12 June 2026

BSA COMMENTS ON GUIDANCE FOR TRANSPARENCY IN AUTOMATED DECISION MAKING

Submitted Electronically to the Office of the Australian Information Commissioner (OAIC)

The Business Software Alliance (**BSA**)[1] welcomes the opportunity to respond to OAIC's Issues Paper on developing Guidance for Transparency in Automated Decision Making (**Issues Paper** and **ADM** respectively).[2]

BSA is the leading advocate for the global software industry. BSA members create technology solutions that power other businesses, including cloud storage services, customer relationship management software, human resources management programs, identity management services, network infrastructure services, cybersecurity solutions, and collaboration systems. Our members have made significant investments in Australia, and we are proud that many Australian companies and organisations continue to rely on our members' products and services to do business and support Australia's economy.

BSA provided inputs on the ADM-related obligations in previous consultations on the Australian *Privacy Act 1988* (**Privacy Act**) and the *Privacy and Other Legislation Amendment Act 2024* (**Privacy Amendment Act**).[3] Our members support the responsible use of ADM and recognise that meaningful transparency regarding its deployment can strengthen public trust, enhance accountability, and improve individuals' understanding of how their personal information is used in legally consequential ADM processes. At the same time, the ADM transparency obligation should be risk-based, clearly scoped, and proportionate. This is especially critical given the broad range of software systems and AI-enabled tools used across modern enterprises.

Summary of BSA's Recommendations

BSA supports the objective of improving transparency regarding the use of automated decision making (ADM) in decisions that may significantly affect individuals' rights or interests. To ensure that the ADM transparency obligation under APP 1.7 is implemented in a clear, proportionate, and risk-based manner, we recommend that the Guidance:

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[1] BSA's members include: Adobe, Alteryx, Amadeus, Amazon Web Services, Asana, Atlassian, Autodesk, Avalara, Bentley Systems, Box, Cisco, Cloudflare, Cohere, Cohesity, Dassault Systemes, Databricks, Datadog, Docusign, Dropbox, Elastic, EY, Graphisoft, HubSpot, IBM, Kyndryl, MathWorks, Microsoft, Notion, Okta, OpenAI, Oracle, PagerDuty, Palo Alto Networks, PTC, Rubrik, Salesforce, SAP, ServiceNow, Shopify Inc., Siemens Industry Software Inc., Trend Micro, TriNet, Veeam, Workday, Zendesk, and Zoom Communications Inc.

[2] Issues Paper: Automated Decision-Making Transparency Obligation (APP 1), May 2026, https://www.oaic.gov.au/__data/assets/pdf_file/0027/263925/ADM-Issues-Paper.pdf.

[3] See: BSA Comments on Australia Privacy Act Review Report 2022, April 2023, https://www.bsa.org/policy-filings/australia-bsa-comments-on-australia-privacy-act-review-report-2022 and BSA Comments on Privacy Amendment Bill 2024, October 2024, https://www.bsa.org/policy-filings/australia-bsa-comments-on-privacy-amendment-bill-2024.

1. **Maintain a clear focus on consequential decision-making.** The Guidance should clarify that the mere use of software, automation, analytics, or AI-enabled functionalities within ordinary business operations does not, by itself, trigger the ADM obligation. The obligation should apply only where a computer program makes, or is substantially and directly related to making, a decision that could reasonably be expected to significantly affect an individual's rights or interests.
2. **Interpret "substantially and directly related" narrowly and consistently with the purpose of the legislation.** The Guidance should distinguish between technologies that materially determine or shape a decision and tools that merely organise, sort, analyse, or present information. Functions that assist human decision-makers without directing or determining an outcome should generally fall outside the scope of the obligation.
3. **Provide greater clarity regarding decisions that significantly affect an individual's rights or interests. T**he Guidance should include additional examples and clear indicators of the types of decisions that are intended to be covered, focusing on decisions with legal or similarly significant effects, such as those relating to employment, housing, education, healthcare, financial services, insurance, criminal justice, and access to essential goods and services.
4. **Clarify that responsibility rests with the entity making decisions about the use of personal information in the ADM process.** The Guidance should recognise the distinction between entities that determine the purposes and means of processing personal information and service providers that merely process information on behalf of others. Technology providers that do not control how customers use their products and services should not be regarded as having "arranged for" a relevant decision.
5. **Ensure that transparency obligations remain practical and proportionate.** The Guidance should avoid imposing monitoring or oversight obligations on technology providers that lack visibility into how customers deploy technology after implementation. Transparency requirements should reflect the realities of modern digital ecosystems and allocate responsibilities to the entities best positioned to fulfil them.
6. **Protect commercially sensitive and proprietary information.** The Guidance should confirm that compliance with APP 1.7 does not require disclosure of confidential technical information, including source code, model weights, proprietary algorithms, training datasets, or other commercially sensitive information. Transparency should be meaningful to individuals while preserving innovation, security, and intellectual property protections.

