19 NOVEMBER 2024

REVIEW OF AI AND THE AUSTRALIAN CONSUMER LAW

Submission from consumer advocates to the Treasury

About Us

CHOICE

CHOICE is the leading consumer advocacy group in Australia. CHOICE is independent, not-for-profit and member-funded. Our mission is simple: we work for fair, just and safe markets that meet the needs of Australian consumers. We do that through our independent testing, advocacy and journalism. To find out more about CHOICE's campaign work visit www.choice.com.au/campaigns

Australian Communications Consumer Action Network

ACCAN is the peak national consumer advocacy organisation for communications working to achieve trusted, accessible, inclusive, affordable and available communications and digital services for all Australians.

Consumer Policy Research Centre

The Consumer Policy Research Centre (CPRC) is an independent, not-for-profit, consumer think-tank. CPRC aims to create fairer, safer and inclusive markets by undertaking research and working with leading regulators, policymakers, businesses, academics and community advocates.

Financial Rights Legal Centre

The Financial Rights Legal Centre is a community legal centre that specialises in helping consumers understand and enforce their financial rights with consumer financial products and services, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals through our following channels: Credit and Debt Legal Advice Line 1800 844 949 for those needing legal advice in NSW; National Debt Helpline 1800 007 007 – for people needing to talk to a financial counsellor (please note this line is answered by a number of different services around Australia, Financial Rights is one of those services); Financial Rights Legal Centre - https://financialrights.org.au/; Mob Strong Debt Help 1800 808 488 – our national service for Aboriginal and Torres Strait Islander callers https://financialrights.org.au/mob-strong-debt-help/; Insurance Law Service 1300 663 464 – our national service focusing on problems with insurance or debts to insurers.

Justice and Equity Centre

The Justice and Equity Centre is a leading, independent law and policy centre. Established in 1982 as the Public Interest Advocacy Centre (PIAC), we work with people and communities who are marginalised and facing disadvantage. The Centre tackles injustice and inequality through:
- legal advice and representation, specialising in test cases and strategic casework;

- research, analysis and policy development; and
- advocacy for systems change to deliver social justice.

Consumer Action Law Centre

Consumer Action is an independent, not-for-profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

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Introduction

This submission is made by CHOICE in partnership with Financial Rights Legal Centre, Justice and Equity Centre, Australian Communications Consumer Action Network, Consumer Action Law Centre and Consumer Policy Research Centre.

The development and use of artificial intelligence (**AI**) is a growing concern in Australia. While AI may present some benefits and opportunities, consumers must be protected from the physical, psychological and financial harms caused by AI. The law must align with consumer expectations on how businesses should use AI to avoid harms to health and safety.

Consumers have repeatedly voiced concerns about the increasing use of AI. Earlier this year, CHOICE conducted national research on consumer sentiment about AI-based goods, services, and practices.[1] The research found that:

- 78% agree that businesses should have to ensure their artificial intelligence system is fair and safe before releasing it to the public;
- 80% agree that businesses should allow customers to speak to a person if they're unhappy with a decision made by AI;
- 75% agree that processes should be in place to prevent chatbots from promoting harmful content; and
- 69% agree that the Government should have an independent third party assess the risks of businesses' AI products or services before releasing them to consumers.

Consumer advocates have engaged with a number of consultative processes on how the Government should address AI through laws and regulation, including the Department of Industry, Science and Resources' Safe and Responsible AI in Australia and mandatory guardrails for AI in high-risk settings consultations, and various consultations on reforms to the *Privacy Act*. Despite developments in these areas, consumers remain vulnerable to AI-related harms because the Australian Consumer Law (**ACL**) has not been updated to broaden its protections. The Australian Competition and Consumer Commission (**ACCC**) also needs to be appropriately resourced to monitor compliance and take enforcement action where necessary, in relation to AI harms.

To protect consumers, the Government should implement certain changes to the ACL and resource and empower the ACCC to take appropriate action in relation to AI-enabled goods and services.

