
Submission to the Department of Prime Minister and Cabinet on Positioning Australia as a leader in digital economy regulation – Issues Paper

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Digital Technology Taskforce
Department of Prime Minister and Cabinet
One National Circuit
Barton ACT 2600

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While Australia is in an urgent need for an economy-wide strategy on Artificial Intelligence (AI) and Automated Decision-making (ADM), its development and implementation should reflect the needs of all Australians.

The Consumer Policy Research Centre (CPRC) recommends that the Government consider the following to ensure a more consumer-centric deployment of AI and ADM in Australia:

- Establish and implement an economy-wide consumer protection framework that enables innovation in line with the interests of consumers.
- Resolve outstanding policy issues required to develop an enabling environment including an economy-wide protection framework for consumer data and proactive enforcement of data and technology.
- Embed cost-benefit analysis as part of an AI and ADM framework for essential and/or government services that requires entities to identify direct benefits to consumers.
- Enshrine a ‘duty of care’ on business use of consumer data.
- Establish proactive surveillance and enforcement of emerging technologies.
- Create clear pathways for consumer redress.

CPRC welcomes the opportunity to contribute to the Issues Paper on Positioning Australia as a leader in digital economy regulation.

CPRC is an independent, non-profit consumer research organisation. Our mission is to improve the lives and welfare of consumers by producing evidence-based research that drives policy and practice change. Data and technology issues are a research focus for CPRC, including emerging consumer risks and harms and the opportunities to better use data and technology to improve consumer wellbeing and welfare.

For further discussion regarding our research and the contents of this submission, please contact me via chandni.gupta@cprc.org.au.

Yours sincerely



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Question 7: Is there a need for new regulation or guidance to minimize existing and emerging risks of adopting AI and ADM?

As emerging technologies, AI and ADM, have the potential of becoming embedded across all facets of a person's life over the coming years. CPRC research has found that 79% of consumers think government has a high level of responsibility to ensure personal information is not used to make consumers worse off.¹ Given this, it will be critical that a genuine effort is made to ensure Australians can clearly see, understand and trust how AI and ADM systems are being used and what the benefits are to them.

Failure to get the settings right will lead to direct harm and a loss of consumer trust. As noted by the Australian Human Rights Commissioner, "...*algorithmic bias can cause real harm. It can lead to a person being unfairly treated, or even suffering unlawful discrimination, on the basis of characteristics such as their race, age, sex or disability.*"²

It is vital that there are adequate guardrails in place to ensure that the use of AI and ADM is fair, safe and inclusive. There are two fundamental shifts that Government needs to action to minimise the potential harm to consumers:

- Establish and implement an economy-wide consumer protection framework that enables innovation in the interests of consumers.
- Resolve major policy issues required to develop an enabling environment including an economy-wide protection framework for consumer data and proactive enforcement of data and technology.

Establish and implement an economy-wide consumer protection framework that enables innovation in the interests of consumers

The following consumer protections need to be prioritised to put in place genuine guardrails for emerging technologies:

- Urgent revision of the Privacy Act reform to bring Australia's protection framework into the digital age.
- Introduction of an unfair trading prohibition to protect consumers from data misuse, excessive data extraction or exclusionary practices.
- Introduction of a general safety provision to clearly make companies responsible for delivering safe, secure data-driven products and services.

Technological innovation is neither universally welfare enhancing, nor welfare detracting but can be harmful if not effectively managed. An effective and stable policy regime safeguards against misuse, and at the same time enables innovation in the public interest.

A review of the Privacy Act is currently underway. The Government should prioritise amendments to the Act once the final report is handed down. CPRC has raised concerns with the proposal in the Discussion Paper which merely touched on notification being the only consumer protection measure when automated decision-making is in use. We urge the Government to look beyond the notification model and consider specific safeguards in ensuring fairness and safety of consumers in the context of artificial intelligence. Algorithmic bias can be present in AI-powered decision-making tools and lead to unfair treatment and discrimination.³ CPRC's research in partnership with the Australian Human Rights Commission notes that transparency (including via notification) is only one facet of promoting responsible business use of AI and data.

