

Office of the Australian Information Commissioner
Consultation on Guidance for Transparency in Automated
Decision Making

ACCI Submission

June 2026



Working for business. Working for Australia.

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Table of Contents

General Comments	1
Consultation questions	3
About ACCI	6

General Comments

ACCI has long been engaged with the Australian Government in regard to the reform of the Privacy Act 1988 and welcomes the opportunity to provide the perspective of the business community on the development of OAIC guidance on the automated decision-making (ADM) transparency obligation, introduced as APP 1.7-1.9.

While not directly related to the present consultation, there are a number of issues which must be raised, as decisions taken (or deferred) during the legislative procedure of the first tranche of the Privacy Act reforms (Privacy and Other Legislation Amendment Act 2024) risk needlessly complicating compliance for businesses. **The government's decision to split the Privacy Act reform into numerous tranches – where procedural novelties have been introduced before addressing fundamentals – is now having the impact of overly complicating compliance, at best, and at worst, failing to see the benefits of the reform realised.**

In general, given the complex nature and ambiguity of the legislation, it is of paramount importance that as much guidance is given as possible – building on principles with non-exhaustive lists – to support businesses with compliance and reduce scope of interpretation, which could expose businesses to risk for non-compliance.

APP Entities

The Privacy Act Review Report (2022) recommended the introduction of the concepts of APP entity controllers and APP entity processors into the Act (proposal 22.1), to which the government agreed in principle. This is based on existing best practice in other jurisdictions. This distinction is related to the proposed removal of the small business exemption (proposal 6.1). Read together, while small businesses are (in future) supposed to be covered by the Privacy Act as an APP entity, the controller-processor distinction would limit the compliance burden for those businesses not acting as controllers. In the legislation (2024), neither of the above proposals was addressed, meaning that absent a controller-processor distinction, **all APP entities which use ADM are required to assess their need to comply with the APP 1.7-1.9 obligations.** This compliance burden is also exacerbated by the absence of clarity in terms of a distinction between AI developers and AI deployers, as has been introduced in the EU (AI Act). Above all, it is incumbent on all APP entities to conduct their own assessment of their need to comply (whether this results in the need to comply with the transparency requirements or not), which is in itself a complex and daunting task.

In this context, the continued small business exemption (with no controller v. processor distinction) nullifies any purported benefits to the transparency envisaged by APP 1.7-1.9, representing a major regulatory gap. The small business exemption remains in force for the time being: the protections and transparency under APP 1.7-1.9 are not able to be fully enjoyed by individuals where ADM is carried out by a business of less than \$3 million, as this business is not an APP entity.

Computer Program: Definition and scope

The OAIC has proposed that 'computer program' be given its broad, ordinary meaning, encompassing pre-programmed rule-based processes, AI/ML systems, generative AI, chatbots, commonly-used software, apps, and word-processing tools. **ACCI submits that this approach is too expansive and would undermine the purpose of the obligation.**

ACCI recommends that 'computer program' be **interpreted purposively and functionally**, aligned with comparable approaches in other jurisdictions. Merely by way of illustration, under GDPR (art. 22), the

obligation is triggered by the nature of the decision output, focusing on systems that evaluate personal aspects to produce decisions affecting individuals, rather than the type of software used. The obligation should not be extended to basic administrative tools.

The guidance should provide clear exclusion categories for systems that should not be captured, including: basic administrative tools (word processors, spreadsheets, calculators); spam filters and cybersecurity tools; and general-purpose software tools that do not evaluate personal aspects to produce decisions materially determining individual outcomes.

Automated-Decision Making: Use cases

The legislation and explanatory memorandum make clear that ADM may overlap with definitions of Artificial Intelligence (AI), but that they are not entirely the same. Nevertheless, there does remain considerable overlap, and circumstances described in the OAIC issues paper do, in many cases, address what would be described as high-risk AI use cases.

The National AI Plan (2025) states that the government is committed to risk-based protections and applying fit-for-purpose regulation, including updating Australia's privacy laws. The risk-based approach, a cornerstone of AI regulations and approaches in other jurisdictions, is neglected in the ADM transparency obligations, which apply the same level of information requirement to all entities covered by the Privacy Act.

