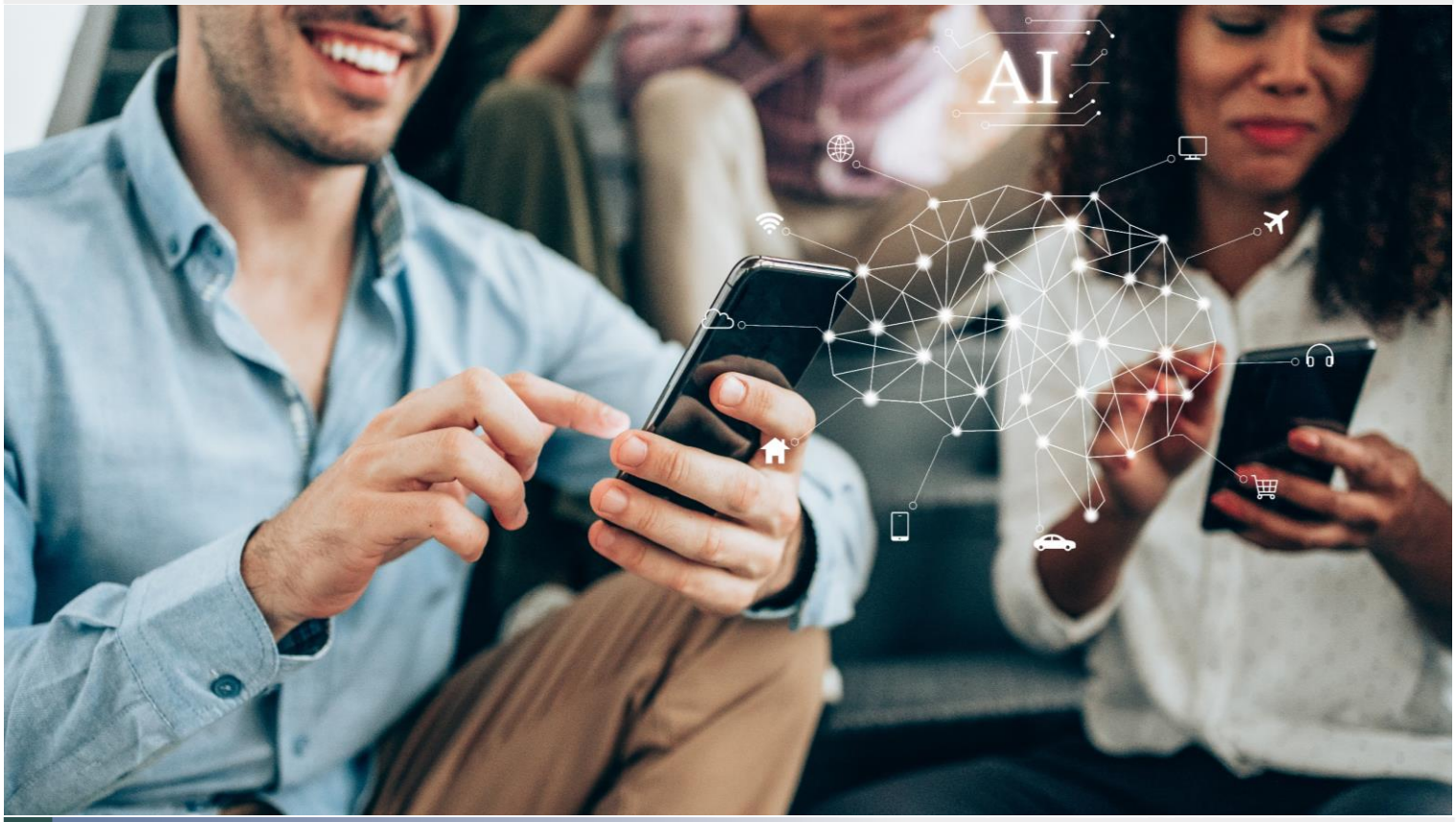
Australian Government
The Treasury

Review of AI and the Australian Consumer Law

Discussion paper

October 2024



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In the spirit of reconciliation, the Treasury acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples.