The ADM Obligation

The Privacy Amendment Act introduced a transparency obligation within Australian Privacy Principle 1 (**APP 1**) of the Australian Privacy Principles (**APPs**) to include information about ADM in an APP entities' privacy policy.

As set out in APP 1.7, this ADM transparency obligation would apply if the following criteria were cumulatively met: [4]

1) the entity has arranged for a computer program to make, or do a thing that is substantially and directly related to making, a decision;
2) the decision could reasonably be expected to significantly affect the rights or interests of an individual; *and*
3) personal information about the individual is used in the operation of the computer program to make the decision or do the thing that is substantially and directly related to making the decision.

Meaning of "Computer Program"

The Issues Paper emphasised that the meaning of computer program is "intended to be interpreted broadly" and "encompass a broad range of matters".[5]

While BSA recognises that the key triggers for whether the ADM obligation applies are ultimately contained in the additional limbs of APP 1.7, notably whether the use of ADM is "substantially and directly related" to making a decision and whether that decision "significantly affects an individual's rights or interests", we are concerned that an overly expansive interpretation of "computer program" could nevertheless create uncertainty regarding the practical scope of the obligation.

Modern enterprises routinely use a broad range of tools and products across ordinary business operations. These may include productivity software, workflow management tools, cybersecurity systems, data analytics platforms and customer relationship management systems. While such products would fall within the broad scope of "computer programs," they are not necessarily connected to the types of consequential decision-making processes that the ADM transparency obligation was intended to address. The Issues Paper specifically stated that "artificial intelligence and machine learning processes" would also be included,[6] but in the same vein, AI functionalities that assist with drafting, coding, translation, or research are typically deployed to support internal operational efficiency and user productivity rather than to make legally significant decisions affecting individuals.

Accordingly, BSA encourages the OAIC to make clear in the Guidance that the mere presence or use of software, automation, or integrated AI-assisted workflows should not, without more, trigger the ADM transparency obligation. Indeed, the relevant inquiry rightfully focuses on whether the system is materially relied upon to make, or meaningfully shape, a decision that could reasonably

[4] APP 1.7 (Contents of APP Privacy Policy – Automated Decisions).

[5] Issues Paper (2026), p. 12.

[6] Issues Paper (2026), p. 12.

be expected to significantly affect an individual's rights or interests. Clarifying these boundaries would help ensure that the Guidance remains appropriately risk-based and targeted toward higher-risk and legally consequential uses of ADM.

Recommendation: The Guidance should make clear that the mere use of software, automation, analytics, or AI-enabled functionalities within ordinary business operations should not trigger the ADM obligation. The Guidance should emphasise that the ADM obligation is intended to apply where the use of ADM makes or is "substantially and directly related" to making a decision and that decision "significantly affects an individual's rights or interests", rather than to ordinary operational, administrative, or productivity-enhancing software functionalities.

Meaning of "Substantially and Directly Related" to Making a Decision

The phrase "substantially and directly related to making a decision" is an important threshold for ensuring that the ADM obligation is appropriately focused on consequential uses of ADM. In this regard, the Issues Paper reiterates the following observations in the Explanatory Memorandum to the *Privacy and Other Legislation Amendment Bill 2024* (**Explanatory Memo**):[7]

- The use of the words "do a thing that is substantially and directly related to making a decision" in APP 1.7(a) reflects that a computer program may be used to recommend a decision to a human decision-maker, or guide a human decision-maker; and
- "Substantially" means where it is a key factor in facilitating the human's decision making, whereas "directly" means where the thing has a direct connection with making the decision.
    - **Note:** The factors are cumulative, i.e., a thing must be both "substantially" AND "directly" related to the decision.

BSA appreciates that the Issues Paper and Explanatory Memo sought to clarify when a thing would be "substantially and directly related to making a decision". However, we remain concerned that the broad scope of this threshold would require the implementation of transparency obligations where they are neither necessary nor warranted to address potential consumer harms.

"Substantially"

The Explanatory Memo explains that a thing is "substantially" related to making a decision when it is "a key factor in facilitating" the human decision-maker's decision.[8] However, the concept of "facilitating" decision-making is itself broad and could potentially capture a wide range of ordinary software functions. Many tools used in enterprise environments help users, including decision makers, organise, sort, filter, prioritise, or present information. While those functions may assist human decision-makers generally, they do not necessarily guide the decision-maker toward a particular outcome or amount to a recommendation that a decision be made.

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[7] Privacy and Other Legislation Amendment Bill 2024 Explanatory Memorandum, September 2024, https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r7249_ems_a01fc1bd-4aa3-4fc2-87d7-ed8aa84ab564/upload_pdf/JC014082.pdf;fileType=application%2Fpdf.