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[1] CHOICE Consumer Pulse January 2024 is based on an online survey designed and analysed by CHOICE. 1,058 Australian households responded to the survey with quotas applied to ensure coverage across all age groups, genders and locations in each state and territory across metropolitan and regional areas. The data was weighted to ensure it is representative of the Australian population based on the 2021 ABS Census data. Fieldwork was conducted from the 16th of January until the 5th of February, 2024.

Recommendations

The Government should:

1. Amend the Australian Consumer Law to establish a prohibition on unfair trading practices that is:

   ○ economy-wide to reduce gaps in consumer protection,
   ○ broadly drawn to respond to current and future practices, including AI-based goods and services, and
   ○ backed by a comprehensive range of penalties and remedies;

2. Amend the Australian Consumer Law to include a general safety provision that is:

   ○ based on a clear definition of "safe" that captures AI-related safety issues,
   ○ applicable to the entirety of the AI supply chain, and
   ○ backed by a comprehensive range of penalties and remedies;

3. Resource the ACCC to enforce existing provisions of the ACL in relation to AI-enabled goods and services;

4. Review the definitions of "good", "service" and "supplier" in the ACL to ensure they remain appropriate in a world with more AI enabled goods and services. It may also be appropriate for more regulator guidance about other concepts in the ACL;

5. Amend the consumer law to include software-specific consumer guarantees in the ACL to ensure consumers have access to remedies;

6. Direct the ACCC to conduct a market study of AI-based goods and services, including but not limited to studying the governance frameworks of businesses using or developing AI-based goods and services;

7. Conduct regular reviews of the ACL to ensure new and emerging issues with AI-based goods and services are addressed in the ACL;

8. Empower the ACCC to enforce consumer guarantees with penalties;

9. Establish a digital ombuds scheme to resolve disputes, including disputes arising from the use of AI; and

10. Protect consumers in all markets by ensuring that relevant updated provisions in the ACL are reflected in other consumer-related laws, including the *ASIC Act*, where appropriate.

Managing risks by addressing known gaps in the ACL

Known gaps in the ACL mean it is ill-equipped to manage the specific risks of consumer harm posed by AI-enabled goods and services. The foundational principles of the ACL provide consumers with some protection from harms from goods and services. However, AI-enabled goods and services pose unique challenges to the ACL that traditional goods and services do not, including the autonomous, scalable, adaptable and opaque nature of AI systems. These unique features of AI can create or exacerbate risks of discrimination, manipulation, incorrect information and goods and services not fulfilling basic expectations due to unintended or unforeseen consequences.

There are a number of AI-based practices that may create risks for consumers at present and into the future, including:

- Virtual assistants (also known as voice or digital assistants), which pose risks to privacy through data collection and cybersecurity breaches, risks for discriminatory outcomes based on algorithmic bias, and risks for unequal access for people with disabilities, including people who are deaf or hard of hearing.[2]

- Chatbots used for customer service, which may provide incorrect information or limit consumer access to support or redress. For instance, a chatbot used by Air Canada provided inaccurate information about discounts to a passenger[3], while a survey on sentiment towards chatbots showed that 75% of consumers found that chatbots are unable to "handle complex questions and are often unable to provide accurate answers."[4] Research conducted by Consumers International with national consumer organisations found that generative AI chatbots in their study presented instances of bias and hallucinations in their responses.[5]

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[2] Paterson, Jeannie Marie and Maker, Yvette and Maker, Yvette (2021), "AI in the Home: Artificial Intelligence and Consumer Protection, To be published in Ernest Lim and Phillip Morgan (eds), *The Cambridge Handbook of Private Law and Artificial Intelligence (Cambridge University Press, Forthcoming)*, Available at SSRN: https://ssrn.com/abstract=3973179 or http://dx.doi.org/10.2139/ssrn.3973179.

[3] BBC (2022), "Airline held liable for its chatbot giving passenger bad advice - what this means for travellers", https://www.bbc.com/travel/article/20240222-air-canada-chatbot-misinformation-what-travellers-should-know.

