAI in Australia would be an infringement of the copyright in the materials.

40. As stated in the Interim Report, licences for data use in training AI models is increasingly prevalent.[29] Copyright owners are already licensing the use of their material for AI training processes, with notable examples including Cambridge University Press[30] and HarperCollins.[31] In February 2025, the New England Journal of Medicine entered into an agreement with Open Evidence to allow the integration of 30 years of content into its AI models for clinical use.[32] Moreover, the United States Copyright Clearance Center now enables publishers to include AI training in their licensing arrangements (usually for internal use).[33]

41. Licensing also provides an avenue for lawful access to works, rather than AI developers using 'shadow libraries' of pirated works, which is an increasing problem in the United States.[34]

42. Although the issue has not yet been tested in Australia, the existing licensing regimes under the *Copyright Act 1968* (Cth) may apply to the training and use of AI. Commonwealth and State Governments have a broad statutory licence to use copyright material under section 183 of the Copyright Act, and educational institutions have a set of more conditional statutory licences. In both cases, information must be provided, and remuneration must be paid to the copyright owner.

43. In Australia, existing copyright licensing and collection agencies (such as the Australasian Performing Right Association Limited, Australasian Mechanical Copyright Owners Society, and the Phonographic Performance Company of Australia) act on behalf of copyright holders to ensure that they are compensated for the use of their works. Users can obtain a licence to use the works across various platforms. Blanket licences are available to enable businesses and organisations to use works from the agencies' catalogue without negotiating individual agreements. It is possible that that system will evolve for use in the context of AI.

44. Whether, and to what extent, reforms may be required depends on whether there should be an exception (either free or paid) to permit the use of copyright material for training or using AI. Where there are already licences in place, an exception may interfere with those arrangements. As such, a clear policy reason for proposing such a change would need to be established.

45. A critical question is whether there is a policy rationale for derogating from the rights of copyright owners (either the right to set terms, or the right to receive payment), in circumstances where a market is emerging for copyright owners to license uses in

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[29] Productivity Commission, *Harnessing data and digital technology* (Interim Report, August 2025) 25.
[30] Rosalind Moran and Andy Woodfield, *Protecting authors and research in the age of AI*, Cambridge University Press (August 2025).
[31] Ella Creamer, *HarperCollins to allow tech firms to use its books to train AI models*, The Guardian (20 November 2024).
[32] OpenEvidence Australia, *OpenEvidence and NEJM Group, publisher of the New England Journal of Medicine, sign content agreement* (Media Release, 19 February 2025).
[33] Copyright Clearance Centre, *CCC announces AI systems training license for the external use of copyrighted works coming soon* (Media Release, 4 March 2025).
[34] See Antonio Pequeno IV, *Anthropic will pay $1.5 billion to settle copyright lawsuit from book authors*, Forbes (5 September 2025).

AI. That analysis should include an examination of the benefits that would be conferred on businesses that are likely to take advantage of an additional exception.

46. Ultimately, there is a balance to be struck, in that Australia's position as an exporter of creative content—but an importer of AI services—makes it essential to protect local creators while enabling access to global AI tools.

47. To establish the need for a new exception, it will be necessary to comply with the requirements of the Berne Convention for the Protection of Literary and Artistic Works,[35] specifically the need to show a 'certain special case' that 'does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.'[36] In that regard, we note:

- the need to carefully define the parameters of the case for exception;
- that many copyright owners are already licensing or offering to license their works to AI developers; and
- the fact that some AI outputs compete directly with the materials on which they have been trained.

48. Further, the Interim Report acknowledges that:

> *[AI] has the potential to enhance productivity not only by automating routine tasks, but also by simplifying complex ones traditionally performed by highly-trained professionals. For example, Generative AI can instantly produce text, audio, and video from a simple written prompt—tasks that previously required specialised skills in media creation.*[37]

49. Given the above, the Interim Report's analogies to the productivity growth that occurred during the Industrial Revolution, and AI technologies, are too simplistic and fail to reflect the nuances of modern intellectual property and digital markets.[38] In the case of the Industrial Revolution, it was the cost of workers' labour that was reduced through the use of new technologies that produced the same product, but with less work. In the context of AI, it is proposed that the owner of the technology takes the product of labour, without compensation, to produce a competing product that is cheaper, at least in part, because a major contribution has not been paid for.