[8] Explanatory Memo (2024), p. 78. As an example, the Explanatory Memo noted that "if Microsoft Excel was used to generate a score about an individual that was a key factor in a human decision-maker making a decision, this would be considered "substantially related to" making the decision.

For example, a function that ranks records based on prescribed parameters and datasets should not automatically be treated as a key factor in facilitating a decision. In many cases, such ranking merely presents facts or data in a specified order, such as by date received, age, or other objective criteria. While this may help a human decision-maker review information more efficiently, it does not, without more, recommend or direct a particular decision.

The presence and role of human oversight should therefore be highly relevant in determining whether a thing is "substantially" related to making a decision. Where a function simply presents facts or data without making a clear recommendation, and the human decision-maker has access to the underlying information together with genuine authority to assess, override, reject, or modify the output, the function is more appropriately characterised as assistive or merely informational, rather than determinative, in shaping or directing a decision.

By contrast, a thing or function may be substantially related to making a decision where it generates a clear and substantive recommendation or decision, particularly where the human decision-maker lacks meaningful ability in practice to independently assess, modify, or depart from the output.

Recommendation: The Guidance should make clear that to be "substantially" related to making a decision, a technology must either: 1) wholly replace human decision-making; or 2) substantially replace human decision-making by using the output to make a decision without intervention of a human who can review, interpret, and analyse the output and has the authority to make or change the decision based on that analysis. The Guidance should further clarify that functions that merely organise, sort, or present facts and data according to objective or predetermined parameters should not be regarded as "substantially" related to making a decision.

"Directly"

The Explanatory Memo explains that a thing is "directly" related to a decision when it "has a direct connection" with making the decision.[9] This explanation is of limited utility because it restates the concept of "directness", rather than clarifying the threshold that needs to be met.

A thing should only be regarded as "directly" related to making a decision when it results in the provision or denial of a service or opportunity that significantly affects the rights or interests of the individual. In other words, the function or thing should be the final step of the decision-making process at which the substantive recommendation is reached.

To illustrate, a tool that determines whether an individual should be approved or rejected for a housing loan will likely have a sufficiently direct connection with the resulting decision. By contrast, a tool that presents loan applications in a specific order, such as credit worthiness, value of collateral, etc., should not be regarded as being "directly" related to the decision.

Recommendation: The Guidance should clarify that a thing is only "directly" related to making a decision when its results in the provision or denial of a service or opportunity that significantly affects the rights or interests of the individual without human oversight, such as when the human

[9] Explanatory Memo (2024), p. 78.

agent is otherwise practically constrained in making a different decision. In such a scenario, it is directly related.

Meaning of "Significantly Affect Rights or Interests"

OAIC should provide a comprehensive explanation of what would constitute a decision that "could be reasonably expected to significantly alter the rights or interests of an individual" under APP 1.7(b). This would increase certainty for both individuals and companies regarding their rights and obligations.

The Issues Paper provided information on how the terms "rights" and "interests" have been interpreted in both Australia and other jurisdictions, such as the EU.[10] In addition to those cited in the Issues Paper, we encourage OAIC to consider how these terms are defined in state privacy laws in the United States, where at least 18 state consumer privacy laws create a right to opt out of automated "profiling" decisions that have legal or similarly significant effects.[11] As a general matter, creating obligations that are interoperable with other privacy laws also ensures that individuals and companies are better able to apply these protections across jurisdictions and drives investment by businesses in effective compliance programs.

We also note that the APP 1.9(d) provides examples of such decisions.[12] These examples are helpful and consistent with the overall intent of the ADM obligation, namely, to focus on decisions that have legal or similarly significant effects on individuals. However, the Guidance can, and should, provide further specificity beyond the examples provided in the APP 1.9(d).

Recommendation: The Guidance should include a comprehensive list of decisions that "could be reasonably expected to significantly alter the rights or interests of an individual" under APP 1.7(b). Specifically, guidance should list decisions like those resulting in the provision or denial of financial or lending services, housing, insurance, education enrolment or opportunity, criminal justice, employment opportunities, health care services or access to essential goods or services. Creating a clear list will help companies better comply with this obligation.

Meaning of "Arranged For"

The ADM obligation applies to the entity which "*arranged for* a computer program to make or do a thing that is substantially and directly related to making, a decision" [emphasis added]. BSA appreciates the Issues Paper's recognition that the phrase "arranged for" is intended to address the fact that "a computer program may be operated by one entity, but another entity is

[10] Issues Paper (2026), p. 16.