[4] Forbes (2023), "One Negative Chatbot Experience Drives Away 30% Of Customers", https://www.forbes.com/sites/gilpress/2023/02/01/one-negative-chatbot-experience-drives-away-30-of-customers.

[5] Consumers International (2024), "Can we trust AI chatbots? Results revealed from our experiment", https://www.consumersinternational.org/news-resources/news/releases/can-we-trust-ai-chatbots-results-revealed-from-our-experiment/

- Personalised and dynamic pricing, which can increase costs for consumers, and discriminate against cohorts of consumers based on their personal characteristics. Algorithmic systems have increased the capacity for businesses to deploy personalised and dynamic pricing practices. For example, dating service Tinder recently agreed to cease personalised pricing based on age and to inform consumers of other personalisation practices after investigations by European Union consumer authorities.[6] A CHOICE investigation in 2020 found similar practices in Australia at the time.[7]

- Recommender systems, which risk manipulating consumer behaviour or promoting harmful content. The eSafety Commissioner noted that recommender algorithms can promote scam content, while also noting that platforms can exploit recommender systems to self-preference their own content or products above competitors.[8]

- Targeted advertising, particularly systems that use generative AI, which risks consumer manipulation. Targeted advertising has the capacity to manipulate people based on vulnerable characteristics that may increase susceptibility to predatory marketing[9]; generative AI can exacerbate these issues – a report by the Norwegian Consumer Council noted that generative AI can be used to create text copy and visuals for advertising tailored to manipulate specific traits and cohorts, and that this process can be automated.[10]

- AI-based scams are increasing in prevalence. AI allows scammers to create "deepfake" video and audio to impersonate celebrity sponsorships of scam products and services[11], or use voice cloning technology to impersonate loved ones for financial scams.[12]

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[6] European Commission (2024), "Tinder commits to provide consumers with clear information about personalised prices", https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1344.
[7] CHOICE (2020), "Tinder charges older people more", https://www.choice.com.au/consumers-and-data/data-collection-and-use/how-your-data-is-used/articles/tinder-plus-costs-more-if-youre-older.
[8] eSafety Commissioner, *Position statement: Recommender systems and algorithms*, https://www.esafety.gov.au/sites/default/files/2022-12/Position%20statement%20-%20Recommender%20systems%20and%20algorithms.pdf.
[9] Reset Australia (2023), *Australians for Sale: Targeted Advertising, Data Brokering, and Consumer Manipulation*, https://au.reset.tech/uploads/Reset.Tech-Report-Australians-for-Sale-2023.pdf.
[10] Norwegian Consumer Council (2023), *Ghost in the machine – Addressing the consumer harms of generative AI,* https://storage02.forbrukerradet.no/media/2023/06/generative-ai-rapport-2023.pdf.

[11] Sky News (2024), "Aussie consumers and businesses urged to remain 'informed and vigilant' as growth of AI technology increases threat of deepfakes", https://www.skynews.com.au/business/tech-and-innovation/aussie-consumers-and-businesses-urged-to-remain-informed-and-vigilant-as-growth-of-ai-technology-increases-threat-of-deepfakes/news-story/c72ad3f231cacae21af9e450873c5e5b.
[12] CHOICE (2024), "AI voice scams: What you need to know", https://www.choice.com.au/consumers-and-data/protecting-your-data/data-privacy-and-safety/articles/ai-voice-scams.

Unfortunately, the ACL does not provide sufficient general protections for consumers in all markets, which increases the risk of harm and failures of redress. The preceding examples highlight risks that may not be adequately addressed under the current ACL. Two major reforms that would increase the effectiveness of the ACL include a **prohibition on unfair trading practices** and a **general safety provision.** In conjunction, these reforms would provide baseline protections for consumers when other laws fail or include gaps, such as privacy laws or future mandatory guardrails on AI in high-risk settings. Specifically:

- The Government's announced prohibition on unfair trading practices should provide protections against the unfair use of AI against consumers in the marketing and selling of goods and services, product design and pricing and post-sale practices, such as using AI to set discriminatory or unfair prices on services and forcing consumers to use an AI chatbot to access customer service;

- A general safety provision, analogous to the regulatory regime in the United Kingdom, would protect consumers from unsafe applications of AI, such as the sale of AI-enabled products that may cause physical (e.g. autonomous appliances causing injury to users) or non-physical harm (e.g. chatbots providing dangerous advice or abusive communication).