Fair dealing exception for text and data mining

50. As noted in the Interim Report, fair dealing exceptions allow for the use of copyright material without permission from the copyright owner, so long as it is used for one of several specified purposes and is considered fair.[39]

51. The Copyright Act specifies several purposes where the exception may apply, including:

- research or study;
- criticism or review;
- parody or satire;

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[35] Berne Convention for the Protection of Literary and Artistic Works, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972, as amended on 28 September 1979).
[36] Ibid art 9(2).
[37] Productivity Commission, *Harnessing data and digital technology* (Interim Report, August 2025) 6, 14.
[38] Ibid 11.
[39] Ibid 26.

- reporting news; and
- enabling a person with a disability to access the material.[40]

Fairness is determined with regard to all the relevant circumstances, although some purposes have specified criteria that must be taken into account.[41]

52. The Interim Report indicates that the Productivity Commission is considering whether there is a case for a new fair dealing exception that explicitly covers text and data mining.[42] The Interim Report states:

> *Such an exception would cover not just AI model training, but all forms of analytical techniques that use machine-read material to identify patterns, trends and other useful information. For example, the use of text and data mining techniques is common in research sectors to produce large datasets that can be interrogated through statistical analysis.*[43]

1.1(b): How would an exception covering text and data mining affect the development and use of AI in Australia? What are the costs, benefits and risks of a text and data mining exception likely to be?

Experience of overseas jurisdictions

53. The experience of jurisdictions where there is a text and data mining exception should be instructive. The Interim Report identifies these jurisdictions, including the United Kingdom, where a text and data mining exception applies to non-commercial research.[44] The exception in the European Union comprises two strands: an exception for research; and a broader exception for commercial enterprises, from which it is possible for copyright owners to opt out.

54. The EU and UK experience would suggest that introducing such an exception does not, on its own, lead to the domestic development of a significant number of new AI platforms, particularly large language models (**LLMs**).

55. It is unclear whether the EU text and data mining exception was ever intended to apply to creative content. Its stated purpose was to enable access to scientific data that was otherwise unavailable, in order to promote research. Broader application to all copyright material is contested, and is the subject of a complex opt-out system.[45] Moreover, the July 2025 'Generative AI and Copyright' Report (**EU Parliamentary Report**), commissioned by the EU Parliament's Committee on Legal Affairs found that:

> *The current EU text-and-data mining exception was not designed to accommodate the expressive and synthetic nature of generative AI training, and its application to such systems risks distorting the purpose and limits of EU copyright exceptions.*[46]

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[40] *Copyright Act 1968* (Cth) ss 40, 41, 41A, 42, 113E.
[41] Ibid.
[42] Productivity Commission, *Harnessing data and digital technology* (Interim Report, August 2025) 27.
[43] Ibid.
[44] Ibid.
[45] See Martin Kretschmer et al., *Copyright and AI in the UK: Opting-In or Opting-Out?*, GRUR International (2025) 1-16; João Quintais, *Generative AI, copyright and the AI Act*, Computer Law & Security Review 56 (2025) 1-17.
[46] European Parliament, *Generative AI and Copyright: Training, Creation, Regulation* (Report from study requested by the Committee on Legal Affairs, July 2025) 8.

56. The EU Parliamentary Report observes that, while copyright law has proved durable and adaptable in the face of technological change (e.g., the introduction of the photocopier), 'generative AI presents an unprecedented test of scale, opacity and economic impact.'[47] Further, the Report cautions that 'without timely reform, the EU risks legal uncertainty, market concentration and cultural homogenisation'.[48] The current situation in the EU demonstrates the need to have a policy basis for reforms, and to be wary of the unintended consequences of broad reform.

