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Office of the Australian Information Commissioner
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By email: privacyreformtranche1@oaic.gov.au.

RE: Consultation on Guidance for Transparency in Automated Decision Making

About us

Governance Institute of Australia is the only fully independent professional association dedicated to the advancement of governance and risk practice in Australia. Our internationally recognised qualifications equip a diverse professional network of business leaders to make good decisions for the benefit of Australia's economy and society. With a history dating over 100 years, Governance Institute is Australia's leading and trusted voice of governance. Our fully accredited education and training is tailored to the meet the needs of governance professionals across public listed, unlisted, and private companies, as well as the public sector and not-for-profit organisations. Governance Institute is committed to independent, evidence-based advocacy that is focused on strengthening the governance capability of Australian organisations. We believe that good governance is the foundation of organisational resilience, productivity, and public trust.

Executive summary

Governance Institute recognises the benefits that derive from the use of technology when it is underpinned by public trust and confidence. Governance Institute's annual Ethics Index has observed AI rapidly climbed the ranks to become the third most pressing ethical challenge and the second hardest future issue to navigate with concerns heavily centred on AI deception, the need for transparency, and corporate use of AI.[1] Governance Institute Studies have shown that the uptake of AI technologies is a patchwork of adoption and success.[2] Stated reasons for this stalled progress relate in part to regulatory uncertainty.

Governance Institute supports the intended aims of the privacy reforms in driving public trust and confidence in frontier digital technologies in the workplace, including the significant value add, that comes with AI systems. However, some of the proposed definitions and the interpretation of key terms appear too broad to achieve an appropriate balance between increasing public trust and giving organisations confidence in their ability to adopt and deploy new technologies. We provide 7 recommendations to streamline and simplify the implementation of the reforms and spread the regulatory incidence between consumer, product and service providers and new businesses being captured by these new reforms.

[1] https://www.governanceinstitute.com.au/ethics-index/
[2] https://www.governanceinstitute.com.au/thought-leadership/2025-ai-deployment-and-governance-survey-report/

Meaning of 'computer program'

The Issues Paper confirms the term 'computer program' is intended to be interpreted broadly to include pre-programmed rule-based processes and AI and machine learning processes to make or execute a task. This incorporates chat bots and generative AI tools used to generate text, images, videos, code or synthesis including chatbots, but will also include a much broader suite of commonly used software apps and word processing tools.

We consider the proposed definition is too broad and risks over-regulating low-risk, administrative systems. Partially automated decisions assisted by computer programs, such as the use of Excel outputs in the use of financial decisions, should be excluded as these computer programs are not used to determine outcomes per se; they are leveraged to support human decision-making efforts rather than replacing them altogether. The term 'computer program' should be more narrowly defined to, 'computer programs that think, act or learn autonomously as agents or algorithms on behalf of humans'. That is, wherever automated decisions are being made without human oversight. This highlights the need for humans-in-the-loop or appropriate governance and oversight frameworks to ensure the integrity of decisions made by autonomous AI algorithms or agents.

Recommendation 1: Narrow the definition of 'computer program' to 'computer programs that think, act or learn autonomously or on behalf of humans' to raise organisational awareness of the need for human oversight wherever critical decisions are being made by automated or autonomous computer programs.

Meaning of 'substantially and directly related to making a decision'

This Issues Paper restates the Explanatory Memorandum's high-level guidance that:

a. *'substantially' means where the thing made or done by a computer program is a key factor in facilitating the human's decision making; and*

b. *'directly' means where the thing made or done by a computer program has a direct connection with the making of the decision.*

The EU Guidelines provide useful clarification on 'human involvement':

> *'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.'*[3]

Taking this definition, the degree of reliance on the ADM system output would need to be high with a direct ability and likelihood of human override over an ADM decision. The nature of the output should be determinative rather than advisory in nature. Organisations regularly integrate 'automated decisions' into decision-making processes and thus the term 'substantial' should be closely aligned with the interpretation of other legal frameworks, such that 'substantial adverse effects' should amount to 'substantial loss or damage that is real or of substance and not insubstantial, ephemeral or nominal'.

Recommendation 2: Adopt the EU Guideline definition of 'human involvement' and define an ADM system output as 'an ADM system output that directly and substantially facilitated a human to make a determinative decision or outcome'.

[3] https://ec.europa.eu/newsroom/document.cfm?doc_id=47742

Meaning of 'significantly affect rights or interests'

The Issues Paper considers overseas guidance on the meaning of 'rights' and 'interests', such as the UK Information Commission's Office Guidance and the European Commission Guidelines on Automated individual decision making and Profiling for the purposes of regulation 2016/679. The OAIC provides that to meet the 'significant' threshold, 'the effects must be more than trivial and have the potential to significantly influence the circumstances of the individual concerned'. The proposed definition should be narrowly defined to incorporate 'rights or interests that adversely affect individuals on a prolonged or permanent basis or lead to the exclusion or discrimination of that individual' rather than a broader interpretation of rights that may incorporate a combination of federal, state, and territory legislation, common law, and international commitments that risks duplication and overlap with existing regulatory schemes and provisions.