¹ CPRC, "CPRC 2020 Data and Technology Consumer Survey", (December 2020), [CPRC 2020 Data and Technology Consumer Survey - CPRC](#) – CPRC, page 30

² AHRC, "Using artificial intelligence to make decisions", (November 2020), [Using artificial intelligence to make decisions: Addressing the problem of algorithmic bias \(2020\) | Australian Human Rights Commission](#)

³ Australian Human Rights Commission, "Using artificial intelligence to make decisions: Addressing the problem of algorithmic bias" (2020), <https://tech.humanrights.gov.au/downloads>.

Any changes to the Privacy Act or other laws that govern AI or ADM should seek to deliver the following consumer outcomes:

- **Accessibility:** Markets are inclusive, and all consumers have the right to access this technology and its application on an equal basis with others.
- **Accountability:** Consumers have a clear route for seeking explanations and accessing appropriate redress from a responsible party if things go wrong.
- **Agency:** Consumers are empowered to exercise autonomy and freedom of choice in their interactions with technologies such as AI systems and the use of their personal data.
- **Transparency:** People are made aware when they are the subject of a decision-making process that uses an AI system.
- **Understandability and explainability:** Individuals subject to these decisions are entitled to a meaningful, comprehensible explanation of the AI system and its decision-making process.
- **Sustainability:** Long-term implications of technology on consumers are considered and addressed throughout design and implementation.⁴

We recommend that the Government also prioritise the development of innovation enablers to support technology that will create genuine benefits for all Australians. Innovation enablers should include:

- investing in and enabling AI and ADM innovation in the not-for-profit sector to demonstrably improve community outcomes and welfare
- implementing regulatory sandboxes to enable the safe testing and learning environment prior to deploying AI and ADM-enabled products and services at scale.

Resolve major policy issues required to develop an enabling environment

Key policy issues that an emerging technologies' framework should adequately address as a priority include:

- the pathway to an economy-wide protection framework for consumer data from sectoral-based regulatory regimes (e.g. energy, telecommunications, banking)
- protocols for ensuring that deidentified consumer data, including for the purposes of machine learning, cannot be re-identified⁵
- use of technology/data impact assessments which include a cost-benefit analysis to truly identify the value of moving specific data into open data will bring and to whom will it benefit the most – consumers, or entities with a commercial interest in gathering and analysing the data
- alignment of Australia's principles for regulating technology and data and the expectations of the public and Australian consumers in relation to how their data is collected, used and shared
- effects of combining public and private enterprise data, and ensuring transparency in categorisation of data to address applicable recourse when issues arise
- proactive enforcement of consumer protections for data and technology and clear pathways for identifying and managing those parties that wilfully operate in ways that harm consumers.

Question 8: Would increased automation of decision making have adverse implications for vulnerable groups? How could any adverse implications be ameliorated?

When it comes to emerging technologies, misuse as well as thoughtless design or failure to test for bias creates new harms or perpetuates existing potential harms. This can lead to adverse implications for consumers, especially for those experiencing vulnerability.

⁴ *Ibid.*

⁵ For example, the NSW Government specifically notes the use of a Personal Information Factor tool to assess re-identification risk as part of its strategy to publish COVID-19 cases and tests data NSW Government. See: [Case Study: Personal Information Factor \(PIF\) Tool | Data.NSW.](#)

It is important when deploying or regulating emerging technologies that vulnerability is not just attributed to specific groups but is considered more holistically. Vulnerability arises, not just from personal factors but can also occur due to market features, such as:

- poor product and service design
- exploitation of people's behavioural biases
- information asymmetry
- targeted exploitation of particular communities.⁶

Vulnerability is not something that is experienced by fixed groups but can be faced by anyone at various stages. It is critical that in addition to considering personal factors, any framework must also address market-based factors to set clear expectations of what good practices look like.

CPRC recommends the following to address adverse implications for consumers participating in AI or ADM related processes:

- Embed cost-benefit analysis as part of an AI and ADM framework that identifies direct benefits to consumers.
- Enshrine a 'duty of care' on business use of consumer data
- Establish proactive surveillance and enforcement of emerging technologies.
- Create clear pathways for consumer redress.