[11] See, e.g., Colorado Privacy Act, Sec. 6-1-1303(10) ("Decisions that produce legal or similarly significant effects concerning a consumer" is defined as "a decision that results in the provision or denial of financial or lending services, housing, insurance, education enrollment or opportunity, criminal justice, employment opportunities, health care services, or access to essential goods or services."); Connecticut Data Privacy Act Sec.1(22) ("Decisions that produce legal or similarly significant effects concerning the consumer" are defined as "decisions made by the controller that result in the provision or denial by the controller of financial or lending services, housing, insurance, education enrollment or opportunity, criminal justice, employment opportunities, health care services or access to essential goods or services."); Virginia Consumer Data Protection Act, Sec. 59.1-575 ("Decisions that produce legal or similarly significant effects concerning a consumer" are defined as "a decision made by the controller that results in the provision or denial by the controller of financial and lending services, housing, insurance, education enrollment, criminal justice, employment opportunities, health care services, or access to basic necessities, such as food and water.").

[12] These examples are: 1) a decision made under a provision of an Act or legislative instrument to grant, or to refuse to grant, a benefit to an individual; 2) a decision that affects the individual's rights under a contract, agreement or arrangement; 3) a decision that affects the individuals access to a significant service or support.

responsible for arranging for the computer program to make or assist a decision".[13] This distinction is important and reflects the reality of complex digital ecosystems where multiple actors perform different functions.

In that context, we urge OAIC to distinguish between controllers and processors in its Guidance. Controllers are entities that determine the purposes and means of processing personal information and therefore make the types of decisions relevant to this obligation. Processors are entities that process personal information on behalf of, and in accordance with the instructions of, a controller.[14] BSA notes that the Australian Government committed to implementing a controller-processor distinction following the Attorney General's Department's Privacy Act Review, recognising that "different entities have differing degrees of control over the handling of personal information".[15]

The Guidance should ensure that the "arranged for" language clearly applies to controllers and does not reach processors, because it would impose impractical obligations on them. Without a clear statement to this effect, the current language could be read to include a processor that provides back-end software to business customers but does not decide how those customers use the software and has no information about the types of decisions the business customers may make using the software.

We are also concerned about obligations the Issues Paper may place on vendors, who have limited insight into how their products and services are used after they are purchased and deployed by business customers. The Issues Paper indicates that such entities are expected to "actively identify, assess and keep oversight" of how those tools are used to make or assist decisions on an ongoing basis, both "during and after procurement."[16] This is at odds with the reality of how technology services are provided today. A vendor that sells a technology service to other businesses is unlikely to have oversight as to how those businesses use the service, as strict privacy protections are usually implemented to ensure data is kept secure and private. Monitoring obligations would undercut those protections, creating new privacy and security concerns. Unless a technology provider ordinarily has insight into its business customers' decisions, it should not be treated as "arranging for" a relevant decision.

Recommendation: The Guidance should clarify that the entity which has "arranged for" the use of a computer program under APP 1.7 is the controller, because it is the entity that determines the purpose and use of personal information within the relevant ADM process and therefore makes the relevant decisions. The Guidance also should also ensure that technology providers that do not ordinarily have insight into their business customers' use of that technology are not treated as "arranging for" a relevant decision.

[13] Issues Paper (2026), p. 20-21.

[14] Controllers and Processors: A Longstanding Distinction in Privacy, April 2025, https://www.bsa.org/policy-filings/controllers-and-processors-a-longstanding-distinction-in-privacy.

[15] Government Response to the Privacy Act Review Report, September 2023, https://www.ag.gov.au/rights-and-protections/publications/government-response-privacy-act-review-report, p. 15.

[16] Issues Paper (2026), p. 20.

Extent of Disclosure

BSA agrees with the Issues Paper's observation that the obligation should draw "a balance between providing enough meaningful information for individuals to understand the use of ADM and avoiding excessive detail that obscures the purpose of transparency and clear communication".[17] We also agree that with the approach of excluding "commercial-in-confidence information about ADM systems" from the requirements of APP 1.7[18] and encourage the OAIC to reinforce this principle in the Guidance. In particular, the Guidance should make clear that APP 1.7 does not require disclosure of technical details pertaining to ADM systems such as source code, model weights, proprietary algorithms, training datasets, and other similarly commercially sensitive information.

Recommendation: The Guidance should provide further details on the "commercial-in-confidence information about ADM systems" that is excluded from the requirements of APP 1.7.

Conclusion

We thank OAIC for the opportunity to provide our recommendations in response to the Issues Paper. We hope our comments are useful as the OAIC develops Guidance on the ADM transparency obligations under APP 1.7–1.9. BSA and our members remain committed to supporting responsible and trustworthy uses of ADM and AI technologies. We would welcome continued engagement with the OAIC as the Guidance is further developed.

Yours sincerely,

[redacted]

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Director, Policy – APAC

[17] Issues Paper (2026), p. 21.

[18] Issues Paper (2026), p. 21.