As such, in the absence of any legislative direction or list, companies are exposed to the **risks of over-reporting of trivial or additive use-cases**, and under-compliance with seemingly more high-risk situations. Legal frameworks in other jurisdictions provide non-exhaustive lists of situations where AI would be considered high-risk (e.g. biometrics, access to education and vocational training, access to employment, worker management, access to essential services), but the APP 1.7-1.9 is sparse on detail, and relies too heavily on forthcoming OAIC guidance.

Other jurisdictions also apply a tiered approach depending on the level of risk of the system in question, however the APP rules are binary, and **the threshold is ambiguous** ('could reasonably be expected to significantly affect the individual's rights or interests'). In addition, **the breadth of application is unjustified** – in the EU Regulation 2016/679 (General Data Protection Regulation/GDPR), only those decisions which are 'based solely on automated processing' are captured by the regulation.

Compliance burden

The new obligations related to ADM in the Privacy Act, notwithstanding any future amendments to the legislation, represent a major compliance burden for Australian businesses, which starts with discerning if they are in the scope of application of the obligation, and if so, what information needs to be provided in the privacy policy. This obligation is also not a one-off activity, as it will require continuous updating of the policy based on new software applications and new business activities, to ensure ongoing compliance.

Furthermore, while it is positive that the explanatory memorandum to the legislation confirms that commercial-in-confidence information is excluded from the requirement, the decision on the line between compliance, and commercially sensitive information, will likely be nebulous in many cases.

In summary, the burden for businesses to assess their place in the ADM value chain, their third-party suppliers, and the nature of the ADM in question, will be extremely high, and is not likely to be ameliorated by OAIC guidance.

Implementation

The proposed three-month period between the publication of guidance and commencement of ADM obligations is insufficient. Entities will need to audit automated systems across the enterprise, assess

which meet the 'substantially and directly related' and 'significantly affect' thresholds, map personal information flows, update privacy policy disclosures, implement layered transparency measures, and train staff. These steps are sequential, as each depends on the outputs of the preceding stage, making three months an unworkable timeframe. We strongly recommend a transitional period of six to twelve months following finalisation of guidance.

Consultation questions

Question 1 – Substantially and directly related to making a decision

It is positive that the legislation introduces a test, where the conditions of 'substantially' and 'directly' related to making a decision need to be satisfied for the activity to fall within the scope of the obligations. The explanatory memorandum is useful in this regard and provides some useful illustrations as to the meaning of 'substantially' and 'directly' related to making a decision.

The EU GDPR sets a different threshold trigger for obligations related to ADM, namely where a decision is taken 'solely' by ADM. The EU Guidelines provide clarification on what human involvement is: 'To qualify as human involvement, the controller must ensure that any oversight of the decision is **meaningful**, rather than just a token gesture. It should be carried out by someone who has the **authority and competence** to change the decision. As part of the analysis, they should consider all the relevant data.' **The guidance should establish that advisory outputs with genuine human override capability should not be captured by the obligation.** The threshold should draw an **explicit distinction** between systems that effectively determine outcomes (captured) and systems that provide one input among many that a human genuinely evaluates before reaching a determination (not captured).

As such, the suggested factors in the OAIC Issues Paper are largely adequate, but should be complemented with further detail:

- **Degree of reliance on the ADM system output:** there must be a clear threshold which would enable APP entities to assess with certainty where their degree of reliance on the ADM system output sits on a scale. Rank: 5
- **Ability and likelihood of human override over an ADM decision:** the EU guidelines (see above) introduce nuances to this test. These must be of a technical nature (can the decision technically be overridden?), of an organisational nature (does the individual in question have the authority and competence to change the decision?), and look at the situation not only from a systemic point of view (are the above factors a possibility) but also a procedural one (could human negligence render the potential of human override useless, a mere token gesture?). Rank: 4
- **Nature of the output:** the examples provided in the explanatory memorandum are useful in this regard. Rank: 5
- **Transparency and explainability of outputs:** unlike the provisions of the GDPR, the Privacy Act (2024) only requires information to be provided where ADM occurs in the prescribed circumstances. Under Article 22 of the GDPR, data subjects have the right to an explanation of decisions carried out solely by ADM. Without this right for individuals, considering transparency and explainability to be a factor in assessing the ADM is less useful. Furthermore, for entities

using third-party software, access to transparency and explainability of outputs either in general, or on a decision-by-decision basis, renders the process highly complex. Rank: 3

- **Integration of ADM into decision-making workflow:** as a concept, this is not sufficiently clear – the level of integration of ADM does not automatically mean that it is more or less subject to human review.