Contents

Consultation process

Request for feedback and comments

This discussion paper is designed to support stakeholders provide submissions. Each section contains a list of questions which are intended as a guide in formulating responses.

This discussion paper builds on previous consultation undertaken by the Department of Industry, Science and Resources (DISR) on *Safe and responsible AI in Australia* in June 2023. This consultation process also complements ongoing work being progressed across Government in relation to AI, including DISR's Proposals paper for introducing mandatory guardrails for AI in high-risk settings.

In responding to this discussion paper, we invite stakeholders to cross-reference other submissions which may have been made to Government on these or related topics where appropriate.

The consultation process is open until **Tuesday, 12 November 2024**.

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Publication of submissions

All submissions to the consultation process will be published, unless authors have indicated they would like all or part of their submission to remain confidential. Specifically, all information (including name and address details) contained in submissions will be made available to the public on the Treasury website, unless it is indicated that you would like all, or part of your submission to remain confidential. Automatically generated confidentiality statements in emails do not suffice for this purpose. Stakeholders who would like part of their submission to remain confidential should provide this information marked as such in a separate document.

A request made under the *Freedom of Information Act 1982* for a submission marked 'confidential' to be made available will be determined in accordance with that Act.

Executive summary

Artificial intelligence (AI) is a fast-evolving class of technologies with the potential to impact a range of economic activities and boost productivity growth.

AI is already delivering benefits to Australian consumers and businesses through a wide variety of AI-enabled goods and services, including chatbots and virtual assistants. Demand for AI-enabled goods and services is expected to grow into the future. While integrating AI systems within goods and services presents a range of benefits, it may also amplify or create new risks for consumers.

As Australia's whole-of-economy consumer protection framework, the Australian Consumer Law (ACL) has the potential to address AI-related harms across a broad array of economic settings. The ACL, which is part of the *Competition and Consumer Act 2010*, contains technology-neutral requirements that regulate business behaviour. It uses a combination of standards-based provisions which set out principles that generally apply across circumstances and industries, and specific provisions which establish contraventions for defined behaviours.

Submissions to Government on the *Safe and responsible AI in Australia* discussion paper raised a number of questions and suggestions on how Australia's consumer protection framework may respond to the increased availability of AI-enabled goods and services. This discussion paper seeks to further explore the application of the ACL in relation to AI-enabled goods and services and forms part of the Australian Government's broader ongoing work to clarify and strengthen existing laws to address AI-related risks and harms while considering whether additional AI specific frameworks – for example, framework legislation or an AI Act – may be required.

In this paper, stakeholder views are sought on:

- how well adapted the ACL is to support Australian consumers and businesses to manage potential consumer law risks of AI-enabled goods and services,
- the application of well-established ACL principles to AI-enabled goods and services,
- the remedies available to consumers of AI-enabled goods and services under the ACL, and
- the mechanisms for allocating liability among manufacturers and suppliers of AI-enabled goods and services.

The Review will complement other policy work underway in relation to Australia's consumer protection framework. Insights from the Review will inform broader work across Government, including to mandate guardrails for AI in high-risk settings.

Feedback is sought from a broad cross-section of interested stakeholders. Should you require support engaging in this consultation process, please contact AIACLReview@treasury.gov.au.

Introduction

In the 2024-25 Budget, the Australian Government invested $39.9 million over five years for the development of policies and capability to support the adoption and use of AI, including work to clarify and strengthen existing laws.

As part of this work, Treasury is leading a priority review (the Review) into the implications of AI on the ACL. The Department of Health and Aged Care and the Attorney-General's Department are undertaking similar AI reviews into health and aged care sector regulation and copyright law.

The ACL is Schedule 2 to the *Competition and Consumer Act 2010*. The ACL is the principal consumer protection law in Australia and is a single, national law, which applies in each State and Territory. The Review will consider whether the ACL remains fit-for-purpose in an evolving AI-enabled landscape to protect consumers and support the responsible use of AI by businesses.