Likely impact in Australia

57. We are concerned that introducing a text and data mining exception would effectively grant unrestricted use of copyright materials for AI training, without regard for the rights of copyright holders. Further, the Interim Report gives little consideration to how training resources should be chosen. This raises concerns about the lack of safeguards against bias, given that AI systems are only as reliable as the data and human inputs used to train them.

58. Consequently, the risks of a text and data mining exception in Australia are likely to be significant. There is a risk that human innovation and creativity would be stifled by blanket AI adoption, as there may be less desire by humans to create new solutions, and more desire to rely on AI to do the 'thinking'.

59. It follows that the creative industries that contribute significant financial value to the Australian economy—and also have cultural value—would suffer loss and damage. Even if skilled media creators can be deployed into other employment, the general public would nonetheless be harmed by the loss of access to Australian creativity. This loss would be even more stark for Aboriginal and Torres Strait Islander creators, whose work is vulnerable to copying, and for whom cultural damage cannot be compensated.[49]

60. If an exception is adopted, it is imperative that there be a compensation mechanism for copyright holders, as well as an option for them to opt in or out. However, administratively, this could present a significant challenge to seek approvals and compensate for material use.

1.1(c): How should the exception be implemented in the Copyright Act—for example, should it be through a broad text and data mining exception or one that covers non-commercial uses only?

61. The form of any exception should be evaluated within the broader copyright framework, relevant case law, and the objectives of AI-related policies. As stated above, the exception poses significant risks to copyright holder rights which must be further considered before implementing the proposed approach.

[47] Ibid.
[48] Ibid.
[49] See Productivity Commission, *Aboriginal and Torres Strait Islander visual arts and crafts* (Study report, November 2022); Law Council of Australia, *A new legislative framework to address and protect Indigenous cultural and intellectual property rights* (Submission to the Department of Infrastructure, Transport, Regional Development, Communication, and the Arts, 5 July 2024).

62. A rigorous examination of the policy basis for reform may elicit different proposals for different types of copyright material and access for different users. That would require:

- identification of the entities for which there is a public benefit in enabling access (which assumes that licences are unavailable or not commercially reasonable);
- consideration of whether that access should be free or paid for; and
- analysis of the copyright material to be included in the reform.

63. In addition, we do not consider 'commercial' and 'non-commercial' to be particularly helpful delineators when considering exceptions. The meaning of both terms is contested, and it is unclear whether 'non-commercial use' refers to end-users of AI, or if it pertains to the AI models developed using copyrighted materials.

64. Moreover, use that is non-commercial on one day can become commercial on the next. Even governments and educational institutions are involved in commercial enterprises to some extent, noting, for example, the increasing adoption of public-private partnerships by universities. It may be the case, for example, that scientific data—if it can be legally accessed, and to the extent that it is protected by copyright—could be the subject of an exception for research purposes.

65. In its consideration of any potential exception, the Productivity Commission should adopt a comprehensive approach that aligns Australia's technological landscape and legal framework with its copyright laws and policy goals concerning AI development and use.

1.1(d): Is there a need for legislative criteria or regulatory guidance to help provide clarity about what types of uses are fair?

66. Whether there is a need for legislative criteria or regulatory guidance would depend on the breadth of the exception. Nonetheless, we consider that the existing fair dealing factors set out in subsection 40(2) of the Copyright Act in respect of research or study are an appropriate starting point. These factors include:

(a) the purpose and character of the dealing;

(b) the nature of the work;

(c) the possibility of obtaining the work within a reasonable time at an ordinary commercial price;

(d) the effect of the dealing upon the potential market for, or value of, the work; and

(e) the amount and substantiality of the work that was copied.

67. This approach would ensure that any exception is assessed and applied in context, taking into account both the nature of the copyright material, and the specific manner in which it was used with respect to AI.

