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Office of the Australian Information Commissioner

By email: privacyreformtranche1@oaic.gov.au

Consultation on Guidance for Transparency in Automated Decision Making

The Australian Energy Council (AEC) welcomes the opportunity to comment on the development of guidance in relation to Automated Decision Making (ADM) following the Privacy and Other Legislation Amendment Act 2024 (POLA).

The AEC broadly supports the ADM obligation and the Office of the Australian Information Commissioner's (OAIC) mandate to provide further guidance, which will be critical to its effective and efficient implementation. However, we are concerned about additional and unnecessary regulatory burden in circumstances where disclosure does not provide meaningful benefits to customers or other individuals.

The AEC advocates for proportionate, harm-led guidance that delivers meaningful transparency for individuals while remaining feasible to implement and maintain.

We believe the ADM obligation, as drafted, is too broad; pragmatic guidance is essential

The obligation is a significant-decision disclosure duty, not a technology inventory. Without clear guidance, it risks creating unnecessary regulatory burden and overly broad disclosures.

Any guidance prepared by the OAIC should organise assessment and disclosure obligations around harm and impact. We note this is what the statute's own threshold already contemplates, since a decision must 'significantly affect the rights or interests of an individual'.

The AEC's view is that the OAIC should set a reasonable, good-faith compliance standard focused on automated decisions that materially contribute to significant outcomes for individuals, including artificial intelligence-enabled decisions, rather than requiring a technical scan of every downstream system or formula that may lead to an automated outcome.

The core issue with the obligation is its breadth. It extends beyond solely automated decision-making to computer programs that substantially and directly assist a human decision. The broad definition of "computer program" and the open-ended "arranged for" concept create real uncertainty about what is in scope. Guidance is the appropriate vehicle to resolve this uncertainty through proportionate interpretation, rather than encouraging additional disclosure for its own sake.

Suggested improvements

To enable meaningful transparency and harm-oriented protection for individuals, we suggest three key improvements to support practical feasibility and operability for industry.

1. Clarify the scope and application of the obligation, including supply-chain depth

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The AEC would like the OAIC to confirm that obligations under APP 1.7–1.9, including the "arrangements" and "operation" of ADM, are limited to activities conducted by AEC members and their directly engaged third parties.

It is not feasible for entities to manage or disclose every embedded or downstream technical function across complex supply chains. Clarifying that the obligation is confined to activities within an entity's control would ensure that disclosures remain practicable, accurate, and meaningful.

- This would ensure feasible and targeted disclosures focused on decisions AEC members can control; and
- It would ensure that significant decisions arranged by AEC members remain fully disclosed.

The Issues Paper indicates that the obligation is not limited to fully automated decisions and extends to processes that are "substantially and directly related" to decision-making. While this broad approach is understood, it introduces material uncertainty as to when the obligation is triggered in practice, particularly when considered alongside complex supply chains and layered technological systems.

In particular, there is limited practical guidance on:

- How to assess whether a decision "significantly affects the rights or interests" of an individual, especially in complex or indirect decision-making contexts;
- What constitutes a process that is "substantially and directly related" to a decision, particularly where automation informs but does not determine outcomes; and
- How thresholds of "significance", "risk" and "impact" should be applied consistently across sectors with differing operational models and regulatory settings.

Absent clearer thresholds and interpretive guidance, entities may struggle to consistently determine which processes fall within scope. This creates a risk of inconsistent application across industry and undermines regulatory certainty. It may also incentivise an overly cautious, over-inclusive approach to disclosure in order to mitigate compliance risk, resulting in disclosures that are overly broad or generic and therefore less meaningful to consumers.

Clarifying both the scope (including limits on supply-chain depth) and the thresholds for application would support a more consistent and proportionate framework. This would help ensure that disclosures are focused on decisions that meaningfully affect individuals, while remaining practical to implement and useful in informing consumer understanding.

Need for practical guidance and worked examples

To support implementation, the final Guideline should include practical, sector-relevant worked examples. These examples would help entities to:

- Distinguish in-scope and out-of-scope decisions;
- Interpret how the obligation applies to common business processes; and
- Understand how to treat partially automated decision-making.

This is particularly important in sectors such as energy, where automation is embedded across a wide range of functions. Worked examples should also make clear what the OAIC expects entities to disclose in practice.

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Worked examples would reduce interpretive uncertainty, clarify expectations, and support more consistent application across industry.

2. Provide guidance on the OAIC's approach to enforcement, including recognition that good-faith efforts to identify and disclose ADM on a harm-based basis support compliance with POLA.

AEC members are heavily regulated businesses with strong risk management frameworks. We propose that retail energy businesses should be able to rely on a structured, harm-prioritised scoping process and harm-based disclosure to satisfactorily meet the ADM obligation.

- This provides certainty and proportionality for entities acting in good faith.
- It anchors compliance to the statutory significant-effect categories as a backstop, so the standard cannot be used to avoid disclosing genuinely significant ADM.

The AEC has examined relevant business processes and considers that there are many use cases where disclosures would be neither feasible nor practical.

3. Consider a staged implementation approach, using the GDPR position as an initial baseline

In addition to the above, the proposed ADM disclosure obligations extend to decisions where a computer program plays a substantial and direct role in the decision-making process. This differs from the position under the GDPR, which limits disclosure obligations to decisions that are solely automated.

At least in the initial implementation phase of this legislative framework, we consider that there is merit in adopting the GDPR approach as a baseline. This would provide organisations with a more targeted and manageable starting point for compliance. Consideration could then be given to expanding the scope to the currently proposed broader obligations once entities have had sufficient time to adapt to and operationalise the requirements.

We would be happy to engage further with the OAIC or provide additional information in relation to this submission. If you have any questions, please contact me directly at [redacted] or by telephone on [redacted]

Yours sincerely,

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