AI has the potential to increase productivity and improve citizens' interaction with one another and with government. Increasing consumer confidence when purchasing AI-enabled goods and services, and certainty for businesses looking to adopt AI technologies, is critical to realising these benefits.

Submissions to the *Safe and responsible AI in Australia* discussion paper[1] raised a range of issues regarding the application of the ACL to AI-enabled goods and services. The themes which emerged through these submissions form the basis of this discussion paper, and include:

- the appropriateness of existing consumer protections under the ACL for consumers of AI-enabled goods and services,
- uncertainty over the application of existing ACL provisions to new and emerging AI-enabled goods and services, and
- remedies for consumers and liability for suppliers and manufacturers of AI-enabled goods and services.

The purpose of the Review is to further consider these themes and provide an opportunity for stakeholders to raise other issues relating to the application of the ACL to AI-enabled goods and services. The Review will also consider how anticipated future developments in AI-enabled goods and services may pose new challenges for Australia's consumer protection framework.

The fundamental principles that underpin existing consumer laws and the mirror provisions of the ACL contained in the *Australian Securities and Investments Commission Act 2001* which regulate financial products and services are not in scope of the Review. Instead, the Review will support consideration of whether further work is required to harmonise or modify consumer protections in other laws, including those applying to the provision of financial products and services.

The discussion paper should be read together with the following attachments:

- Attachment A provides examples of AI-enabled goods and services currently in the economy.
- Attachment B defines key terminology used throughout this discussion paper.
- Attachment C sets out selected related workstreams and supporting materials.

[1] DISR, Safe and responsible AI in Australia, Discussion paper, June 2023.

Selected relevant Australian Consumer Law protections[2]

General protections establish general standards of business conduct

Misleading or deceptive conduct (sections 18 to 19)

- It is unlawful for a business to engage in conduct in trade or commerce that is misleading or deceptive, or likely to mislead or deceive.
- Statements, promises, opinions and predictions can be misleading or deceptive, as can a failure to disclose relevant information.
- A key question to consider is if the overall impression of the conduct is misleading or deceptive.

Unconscionable conduct (sections 20 to 22)

- It is unlawful for businesses to act unconscionably towards consumers or other businesses.
- Unconscionable conduct is behaviour that goes against good conscience. It is not enough for the conduct to be unfair.

Unfair contract terms (sections 23 to 28A)

- An unfair contract term is void if it is unfair and is in a standard form contract.
- A standard form contract is one that is not negotiated.
- A term is unfair if it would cause (1) a significant imbalance in the parties' rights and obligations, (2) the term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term, and (3) would cause detriment to a party.

Specific protections provide protection for certain defined businesses practices

False or misleading representations (sections 4, and 29 to 38)

- It is unlawful for a business to make false or misleading representations, including in relation to future matters, about goods or services they are supplying or promoting.
- Claims should be true, accurate and based on reasonable grounds.

Consumer guarantees (sections 51 to 68)

- Certain goods and services purchased by consumers for personal, household or business use[3], are covered by statutory consumer guarantees. These cannot be excluded by businesses.
- Guarantees for goods include they be of acceptable quality (section 54) and be fit for any disclosed purpose (section 55). Guarantees for services include that the service will be supplied with due care and skill (section 60), will be fit for a particular purpose (section 61) and will be provided within a reasonable time (section 62).

Liability of manufacturers for goods with safety defects (sections 138 to 150)

- Manufacturers are liable for loss or damage caused by goods with safety defects.
- A safety defect occurs where products do not meet the level of safety the public is entitled to expect.
- Whether a good has a safety defect varies but factors to consider include: (1) how and for what purpose the product has been marketed for, (2) packaging, instructions or warnings that are included, (3) the time the product was supplied and (4) what might be reasonably expected to be done with the product.

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2 This is intended as an overview of the most relevant provisions when considering this discussion paper. The descriptions of the various provisions contained above synthesise relevant provisions but are not intended as legally accurate statements of law. Further guidance on these provisions is available in **Attachment C**.