Part 2: New pathways to expand data access

68. Part 2 of the Interim Report contains the following recommendation with respect to data access:

    - **Recommendation 2.1**: Establish lower-cost and more flexible regulatory pathways to expand basic data access for individuals and businesses.[50]

69. The Interim Report states:

    > *The Australian Government should support new pathways to allow individuals and businesses to access and share data that relates to them. These regulatory pathways will differ by sector recognising that the benefits (and the implementation costs) from data access and sharing are different by sector.*[51]

70. Modern technology use requires significant data exchange between industries and sectors, and we agree with the Productivity Commission that there is 'little to no consistency across, or even within, different sectors, about which parts of these data holdings individuals and businesses can access'.[52]

71. However, we caution that expanded data-sharing obligations risk discouraging businesses from investing in data collection, infrastructure, and analytics, which could weaken innovation and the overall quality of available data. It is also important to simplify and clarify data retention obligations on industry and minimise unnecessary data retention.[53] Without this consideration, there is an additional risk that further layers are added to data regulation, which would complicate an already complex framework. Accordingly, we support draft recommendation 2.1 in part.

72. The Consumer Data Right could provide a more coherent vehicle for expanding data access, and for organisations to share data in a consistent format. Further, integrating multiple sectors under unified data-sharing rules offers a substantial volume of standardised data that can be harnessed for innovative applications.

73. It may, therefore, be advantageous to adopt the Consumer Data Right across more sectors, although we understand that the significant compliance costs at present can deter engagement. We are also aware of concerns amongst some parts of the profession that adhering to the intricate Consumer Data Right requirements typically outweigh the benefits delivered. Consequently, these concerns would need to be addressed if the Consumer Data Right were utilised across more sectors.

74. There may also be merit in considering alignment with international models, such as the *European Union Data Act*, which provides a structured approach to interoperability and portability.

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[50] Productivity Commission, *Harnessing data and digital technology* (Interim Report, August 2025) 39.
[51] Ibid.
[52] Ibid 30.
[53] See Law Council of Australia, *Commonwealth Data Retention Review* (Submission to the Department of Home Affairs, 21 March 2025).

Part 3: Supporting safe data access and use through outcomes-based privacy regulation

75. Part 3 of the Interim Report contains the following two draft recommendations with respect to privacy regulation:

    - **Recommendation 3.1**: An alternative compliance pathway for privacy.[54]
    - **Recommendation 3.2:** Do not implement a right to erasure.[55]

Alternative compliance pathway

76. The Interim Report takes the view that 'the consent, notification and disclosure requirements in the Privacy Act can be overly burdensome'[56] and proposes that:

> *[The introduction of an alternative compliance pathway] would create a 'dual track' compliance regime, consisting of one outcomes-based track (designed to provide flexibility for regulated entities) and one more prescriptive track (designed to provide regulated entities with greater certainty about their privacy obligations). Regulated entities would be able to choose the mode of compliance that best suits their business needs.*[57]

77. The Law Council's view is that an alternative compliance pathway, as proposed in draft recommendation 3.1, could benefit individuals, businesses, and the wider community, but only if that pathway is clear and certain. To determine whether this is the case, further work needs to be undertaken as to how such an alternative compliance pathway would operate in practice. This work needs to focus on:

    - the provisions of the Australian Privacy Principles (**APPs**) and the Privacy Act, to which the new compliance pathway would be an alternative;
    - ensuring that there is sufficient certainty in the scope of the alternative compliance path, so that it is a meaningful alternative for businesses to adopt;
    - demonstrating that the alternative pathway would not lessen the privacy protection for individuals; and
    - how this alternative pathway would interact with international privacy frameworks.

78. Protecting data builds trust, and encourages stronger participation in our digital economy, which contributes to productivity. There will likely be a cost to national productivity if individuals are not confident to share information with others, given that the basis of effective data flow is an individual's consent to having their personal information collected in the first place. We have repeatedly witnessed how data breaches and misuse of personal information erodes trust in the digital environment. An effective regulatory safety net helps to build confidence in information exchange frameworks by building trust in the framework that supports such information sharing and the quality of the information (including personal information) used and generated in or by those systems.