However, in some instances, current provisions in the ACL already apply and should be enforced when appropriate. For instance, false representations or misleading conduct about the use of AI in goods and services should be addressed by the ACCC under existing protections. Recommendations made by AI systems (such as virtual assistants) that lead to unsuitable or costly outcomes may also fall under existing protections against false and misleading representations and should be addressed using these powers.[13] Recently, the U.S. Federal Trade Commission has taken enforcement actions against companies that deceived consumers under "Operation AI Comply" – including penalties against DoNotPay for falsely claiming AI systems could replace human lawyers and review websites for legal violations, and penalties against Rytr for AI-generated reviews containing false information.[14] Enforcement actions may be necessary in Australia against businesses with similar practices.

Recommendations

The Government should:

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[13] Paterson, Jeannie Marie and Maker, Yvette and Maker, Yvette (2021), "AI in the Home: Artificial Intelligence and Consumer Protection, To be published in Ernest Lim and Phillip Morgan (eds), *The Cambridge Handbook of Private Law and Artificial Intelligence (Cambridge University Press, Forthcoming)*, Available at SSRN: https://ssrn.com/abstract=3973179 or http://dx.doi.org/10.2139/ssrn.3973179, p. 10.

[14] Federal Trade Commission (2024), "Operation AI Comply: continuing the crackdown on overpromises and AI-related lies", https://www.ftc.gov/business-guidance/blog/2024/09/operation-ai-comply-continuing-crackdown-overpromises-ai-related-lies.

1. Amend the Australian Consumer Law to establish a prohibition on unfair trading practices that is:

   ○ economy-wide to reduce gaps in consumer protection,
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2. Amend the Australian Consumer Law to include a general safety provision that is:

   ○ based on a clear definition of "safe" that captures AI-related safety issues,
   ○ applicable to the entirety of the AI supply chain, and
   ○ backed by a comprehensive range of penalties and remedies; and

3. Resource the ACCC to enforce existing provisions of the ACL in relation to AI-enabled goods and services.

Managing risks by addressing uncertainty in the ACL and in AI itself

Consumers are left uncertain about the risks of AI due to the nature of AI, the practices of businesses that use or provide AI-based goods and services, and uncertainty in the ACL and other laws. This uncertainty has a negative impact on consumers who may be unaware of the risks associated with AI and how to seek redress. There may be opportunities to improve certainty in relation to certain definitions in the ACL and consumers should be entitled to disclosure and transparency about the use of AI.

Uncertainty in the ACL

The Federal Government should ensure that core definitions in the ACL are sufficiently broad to ensure all possible loss or harm that may result from goods or services that are, or involve, AI-based goods and services can be prevented or remedied. In this respect, we highlight the following challenges with existing definitions and protections in the ACL which are likely to be exacerbated by the proliferation of AI-enabled goods and services.

● The guarantees and remedies consumers are entitled to under the consumer guarantees differ depending on whether they have purchased a "good" or a "service". AI is likely to further complicate the distinction between goods and services, and what consumer guarantees apply.

- Our product safety regime only applies to "goods". Again, AI is likely to challenge this distinction and there is potential for certain products to involve both goods and services, and these may cause illness or injury.
- There are no specific obligations in consumer guarantees that explicitly relate to any form of software or technology embedded in products or its associated updates, including guarantees requiring businesses to provide security and software updates to customers. Consumers will require access to software updates and other protections to ensure their products and services remain fit for purpose.