3 Subject to certain exceptions, goods and services acquired for business use are covered by consumer guarantees where either (i) they cost less than $100,000, (ii) if they cost over $100,000, are commonly bought for personal, domestic or household use or (iii) the good is a vehicle or trailer that is used mainly to transport goods on public roads.

Managing risks to realise benefits

Questions

1. How well adapted is the ACL to managing the risks of consumer harm of AI-enabled goods and services now and into the future?
2. Does the ACL protect consumers of AI-enabled goods and services to the same extent as consumers of traditional goods and services covered by the ACL?
3. Does the ACL impact the choices of suppliers and manufacturers of AI-enabled goods and services differently to other suppliers and manufacturers?
4. Do the current or anticipated uses of AI-enabled goods and services present risks that reveal gaps in consumer protection under the ACL?

Risks and benefits

AI-enabled goods and services can offer substantial benefits to consumers and businesses. For example, digital assistants can help consumers by providing recommendations, controlling lighting and heating at home, and collating voice generated shopping lists. Chatbots allow businesses to deliver enhanced service offerings, such as providing 24-hour customer support in a variety of languages. However, the integration of AI into goods and services may amplify existing, or create new, risks.

As set out in the *Proposals paper for introducing mandatory guardrails for AI in high-risk settings*[4], harms from AI misuse and failure can occur on several levels:

- harms to people (such as physical or psychological injury and exclusion from access to opportunities and services)
- harms to groups of people (such as bias and discrimination based on protected attributes)
- harms to organisations (such as introduction or identification of unknown vulnerabilities in common enterprise software or a cyber-attack exposing training data causing reputational and commercial harm)
- collective harms to society more broadly (such as growing economic inequality, mis- and disinformation and spread of extreme or misogynist content or eroding social cohesion).

The breadth of the challenges posed by AI cannot be addressed within a single legal domain. Accordingly, the Australian Government is taking a coordinated approach to regulating AI. As the ACL regulates relationships between suppliers, manufacturers and consumers it provides an important framework for minimising potential AI-related consumer harms.[5]

To date, AI has augmented or amplified existing risks through its incorporation into traditional goods and services. For example, AI-enabled systems could potentially be used to facilitate personalised

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4 DISR, Safe and responsible AI in Australia, Proposals paper for introducing mandatory guardrails for AI in high-risk settings, September 2024.

5 DISR consultation on *Safe and responsible AI in Australia* uses the terminology of 'developers' and 'deployers' of AI systems (**Attachment B**). In the context of the ACL, deployers are likely to be considered suppliers and developers are likely to be considered manufacturers.

persuasion at scale[6], which could be used to shape user preferences and purchasing decisions in ways not available through traditional marketing practices.

AI systems vary considerably in their design, function and capabilities. The following list represents properties that some AI systems may have which could lead to augmented risks for consumers:

- Adaptability and learning: AI systems can improve their performance over time and adapt by learning from data. As noted above, this differs from previous technologies, such as simpler software, which often follow pre-defined rules and need explicit programming.
- Autonomy: Services and products embedded in AI technology or stand-alone AI applications are becoming increasingly autonomous. AI systems can make decisions independently and pervasively, without human intervention at any stage of the decision-making process, if designed that way.
- Opacity or lack of explainability: This is often referred to as the 'black box' problem. The most advanced AI models are trained on vast amounts of data that is difficult for humans to efficiently process, and which may not have been curated or documented prior to ingestion for training. Techniques used to reason from data are multi-layered and under-studied, contributing to a limited understanding of their outputs.

These factors could result in certain AI-enabled goods and services being less 'controllable' than traditional goods and services. In this way, AI systems could impact the relationship between suppliers, manufacturers and consumers which the ACL regulates. In particular, the incorporation of AI systems within goods and services may increase the risk that the good or service acquired by the consumer may deviate from that contemplated by the manufacturer or supplier.

However, the development of AI-enabled goods and services does not automatically necessitate changes to the ACL. The ACL contains a combination of specific rules and principles-based standards which are technology neutral. To date, both consumers and regulators have been able to apply the ACL to circumstances involving both traditional and cutting-edge goods and services developed well after the ACL was enacted.