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[54] Productivity Commission, *Harnessing data and digital technology* (Interim Report, August 2025) 63.
[55] Ibid 67.
[56] Ibid 51.
[57] Ibid 59.

79. The Law Council has long supported reform to Australia's privacy regime, noting that there have been significant changes to the landscape in which the Privacy Act operates, and that personal information can be particularly vulnerable in the digital age.[58] As a consequence, we agree that other privacy models deserve further consideration, and an outcomes-based regime can have some positive aspects.

80. The Law Council's position is that, for a dual track to be an effective alternative compliance pathway, it must be clearly expressed and certain so that regulated entities know how the alternative is to be applied. If the alternative pathway is capable of simple implementation, it could reduce compliance costs. By contrast, absence of clarity and certainty will result in increased compliance costs and be counterproductive. Much will depend upon the particular alternative pathway adopted, its terms, and the particular provisions of the APPs and the Privacy Act, to which the new compliance path would be an alternative.

81. Additionally, it will be important to consider how this alternative pathway would interact with international privacy frameworks, such as the European Union General Data Protection Regulation, especially regarding data export and adequacy. If the pathway does not properly interact with these existing frameworks, this may mean it becomes either irrelevant, or will increase compliance costs for the significant number of businesses whose activities require them to interact with international privacy frameworks.

82. Our position on draft recommendation 3.1 is reserved until more information is provided. It would assist if the Productivity Commission provided:

- more specificity as to the model proposed;
- practical examples of how the alternate outcomes-based model would operate; and
- a comparison of the results (including the difference in compliance costs and any differences in the standard of privacy protection provided to individuals) with the application of the current law.

Interaction with other regulatory frameworks and reforms

83. The 2023 Privacy Act Review undertook a comprehensive analysis of many key issues of privacy regulation (including the impact on small businesses) and carefully considered the opinions of both businesses and individuals.[59] The Australian Government provided a formal response to the Review in September 2023,[60] with the *Privacy and Other Legislation Amendment Act 2024* (Cth) representing the first tranche of reforms to Australia's privacy regime.

84. While subsequent reforms may be under development,[61] we have repeatedly called for the Government to release a roadmap to outline its specific intentions for further tranches of reform arising out of the Privacy Act Review Report, including indicative timeframes.[62]

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[58] Law Council of Australia, *Privacy and Other Legislation Amendment Bill 2024* (Submission to the Senate Legal and Constitutional Affairs Legislation Committee, 22 October 2024) 14.
[59] Attorney-General's Department, *Privacy Act Review Report 2022* (February 2023).
[60] Australian Government, *Government Response: Privacy Act Review Report* (September 2023).
[61] Commonwealth, Parliamentary Debates, House of Representatives, 12 September 2024, 25 (Mark Dreyfus, Attorney-General).
[62] See Law Council of Australia, *Privacy and Other Legislation Amendment Bill 2024* (Submission to the Senate Legal and Constitutional Affairs Legislation Committee, 22 October 2024) 17; *2025 Federal Election Call to Parties* (March 2025) 39.

85. In addition, privacy law is closely intertwined with cybersecurity legislation, often resulting in areas of overlap. Organisations must comply with the notifiable data breach scheme contained in the Privacy Act. Some organisations must also comply with the notification requirements under the *Security of Critical Infrastructure Ac 2018* (Cth) and ransomware reporting obligations mandated by the *Cyber Security Act 2024* (Cth).

86. Any proposed changes to Australia's privacy framework should be evaluated with consideration of these regulatory intersections, with an aim of harmonising legal requirements and supporting organisational compliance.

87. We draw attention to the fact that the Government has provided in-principle support to the addition of a new 'fair and reasonable' test in the Privacy Act.[63] A 'fair and reasonable test' can work as an overarching outcomes-based approach. We are concerned that it would be potentially confusing or duplicative to have an overarching outcomes-based test included within the general Privacy Act, in addition to an alternative compliance path with a different overarching outcomes-based test. Accordingly, we recommend that the 'fair and reasonable' test is considered as part of the Productivity Commission's assessment of the outcomes-based approach.