- The current definition of "supplier" creates uncertainty which can create challenges for consumers trying to enforce their rights, particularly when there may be multiple businesses involved in the chain of manufacturing and selling goods and services. It is likely many businesses may adopt or use AI manufactured by other businesses in their AI enabled products and services. Consumers should only have to deal with one "supplier" in this chain.

We recommend the Government undertake a review of these key definitions to ensure they remain appropriate in a world with more AI enabled goods and services. The Government should also amend the consumer law to include software-specific consumer guarantees, as recommended by the Productivity Commission's inquiry into Right to Repair.

We also acknowledge other concepts in the ACL involve uncertainty, such as 'major failure' and 'reasonable rejection period'. We consider that much of this remaining uncertainty could be addressed through appropriate regulator guidance. We consider this in more detail in our submission to the Government's consultation about *Introducing penalties for consumer guarantees*.

The ACCC could also assist in reducing uncertainty by conducting dedicated specialist monitoring on the use, development, and distribution of AI-based goods and services in Australia. At an appropriate time, the ACCC should also be directed to conduct a market study to outline current practices, articulate guidance on the application of current laws and (if needed) recommend any further reforms to the law. A recent ASIC market review into Australian financial services and AI found[15]:

- A widening gap between the accelerating innovation in how financial services used AI, and the slow adaptation of their governance frameworks to accommodate the consumer risks presented by their use of AI;

- Growing use of complex and opaque AI systems that might present challenges to oversight processes; and

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[15] ASIC (2024), *Beware the gap: Governance arrangements in the face of AI innovation*, https://download.asic.gov.au/media/mtllqjo0/rep-798-published-29-october-2024.pdf.

- Gaps in how services assessed risks to consumers and weaknesses in meaningful human oversight.

Similar issues likely exist in consumer markets regulated by the ACL. A market study by the ACCC can clarify the prevalence of AI in the consumer market, particularly in terms of the types and intensity of how AI is used in goods and services, and whether governance frameworks at businesses using or developing AI are suitable. The rapid pace of development in AI technologies may also create future challenges that may be outside current considerations. The Government should conduct regular reviews of the ACL to ensure new and emerging issues with AI-based goods and services are addressed in the ACL.

Recommendations

The Government should:

4. Review the definitions of "good", "service" and "supplier" in the ACL to ensure they remain appropriate in a world with more AI enabled goods and services. It may also be appropriate for more regulator guidance about other concepts in the ACL;

5. Amend the consumer law to include software-specific consumer guarantees in the ACL to ensure consumers have access to remedies;

6. Direct the ACCC to conduct a market study of AI-based goods and services, including but not limited to studying the governance frameworks of businesses using or developing AI-based goods and services; and

7. Conduct regular reviews of the ACL to ensure new and emerging issues with AI-based goods and services are addressed in the ACL.

Uncertainty in AI itself

Uncertainty in AI manifests in a number of ways:

- Consumers may be unaware that AI is being used in a good or service – a global study by the University of Queensland and KPMG found that 41% of respondents were unaware of AI use in common technologies, including ridesharing apps (59%) and accommodation sharing apps (64%)[16];

- Regulatory uncertainty on the scale of AI-based goods and services in Australia – as an unregulated term, the prevalence of AI-based goods and services is unquantified in

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[16] Gillespie, Nicole, Lockey, Steven, Curtis, Caitlin, Pool, Javad, and Ali Akbari (2023). "Trust in Artificial Intelligence: A global study". Brisbane, Australia; New York, United States: The University of Queensland; KPMG Australia, p. 57.

Australian markets, making it difficult to understand the scale of addressing possible consumer issues with AI; and

- Regulatory uncertainty on the nature of AI-based goods and services due to opacity (the "black box" problem) – there is insufficient regulatory power or capacity to demand explainability of algorithmic decisions made by businesses and their AI systems. This may affect the ability of regulators and consumers to evaluate the effectiveness of AI systems as marketed or to ensure that AI systems are operating as intended.[17]

Issues regarding transparency and disclosure of AI may be best addressed through other laws and regulatory regimes – for instance, proposed amendments to the *Privacy Act* may require transparency on the use of automated decision-making, while mandatory guardrails on the use of AI in high-risk settings will require greater transparency throughout the AI supply chain, ideally decreasing uncertainty amongst manufacturers, suppliers, consumers, and regulators.