The ACL and emerging technologies

The technology neutral language and broad applicability of the ACL has led some stakeholders to suggest that it is well suited to protect consumers using AI-enabled goods and services when considered alongside other relevant legal frameworks, for example anti-discrimination and privacy laws. While stakeholders of this view regard the ACL as remaining fundamentally fit for purpose, several considered that there could be scope for greater guidance from regulators.[7]

By contrast, other stakeholders have expressed that the unique characteristics of AI require new consumer guarantees. For example, the rise of certain AI-enabled smart devices has led to recommendations for change to the ACL, including that a new class of digital goods with unique consumer guarantees be established.[8] Some stakeholders have also suggested new additional

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6 Matz et al, The potential of generative AI for personalized persuasion at scale, *Scientific Reports,* 2024. See also discussion of 'hypernudging' in ACCC, Digital Platforms Services Inquiry, Interim report 7: Report on expanding ecosystems of digital platform service providers, September 2023 (p. 114).

7 See, for example, Business Council of Australia, Submission to Safe and responsible AI in Australia discussion paper.

8 Lindsay et.al., 'Responding to the challenges of consumer internet of things devices: the case for reforming the Australian consumer guarantees', *Competition and Consumer Law Journal*, 2022.

guarantees should be implemented into the ACL to better cover digital products in general, such as consumer guarantees related to cyber security, interoperability and that manufacturers provide software updates for a reasonable period.[9] Such guarantees may also be relevant to AI-enabled goods and services.

While the cyber security risks of certain AI-enabled goods will be captured by the Australian Government's ongoing implementation of the 2023-2030 Australian Cyber Security Strategy, these views exemplify a broader desire among some stakeholders for bespoke consumer protections.[10] This approach has been adopted in the United Kingdom where, under the *Consumer Rights Act 2015* (UK), separate consumer protections are provided for consumer digital content such as software, apps, e-books, and streaming services.[11]

Cyber Security Strategy

On 22 November 2023, the Australian Government released the 2023-2030 Australian Cyber Security Strategy. Through the Strategy, the Australian Government seeks to improve cyber security, manage cyber risks, and better support citizens and businesses to manage the cyber environment around them.

Ensuring that consumers and businesses can trust their digital products, the Australian Government is acting to:

- co-design options to legislate a mandatory cyber security standard for consumer-grade 'Internet of Things' devices;
- develop a voluntary labelling scheme for consumer-grade smart devices, and
- embed cyber security into software development practices through a co-designed voluntary code of practice for app store operators and app developers.

Beyond consumer guarantees, the general protections contained in the ACL, as well as specific protections against false or misleading representations, are also important in managing the risks of AI-enabled goods and services.

The opacity of AI systems and the potential difficulty in predicting AI system behaviour may increase the risk of false or misleading representations about AI-enabled goods and services. For example, a person supplying software which incorporates AI functionality will need to take care to ensure that representations about the capabilities of those AI-enabled functions are not false or misleading. This might be challenging for less sophisticated businesses integrating off-the-shelf AI systems.

The expanded use of AI systems in trade and commerce may also increase the risk of misleading or deceptive conduct. Inaccuracies from AI models could result in unwanted bias and misleading or entirely erroneous outputs (or 'hallucinations'). As an example of inaccurate information provided through generative AI, Air Canada was required to provide a partial refund to a grieving passenger who was misled by an airline chatbot inaccurately explaining the airline's bereavement travel policy.[12]

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9 Productivity Commission, Right to repair, Inquiry report, 29 October 2021.
10 Department of Home Affairs, 2023-2030 Australian Cyber Security Strategy, 2023.
11 *Consumer Rights Act 2015* (UK), ch 3.
12 A Belanger, Air Canda must honor refund policy invented by airline's chatbot, Arstechnica, 17 January 2024.

In addition, those using AI systems in trade and commerce will also need to satisfy themselves that AI systems do not operate in a way that is contrary to the prohibition on unconscionable conduct.