88. An outcomes-based approach should also align with human rights. Draft recommendation 3.1 appears to highlight the impact of the privacy regime on large corporations, which is appropriate, given the productivity focus of the Interim Report. However, privacy must be considered more broadly, and balance in regulatory approach is required with appropriate consideration of impacts on a range of actors: from individuals and very small not-for-profits to large charities and corporations. The Law Council reiterates that strong legal privacy protections will encourage stronger participation in Australia's digital economy, which will contribute to productivity. Particular care and consultation are, however, needed with respect to how the regulatory impacts on small businesses are alleviated.

Options for framing requirements for the alternative pathway

89. The Interim Report states that:

> *The overarching objective of privacy regulation is to protect the privacy interests of individuals and/or to prevent or reduce harm resulting from privacy breaches. Therefore, an alternative compliance pathway should require regulated entities to meet broad obligations in relation to this objective.*[64]

90. The Interim Report suggests three options to create a similar duty or obligation in relation to privacy for the alternative pathway:[65]

    (a) A best interest obligation that would require regulated entities to act in the best interest of an individual in respect of their privacy.

    (b) An obligation for regulated entities to have regard to the best interest of an individual in respect of their privacy.

    (c) A duty of care that would require regulated entities to take steps to prevent reasonably foreseeable harm to an individual's privacy.

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[63] Australian Government, *Government Response: Privacy Act Review Report* (September 2023) 8, 27.
[64] Ibid 61.
[65] Ibid.

As set out above, these options depart from the Privacy Act Review Report's recommendation of a 'fair and reasonable' test to be applied by entities in the collection, use, and disclosure of personal information,[66] to which the Government has agreed, in principle.[67]

Best interest obligation

91. It is not clear why a best interest obligation should be considered more certain, and less onerous, than the more objectively assessed test of reasonableness. Further, a cost-benefit analysis of the 'best interests' track is necessary to provide evidence that the alternative pathway will lead to reduced compliance burdens and costs.

92. At a preliminary level, compliance costs associated with a 'best interests' approach would likely include the cost categories of:

- evaluating whether a particular practice is in the best interests of the affected individuals;
- documenting the outcome of the evaluation;
- opportunity costs; and
- maintaining data governance that would prevent data leakage.[68]

Duty of care

93. The duty of care proposed in option (c) is consistent with the duty of care for digital platforms, recommended in the independent statutory review of the *Online Safety Act 2021* (Cth),[69] which the Australian Government committed in November 2024 to legislate.[70] Such a duty of care should shift the onus and responsibility onto regulated entities, consistent with the principle of organisational accountability.

Other possible tests

94. Ultimately, the merits of the best interest and duty of care approaches require further testing and evidence as to how these obligations would lead to reduced compliance costs and better outcomes. In the absence of such evidence, the Law Council does not support these approaches.

95. As outlined above, the Law Council suggests that the Productivity Commission consider including a 'fair and reasonable' test as an alternative pathway. Additionally, we agree with the Productivity Commission that the favourable approach to the implementation of a dual track regime is through framing the outcomes-based obligations as a 'defence':[71]

> *This means that the existing Privacy Act requirements would be retained as the core regulatory regime, but regulated entities who do not (or choose not to), for example, meet all the current APPs to the letter, could*

[66] Attorney-General's Department, *Privacy Act Review Report 2022* (February 2023) 3, 8-9, 110-121 [Proposals 12.1, 12.2, 12.3].
[67] Australian Government, *Government Response: Privacy Act Review Report* (September 2023) 8, 27.
[68] See Peter Leonard, *Data privacy regulation under review: The Productivity Commission's "Pillar 3" interim report* (August 2025).
[69] Delia Rickard PSM, *Report of the Statutory Review of the Online Safety Act 2021* (October 2024).
[70] The Hon Michelle Rowland MP, *New Duty of Care obligations on platforms will keep Australians safer online* (Media Release, 14 November 2024).
[71] Productivity Commission, *Harnessing data and digital technology* (Interim Report, August 2025) 60.

invoke the defence to show that they are nevertheless compliant with their regulatory obligations.[72]

96. This approach may create efficiencies in respect of the enforcement of the Privacy Act because it would enable focus to be placed upon the privacy harms of the conduct.