Accessing remedies

Consumer organisations have advocated for more effective penalties for failure to provide a remedy under the consumer guarantees. At present, consumers often face difficulties enforcing consumer guarantees, in part because they are not enforceable through regulatory enforcement actions. It is also notoriously difficult for consumers to enforce the consumer guarantees themselves due to the difficulties of taking action through tribunals or other mechanisms. The result of this is that businesses are not appropriately incentivised to take consumer guarantees seriously.

Furthermore, consumers are often required to provide significant evidence for their claims. These issues are exacerbated by the opacity and complexity of AI systems which creates additional barriers to raising evidence of harms. As such, the ACCC should be empowered to enforce consumer guarantees as the relevant regulator to protect consumers affected by AI systems. Providing the ACCC with the power to enforce consumer guarantees will have a deterrent effect on businesses that ignore their remedy obligations. The ACCC can also compel businesses to disclose information on their algorithms and AI-based practices in larger investigations to assist affected consumers in accessing their rights to remedies. Enforceable actions taken by the ACCC may also result in remedies such as refunds or compensation in some cases.

Consumers face barriers when accessing redress for harms caused by AI-based goods and services. Consumers may be unsure about where to seek help if they have experienced harm or

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[17] Paterson, Jeannie Marie and Maker, Yvette and Maker, Yvette (2021), "AI in the Home: Artificial Intelligence and Consumer Protection, To be published in Ernest Lim and Phillip Morgan (eds), *The Cambridge Handbook of Private Law and Artificial Intelligence (Cambridge University Press, Forthcoming)*, Available at SSRN: https://ssrn.com/abstract=3973179 or http://dx.doi.org/10.2139/ssrn.3973179, p. 10.

disadvantage due to an AI-based good or service, particularly due to the opaque nature of AI that creates evidentiary barriers to consumers and because AI often crosses different regulatory jurisdictions (e.g. financial services, health services, online safety etc.). A **digital ombuds scheme** could provide a more holistic approach to dispute resolution and provide support on all facets of a digital experience. A digital ombuds scheme should be empowered to gather evidence by requiring businesses to provide information pertaining to an individual's complaint and to make determinations on remedies and compensation. The digital ombuds scheme should also take responsibility for referring complaints to other regulators or complaints handling bodies where appropriate. The ACCC has previously called for a digital ombuds scheme for consumers with complaints against digital platforms.[18]

Recommendations

The Government should:

8. Empower the ACCC to enforce consumer guarantees with penalties; and

9. Establish a digital ombuds scheme to resolve disputes, including disputes arising from the use of AI.

Other issues

Consumers are affected by AI in markets beyond the scope of the ACL. As previously mentioned, ASIC has investigated the prevalence and risks of AI in financial services. One area where consumers may be at high risk of AI-related harms is insurance. Currently, many insurance providers use AI for a range of tasks such as identifying consumer complaints and vulnerabilities through voice interaction models and for investigations.[19] It is unclear as yet whether any insurer is using AI for underwriting purposes, which would raise yet more concerns. Over-reliance on automation and AI for any insurance processes can lead to issues such as misidentification, unfair outcomes or discrimination – particularly since there are already concerns that there is an over-representation of those from a non-Anglo-Celtic background in insurance investigations.[20] AI is also being used in insurance claims handling and customer service,[21] which could lead to poorer consumer outcomes. The Government should protect consumers in all markets by ensuring that other consumer-related laws like the mirror ACL