Some stakeholders have also expressed concern regarding the possible risks to consumers arising from terms excluding liability for suppliers and manufacturers of AI-enabled goods and services, which they consider should be deemed unfair contract terms.[13]

Product safety and AI

The ACL includes national consumer product safety laws. Product safety regulation plays a necessary and important role in identifying and removing unsafe products from the market through recalls, bans, safety standards and public warnings.

The consumer product safety laws contained in the ACL apply to consumer goods and product-related services. Consumer goods are things intended, or likely, to be used for personal, domestic or household use or consumption. Product related services are services for or relating to:

- installation of consumer goods,
- maintenance, repair or cleaning of consumer goods,
- assembly of consumer goods, or
- delivery of consumer goods.

Any person who, in trade or commerce, supplies consumer goods or product-related services is responsible for complying with ACL consumer product safety laws. This means all suppliers in the supply chain (including manufacturers, wholesalers, hirers and retailers) must keep up-to-date with the law and comply with any mandatory standards, recalls or bans. The Australian Government can impose mandatory safety standards that set specific requirements for consumer goods or product-related services. At this time, no specific safety standard for AI-enabled consumer goods has been made under the ACL; however, the Australian Government is taking a range of steps to ensure the safe and responsible use of AI in Australia.

For example, while the Australian Government considers options for mandatory guardrails, a Voluntary AI Safety Standard (Standard) has been developed. It gives practical guidance to all Australian organisations on how to safely and responsibly use and innovate with AI. The Standard also emphasises the importance of open and effective engagement across the AI supply chain and AI lifecycle.

[13] See, for example, Campaign for AI Safety, Submission to Submission to Safe and responsible AI in Australia discussion paper.

Addressing uncertainty

Questions

5. Is the application of the ACL to AI-enabled goods and services uncertain? If so, how and what impact does this uncertainty have on consumers, manufacturers and suppliers?
6. How might uncertainty in relation to AI-enabled goods and services be addressed within Australia's consumer protection framework?

Knowing how the ACL applies to goods and services is critical to ensuring that businesses understand their obligations and that consumers know their rights and remedies. Uncertainty or a lack of clarity may discourage consumers from acquiring AI-enabled goods and services and prevent businesses from investing in AI to improve goods and services that can increase productivity.

As outlined above, the ACL is designed to apply to a broad range of economic contexts and is technology neutral. While, in principle, the existing consumer protections framework should be able to address risks AI may pose, some stakeholders are uncertain about how the ACL applies to AI-enabled goods and services. In particular, uncertainty has been expressed over:

- whether an AI-enabled 'good' or 'service' falls within the definitions of these terms under the ACL, and
- how principles-based standards contained in the ACL apply to AI-enabled goods and services.

AI-enabled goods and services

The ACL sets out a number of guarantees for consumer goods and services. Different consumer guarantees apply to goods and services and if a guarantee is not met then a consumer is entitled to a remedy.[14] In addition, the ACL contains a framework that imposes liability on manufacturers of goods with safety defects. As a result, the type of protection provided by the ACL to consumers, and the scope of remedies which may be available, may turn on whether a business offering is characterised as a good or service. Stakeholders have suggested that, in some cases, this distinction is not clear for AI-enabled goods and services.

Goods and services are defined broadly under the ACL:

- 'Goods' include a range of items, from ships, animals, gas, software, second-hand goods and also includes components of, or accessories to goods.
- 'Services' include any rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce.

Where there is a mixed supply of goods and services, a consumer cannot claim for both a faulty good and a faulty service in connection with a single transaction. In this situation, the question is whether to characterise the transaction as a whole as one involving the supply of goods or the supply of services. Mixed supply commonly arises in relation to high-tech offerings where the physical good and enabling service(s) are often provided by one or more separate entities.

[14] ACCC, Consumer guarantees - A guide for consumers, July 2021.

Definitional uncertainty is not unique to AI-enabled goods and services and the Australian Competition and Consumer Commission (ACCC) publishes a wide range of materials to support consumers and businesses in understanding their rights and obligations under the ACL. However, the increasing availability of AI-enabled goods and services means that software is being embedded into a range of business offerings in new ways. In some cases, this is bringing existing uncertainties over how 'software' is treated under the ACL into new domains.