Question 3 – meaning of significantly affect rights or interests

The suggested list of factors which may increase the likelihood that a decision could affect an individual's rights or interests is a useful starting point, but it is not exhaustive. It is essential to consider first and foremost the **outcome** of the decision, and not just the input factors. In this regard, we welcome the consideration of the EU Guidelines. ACCI recommends that the OAIC interpret 'significantly' consistently with the EU Guidelines that the OAIC itself references. Under that approach, effects must be: **sufficiently great or important** (not merely detectable or trivial); **prolonged or permanent in their impact** on the individual's circumstances; or **leading to exclusion or discrimination**. Trivial or additive effects should not be captured. We recommend guidance provides that routine personalisation falls below the threshold (e.g. product recommendations and suggestions, advertising, and content targeting).

The consideration of ADM which might significantly affect rights or interests of the individual should align with the approach taken under the GDPR interpretation of 'significantly'. Drawing inspiration from similar approaches taken in the EU, this could include access to education, employment, essential services etc.

Building on the principles established in the legislation and on the information in the explanatory memorandum, **ACCI recommends a detailed but non-exhaustive list of use-cases where ADM would constitute significantly affecting rights or interests**. This would serve to support businesses in their assessment of whether their ADM practices would be covered by APP 1.7-1.9.

Question 5 – meaning of significantly affect rights or interests

As mentioned above, the EU AI Act Annex III can prove useful insofar as it lists high-risk AI use-cases / systems, which in many cases are applicable to the present context. As such, a similar non-exhaustive list of situations would be useful for APP entities when assessing their ADM practices.

Question 10 – extent of disclosure

The ADM obligations impose a substantial and ongoing compliance burden on Australian businesses. Organisations must determine whether they are in scope and what to disclose in privacy policies, with continuous updates required as systems and activities change.

Although commercial-in-confidence information is excluded, the boundary with required disclosures will often be unclear. Businesses face a high burden in assessing their role in the ADM value chain, their third-party suppliers, and system characteristics.

Companies relying on third-party ADM systems may struggle to obtain and disclose necessary information, compounded by unclear responsibility across the value chain, which could be addressed by clearer distinctions (e.g. controller vs processor, developer vs deployer).

The Guidance should support businesses as much as possible in their assessment of ADM practices, but crucially also in the provision of information. The burden is already high for entities to ascertain whether

they fall within the scope of the obligations, but the fulfilment of the information provision obligation is also burdensome and unclear.

To support entities in providing effective and meaningful disclosures, the Guidance could include templates and checklists, especially for the most common types of ADM applications (e.g. CV triaging). Furthermore, unclarity on third-party and vendor situations needs to be addressed in the Guidance.

ACCI supports a principles-based approach, supported by a non-exhaustive list of use-cases, to the extent of disclosure under APP 1.7-1.9. Prescriptive disclosure requirements risk creating privacy policies that are technically compliant but practically useless: overwhelming detail defeats the very transparency purpose the obligation is intended to serve. We recommend the guidance support a **disclosure model with a high-level, consumer-friendly summary in the privacy policy** (plain language, accessible to a lay reader, focused on categories and purposes of ADM). Given Australia's broader scope compared to GDPR (capturing beneficial as well as adverse effects, and hybrid as well as fully-automated systems), the case for proportionate and principles-based disclosure is even stronger here than in the EU context. Prescriptive requirements for a broader obligation would produce privacy policies of enormous length and little practical value.

About ACCI

The Australian Chamber of Commerce and Industry represents hundreds of thousands of businesses in every state and territory and across all industries. Ranging from small and medium enterprises to the largest companies, our network employs millions of people.

ACCI strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth, and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education, and training.

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We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

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