Embed cost-benefit analysis as part of an AI and ADM framework that identifies direct benefits to consumers

CPRC strongly recommends that a cost-benefit analysis should be conducted for any AI and ADM processes that are used for essential and/or government services. This should be prior to their public release to identify the value that the system will bring and to remove or mitigate any consumer harms. A key element of the cost-benefit analysis should also give due consideration to factors that contribute to vulnerability. Our research on vulnerability notes the importance of integrating vulnerability principles in a work program and developing clear aims, indicators and measures that are specific to consumer vulnerability.⁷ This is also a concept that is currently being applied in the UK Office of Gas and Electricity Markets where cost-benefit analysis now includes a specific weighting for vulnerability.⁸

Enshrine a 'duty of care' on business use of consumer data

When considering a governance framework for emerging technologies, the concept of a "best interests" duty is a principles-based approach to holding businesses accountable in implementing consumer-centric outcomes as part of their deployment of AI and ADM products and services. The idea of a best interests duty in a digital setting is relatively new and unexplored in the Australian context. Incorporating a fiduciary duty, especially for how consumer data is treated and how it is processed via an AI or ADM system, can help add a level of accountability on entities that could significantly reduce the likelihood of consumer harm. It further shifts the focus towards 'doing right by the consumer'. It could also lead to pro-business benefits by increasing consumer trust in those platforms that actively build this into their business model. As a first step, CPRC recommends a government inquiry to explore how to construct and implement positive obligations on businesses to use data and emerging technologies in consumers' interests.

Establish proactive surveillance and enforcement of emerging technologies

To ensure emerging technologies and the safeguards around its compliance framework are effective in addressing potential risks, the framework needs to be supported by regular surveillance and enforcement. Australia needs a well-resourced regulator with the capacity and capability to monitor and enforce

⁶ CPRC, "Exploring regulatory approaches to consumer vulnerability: A CPRC report for the AER", (August 2020), <https://cprc.org.au/exploring-regulatory-approaches-to-consumer-vulnerability/>.

⁷ O'Neill, E, "Consumer Data Right Report 1: Stepping towards trust Consumer Experience, Consumer Data Standards, and the Consumer Data Right", Consumer Policy Research Centre, (February 2021), [Consumer Data Right Report 1: Stepping towards trust Consumer Experience, Consumer Data Standards, and the Consumer Data Right - CPRC](#).

⁸ Presentation by Meghna Tewari, Head of Retail Market Policy (Ofgem) at the 2021 ACCC/AER Regulatory Conference (Session 2B – Consumer vulnerability and market design).

breaches in this complex digital environment. The regulator needs to be in a position to educate and shift the market towards a more consumer-centric approach to AI and ADM.

Traditional compliance and enforcement models often take place post harm. This needs to be reimagined if protection is to be adequately delivered to consumers in the digital economy. The onus cannot continue to remain on consumers to identify and report breaches. This is not feasible in a digital environment where there is little to no transparency about how consumer data is collected, used and passed to enhance machine learning or decision-making. Instead, regulators need to proactively uncover harm that is currently obfuscated. Regulators should be pushing businesses to be radically more transparent about how they use emerging technologies – this is a first step to then removing unfair practices.

Monitoring and surveillance by regulators in this complex environment need a diverse workforce that not only understands the implications of the law but also the technical architecture on which these business models are built upon. Experts such as data scientists, artificial intelligence engineers, information security analysts and other technical professionals need to be in the mix to support upstream regulation and mitigate the risk to consumers, potentially before widespread harm has occurred.

Create clear pathways for consumer redress

Building consumer trust, including a clear pathway to resolving issues and disputes will be critical in ensuring meaningful engagement by consumers in emerging technologies.

When consumers are unable to resolve issues directly with a utility like an energy provider or telecommunications company, they have access to independent support for redress through an ombudsman. However, in the case of redress relating to a digital experience, this support is out of reach. Consumers are frequently left to navigate any form of recourse themselves or simply give-up.⁹ In absence of support, consumers are left powerless.

There must be effective dispute resolution pathways to enable consumers to seek redress for when things go wrong in a digital setting. As consumers increase their engagement online, a Digital Ombudsman needs to be adequately resourced to meet Benchmarks for Industry-based Customer Dispute Resolution to ensure consumers can effectively resolve any disagreements that will arise.

CPRC strongly recommends that Government finalise and release a scoping study as a matter of priority to identify the types of online disputes consumers are raising along with options for establishing more effective external dispute resolution pathways that not only address digital issues today but also complex matters that are likely to arise in the future. We believe there may be merit in a more holistic approach to dispute resolution, such as via the establishment of a Digital Ombudsman that can provide support on all facets of a digital experience.¹⁰

⁹ CPRC, "The Digital Checkout", (December 2021), <https://cprc.org.au/the-digital-checkout/>.

¹⁰ *Ibid.*