Software is a good within the meaning of the ACL. Previously only software supplied on hardware (such as a CD-ROM) was considered a good; however, following the introduction of the ACL this distinction no longer exists. Some stakeholders have raised that residual uncertainty remains in connection with the definition of software under the ACL, including where software is supplied incidentally to the provision of AI-enabled services or includes components such as non-executable data (such as music in a video game) or bundled services (such as security protection).

Principles-based guarantees

The consumer guarantees regime contains a number of principles-based provisions which include concepts such as 'fitness for purpose', 'acceptable quality' and 'due care and skill'.

Some stakeholders have suggested that it is unclear how these principles-based standards apply in the context of AI-enabled goods and services. For example, in relation to the guarantee of acceptable quality, the ACL sets out attributes against which acceptable quality will be assessed. These factors include whether the goods are 'durable'. How the concept of durability may be applied to some AI systems, particularly large language models where the model's knowledge is fixed during training but may evolve over time either due to fine-tuning or self-learning, may not be immediately clear. Similarly, the extent to which a supplier must be familiar with the processes underlying the AI systems used to deliver AI-enabled services with due care and skill is currently untested.

The Australian Government's ongoing consideration of mandatory guardrails for AI aims to provide businesses with greater regulatory certainty regarding the safe and responsible use of AI, and address risks and harms from AI in high-risk settings. Outside of high-risk settings, interpretation of the ACL will continue to evolve over time through the adjudication of disputes by courts and tribunals.

The regulatory landscape applying to AI-enabled goods and services is in a state of change. To date no clear consensus has emerged among stakeholders regarding the extent to which it may be desirable to enhance certainty through either amendments to the ACL or regulatory guidance.

Accessing remedies

Questions

7. Are the remedies for a breach of the ACL appropriate for consumers of AI-enabled goods and services?
8. Are there barriers to consumers of AI-enabled goods and services accessing appropriate remedies under the ACL?
9. Are the existing mechanisms contained in the ACL appropriate for distributing liability among manufacturers and suppliers of AI-enabled goods and services?

It is critical for consumers to be able to effectively assert their rights, and for manufacturers and suppliers to understand their obligations under the ACL. Ensuring a clear understanding of rights, remedies and obligations under the ACL is particularly important to encourage uptake of AI by consumers and across the supply chain.

Consumer guarantees

The ACL contains a range of remedies where a business sells a good or service that does not meet the basic consumer guarantees. These remedies depend on the nature of the failure and may include a repair, replacement, refund or contract cancellation. When a consumer suffers damage or loss because of a consumer guarantee failure, they are also entitled to compensation. However, as regulators do not resolve individual disputes between consumers and suppliers, it is critical that consumers understand the remedies that are available.

The remedies available to consumers under the ACL where a good or service fails to meet a consumer guarantee depend on whether the failure is 'major' or 'minor'.

Major failures are:[15]

- where a good or service is unsafe
- where a good or service is significantly different from the description
- where the problem is such that the consumer would not have purchased the good or service if they had known about the problem, or
- where a good or service is not fit for its stated purpose, and cannot easily be fixed within a reasonable time.

When there is a major failure with a good, the consumer can choose to return the good for a refund or replacement or keep the good and seek compensation for the drop in value caused by the problem.

When there is a major failure with a service, the consumer can choose to cancel the contract and seek a refund for money already paid, less a reasonable amount for any work done so far. Alternatively, they may keep the contract and negotiate a reduced price for the drop in value of the service.

[15] There is a major failure if a good or service has a major failure as described above, or 2 or more failures that are not major failures individually but, when taken as a whole, would have stopped a reasonable consumer fully acquainted with the nature and extent of the problems from buying the good or service. See sections 260 and 268 of the ACL.

If the failure is 'minor', the seller or manufacturer can choose to provide a repair, replacement or refund, or, in the case of services, resupply.