Differential pricing that is based on personal data for goods or services or pricing that is based on actions or activities of individuals other than the one to which the automated decision relates is often used to price insurance or consumer credit products based on individuals with similar risk categories. Known as third-degree pricing, sellers divide the market into different segments and charge different prices.[4] Differential pricing or pricing discrimination is a practice of pricing goods and services that is already regulated by existing consumer protection and competition laws, such as unfair trading practices and deceptive or misleading conduct. Although the issue of differential pricing was not directly addressed in recently proposed reforms as outlined in the Competition and Consumer Amendment (Unfair Trading Practices) Bill 2026 Bills Digest, *t*he use of personal data to manipulate or unreasonably distort online environments in which consumers make or likely to make a decision causes or is likely to cause financial harm or other such determinant was considered an issue needing to be addressed in digital markets.[5] Stakeholders to that inquiry highlighted a range of issues with proposed provisional amendments to the ACL that risk potential duplication with other provisions and regulatory schemes.

Recommendation 3: Narrow the interpretation of significantly affect rights or interests to mean, 'rights or interests that adversely affect individuals on a prolonged or permanent basis, financial or other such determinant such as the exclusion or discrimination of that individual'.

Meaning of 'making a decision'

APP 1.9 outlines that 'making a decision' includes refusing or failing to make a decision, and doing a thing includes refusing or failing to do a thing. To assist with the interpretation of a 'decision,' the OAIC has considered its meaning across other legal frameworks, including in Administrative law and Corporations law. For consistency, it is recommended that the definition contained in the *Corporations Act 2001 (Cth)* and the *Administrative Review Tribunal Act 2024 (Cth)* is adopted. The definition of 'business judgement' provides further clarification on the meaning of 'making a decision'. Critically, the business judgement rule under s 180(2) of the Corporations Act should be leveraged when OAIC is ascertaining the merits of the decision being made, such as whether it was taken in good faith, for a proper purpose and whether there was rational belief that the judgement or decision was in the best interests of the corporation.

[4] https://www.simon-kucher.com/en/insights/price-discrimination-strategies-legality-and-implications-businesses

[5] https://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/10834382/upload_binary/10834382.pdf

Recommendation 4: Adopt the definition of 'decision' used in existing legal frameworks, the *Corporations Act 2001 (Cth)* and the *Administrative Review Tribunal Act 2024 (Cth*). Where ambiguity exists over how the decision was made, the business judgement rule s 180(2) of the Corporations Act should be used by the OAIC in making that determination.

Meaning of 'arranged for'

The Issues Paper confirms 'arranged for' is distinct to 'operation of' a computer program. To be captured, an APP entity would 'need to be responsible for arranging the computer program to make or assist a decision'.[6] This recognises that a computer program may be operated by one entity, but another entity is responsible for arranging for the computer program to make or assist a decision. This may require an organisation to actively identify, assess and oversee how a third-party product or service uses ADM. Organisations are also required to understand how ADM is being used in a third-party product or service to make or assist decisions and what types of decisions are being made. Some organisations may find it difficult to access or obtain this type of information on the basis that the third-party product or service provider may lack transparency or adequately explain how a third-party product or service uses ADM. For example, an organisation that procures another entity's AI system to screen and rank job applications leading to a decision being made on who to employ. The regulatory incidence should fall on the service or product provider to provide that information rather than the user requesting that information voluntarily or otherwise.

Recommendation 5: The onus of responsibility to identify, assess and oversee how an ADM is being used should fall with the product or service provider of the computer program and not the entity that 'arranged for' its use as the entity arranging for its use, such as a small enterprise, may not have sufficient access or rights to access that information.

Extent of disclosure

The Issues Paper outlines that the objective of APP 1 is to ensure that APP entities manage personal information in an open and transparent way that can achieved through a clearly expressed and up-to-date policy about the management of personal information by APP entities.

Organisations providing ADM products and services should ensure that meaningful and accessible information is provided to consumers in plain language, sufficiently detailed but not as to overwhelm the consumer, with a pathway to challenge or contest the information and decision. For example, if company A uses company B's ADM product or service, company B should be responsible for providing company A's customer with how it handles privacy information including a mechanism for the customer to contest how their information is used. Placing the onus of responsibility on ADM product or service providers rather than organisations providing those ADM products or services as part of their business operations will prevent a major compliance burden on individual Australian businesses as this type of information may be difficult to access, comprehend and will require ongoing updates to keep pace with how the technology evolves and changes over time.

The UK's ICO best practices Report recommendations addresses the need to balance privacy transparency with clear communication to ensure consumers actually understand how an entity processes their information and avoids overly complex explanations or technical or legal jargon.[7]

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[6] https://www.minterellison.com/articles/oaic-seeks-feedback-on-automated-decision-making

[7]

Recommendation 6: Adopt the ICO best practice recommendations to help balance privacy transparency with clear plan language information that is sufficiently detailed with a contestability mechanism for consumers.

Implementation period

The proposed implementation window of three months appears unrealistic as disclosing entities will need time to audit ADM across their enterprise, assess which ADM products and services may meet certain thresholds, consider personal data use and retention policies, seek third-party information and adequately train staff. Full enforcement of these new obligations may require up to 6 to 12 months.

Recommendation 7: Extend the implementation window from the proposed three months to between 6 to 12 months as to provide APP reporting entities sufficient time to adequately prepare policies and train staff of these new reporting obligations.

If you have any questions, please contact me or [redacted]

Yours faithfully,

[redacted]

[redacted]

Policy and Advocacy

https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/artificial-intelligence/explaining-decisions-made-with-artificial-intelligence/>