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[18] ACCC (2022), *Digital platform services inquiry: Interim report No. 5 – Regulatory reform*, p. 98.
[19] Auto & General Holdings (2023), *Auto & General Insurance Company Limited submission to the House of Representatives Standing Committee on Economics Flood Insurance Inquiry*, p. 25; Suncorp (2023), *Submission to House of Representatives Standing Committee on Economics Inquiry into insurers' responses to 2022 major floods claims*, p. 28.
[20] Financial Rights Legal Centre (2016), *Guilty Until Proven Innocent, Insurance investigations in Australia*, https://financialrights.org.au/wp-content/uploads/2016/03/Guilty-until-proven-innocent.pdf.
[21] NextDC (2024), "How AI is Reshaping the Finance and Insurance sectors across Australia", https://www.nextdc.com/blog/how-ai-is-reshaping-the-finance-and-insurance-sectors-across-australia.

provisions in the *ASIC Act* are updated to be consistent with relevant changes in the ACL, where appropriate.

International developments in the regulation and investigation of AI in consumer markets provide guidance on how Australia could address these issues. Relevant examples in analogous jurisdictions include:

- The Office for Product Safety & Standards in the United Kingdom conducted the *Study on the Impact of Artificial Intelligence on Product Safety* in 2021. This report found that the lack of explicit inclusion or exclusion of software in the General Product Safety Regulations meant there were significant challenges relating to "(i) the coverage and impact of safety issues resulting from software downloaded on to, or third-party software incorporated into, a consumer product after it has been placed on the market; (ii) the coverage and impact of safety issues resulting from not maintaining software appropriately (i.e. through a lack of updates); and (iii) the coverage and impact of safety issues resulting from changes to a product after it has been placed on the market (e.g. through self-learning AI or software updates)."[22]

- The Federal Trade Commission in the United States has commenced Operation AI Comply to enforce consumer compliance for AI-based goods and services. This is an important regulatory step to make the market safer for consumers. As noted by Lina Khan, Chair of the Federal Trade Commission, "Claims around artificial intelligence have become more prevalent in the marketplace, including frequent promises about the ways it could potentially enhance people's lives through automation and problem solving. The cases included in this sweep show that firms have seized on the hype surrounding AI and are using it to lure consumers into bogus schemes, and are also providing AI powered tools that can turbocharge deception."[23]

- The European Union's *AI Act* has recently come into force, with significant provisions regulating the use of AI – including in consumer markets. Although consultation is underway by the Department of Industry, Science and Resources on whether Australia should adopt a similar legislative approach, the ACL must nonetheless adapt to these developments, particularly in regards to businesses based in the European Union and/or Australian businesses trade with European Union businesses and consumers.

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[22] Office for Product Safety & Standards (2021), *Study on the Impact of Artificial Intelligence on Product Safety: Final Report*, https://assets.publishing.service.gov.uk/media/628b58e3d3bf7f1f3aa5c13b/impact-of-ai-on-product-safety.pdf, p. 8.

[23] Federal Trade Commission (2024), "FTC Announces Crackdown on Deceptive AI Claims and Schemes", https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-announces-crackdown-deceptive-ai-claims-schemes.

- The European Union is also currently considering a product liability directive on adapting non-contractual civil liability rules on AI ("**AI Liability Directive proposal**").[24] The AI Liability Directive, if legislated, would create obligations on AI operators to disclose information about their AI system if plausible claims can be made about defects or vulnerabilities leading to harm. Additionally, this directive would create a rebuttable presumption of causality between an AI system and any damages caused if an AI operator fails in their duty of care. A similar presumption of causality in Australia would help ensure that AI suppliers and manufacturers carry the responsibility of harms caused by their AI-based goods and services, not consumers.

The Federal Government and regulators should ensure that Australia is not left behind as similar nations develop new laws, guidance, and enforcement on the use of AI.

Recommendations

The Government should:

10. Protect consumers in all markets by ensuring that relevant updated provisions in the ACL are reflected in other consumer-related laws, including the *ASIC Act*, where appropriate.

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[24] European Commission (2022), "Proposal for a Directive Of The European Parliament And Of The Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937", https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071.