97. If the new defence implementation option is adopted, the Productivity Commission should consider an outcomes-based test, based upon harm (or likely harm) to individuals, akin to the 'serious harm' standard for eligible breaches under the Notifiable Data Breaches scheme under Part IIIC of the Privacy Act.

Right to erasure

98. The Productivity Commission proposes in draft recommendation 3.2 that:

> *The Australian Government should not amend the Privacy Act to introduce a 'right to erasure', as this would impose a high compliance burden on regulated entities, with uncertain privacy benefits for individuals.*[73]

99. The Privacy Act Review Report recommended that a right to erasure be introduced, with the following features:

    (a) An individual may seek to exercise the right to erasure for any of their personal information.

    (b) An APP entity who has collected the information from a third party, or disclosed the information to a third party, must inform the individual about the third party, and notify the third party of the erasure request, unless it is impossible or involves disproportionate effort.

    (c) In addition to the general exceptions, certain limited information should be quarantined rather than erased on request, to ensure that the information remains available for the purposes of law enforcement.[74]

    The Government agreed, in principle, with this proposal in its Response.[75]

100. To date, the Law Council has not had a settled position on whether the right to erasure should be introduced,[76] and maintains the view that any right to erasure requires careful consideration and detailed consultation with a broad cross-section of stakeholders.[77]

101. APP 11.2 already requires that information be destroyed or de-identified when it can no longer be handled consistently with the Privacy Act. There is no evidence that an additional broad right of erasure is warranted at this time. Individuals can prompt entities to erase personal information by relying upon APP 11.2 in correspondence under the existing framework. Moreover, we recognise that there may be numerous

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[72] Ibid.
[73] Ibid 67.
[74] Attorney-General's Department, *Privacy Act Review Report 2022* (February 2023) 174-176 [Proposal 18.3].
[75] Australian Government, *Government Response: Privacy Act Review Report* (September 2023) 31.
[76] See Law Council of Australia, *Government response to the Privacy Act Review Report* (Submission to the Attorney-General's Department, 13 April 2023) 25, 62.
[77] Ibid 25.

unintended consequences arising from the introduction of a right to erasure, particularly in the context of multiple exceptions that are a feature of the Privacy Act.

102. These matters require detailed review and consideration to ensure certainty, and to minimise the risk of unintended consequences and change management outcomes that are not proportionate to the privacy and efficiency objectives as sought. In the meantime, we agree with draft recommendation 3.2 in the Interim Report that a right to erasure should not be implemented.

Part 4: Enhancing reporting efficiency, transparency, and accuracy through digital financial reporting

103. Part 4 of the Interim Report contains the following recommendations about digital financial reporting

- **Recommendation 4.1**: Make digital financial reporting the default.[78]

104. The Interim Report proposes that:

> *The Australian Government should make the necessary amendments to the Corporations Act 2001 (Cth) and Corporations Regulations 2001 (Cth) to make digital financial reporting mandatory for disclosing entities. The requirement for financial reports to be submitted in hard copy or PDF format should also be removed for those entities.*[79]

105. We note that the background to this proposed reform arises from the current mandatory requirement for financial reports to be submitted in a non-digital format.[80] The Interim Report identifies that:

- extracting and analysing data from Australian financial reports is expensive, time-consuming. and can be prone to error;
- digital financial reporting is mandated in almost all of the world's other major capital markets; and
- introducing a similar mandate in Australia would be accompanied by transition costs for report preparers and users, but has the potential to raise productivity by increasing the efficiency, transparency, and accessibility of financial reporting.[81]

106. The Law Council supports draft recommendation 4.1, given that digital financial reporting is likely to make engagement with financial documents simpler, more streamlined, and more effective.

[78] Ibid 81.
[79] Ibid.
[80] Ibid 70.
[81] Ibid.