There is a substantial body of evidence that many consumers and small businesses are finding it difficult to obtain remedies from suppliers and manufacturers for consumer guarantees failures.[16] To address these challenges, the Australian Government is currently considering options to improve the effectiveness of the consumer guarantees and supplier indemnification provisions, including consideration of penalties and enforcement mechanisms to ensure consumers and businesses (to the extent that business transactions are covered by the consumer guarantees – see discussion earlier in the paper) can access the remedies to which they are entitled.

Consumers typically approach the supplier (rather than the manufacturer) if there are issues with their good, and suppliers generally have primary responsibility for providing remedies to consumers for failure to comply with a consumer guarantee. In recognition of this, the law gives suppliers a right of indemnity if the goods are not of acceptable quality, do not match a description applied by their manufacturer or are not fit for a purpose made known to their manufacturer. Under this indemnity, a supplier that provides a remedy to a consumer can recover from the manufacturer costs they incurred for providing the remedy. The effectiveness of these arrangements is likely to be particularly important for both consumers and suppliers of AI-enabled goods and services as AI systems are currently predominantly manufactured outside Australia.

Given the characteristics of AI systems, existing challenges facing consumers in accessing remedies associated with failures to meet consumer guarantees may be exacerbated in the context of AI-enabled goods and services. Some AI-enabled goods and services are complex with opaque algorithms which in some cases may make it difficult to identify whether there was a failure in the good or service. Even if it is clear that a good has failed to comply with consumer guarantees, it can be difficult to establish the extent of the failure and which party is responsible or accountable for harm. Self-learning AI-enabled goods or services may also act in unpredictable ways which can further complicate access to remedies, particularly where the availability of damages depends on whether a consumer's loss was reasonably foreseeable or occurred independently of human control.

The Australian Government is currently considering options for mandatory guardrails for AI in high-risk settings. The *Proposals paper for introducing mandatory guardrails for AI in high-risk settings* proposes 10 guardrails that organisations developing or deploying AI systems in high-risk settings would be required to comply with.[17] These requirements relate to accountability processes, risk management processes, testing obligations, transparency obligations and record keeping obligations that may assist in preventing and reducing the chance of harms occurring from the development and deployment of AI in high-risk settings.

Manufacturer liability for goods with safety defects

Consumers who suffer loss or damage because of safety defects in a manufacturer's goods can (i) make a complaint to a regulator; and (ii) take the manufacturer to court. A court can award compensation to cover loss or damage, including injuries to the person making the claim or economic loss.

Manufacturer liability under the ACL is centred on the concept of a 'safety defect'. A product has a safety defect if it does not meet the level of safety the public is generally entitled to expect. While this will vary from case to case, it is ultimately for a court to determine whether a product has a safety

16 See, for example, Kantar Public, Australian consumer survey 2023, Final report.

17 Safe and responsible AI in Australia, Proposals paper for introducing mandatory guardrails for AI in high-risk settings, September 2024

defect. The court will take various factors into account when determining whether a product has a safety defect, including how and for what purposes the product has been marketed, product packaging, what might reasonably be expected to be done with the product and the time when the product was supplied. To access compensation under this framework, those who have suffered injury or loss must prove a causal link between the safety defect and any injury suffered.

Who is a manufacturer?

'Manufacturer' is defined under section 7 of the ACL. This term is given a broad meaning and may include a person or company that:

- grows, extracts, produces, processes or assembles goods,
- imports the goods (if the maker of the goods does not have an office in Australia),
- uses its own brand name in relation to the goods,
- promotes itself to the public as the manufacturer of the goods, or
- permits another person to promote the goods as having been manufactured by the company.

A number of statutory defences are provided to a manufacturer against a product liability action. These defences are available when:

- the safety defect did not exist at the time of supply by the manufacturer
- the product was a component of a finished product and the safety defect is only attributable to:
  - the design of the finished goods or the markings on or accompanying them
  - instructions or warnings included in those finished goods—then, the manufacturer of the finished goods is liable and not the component maker
- the safety defect could not have been discovered at the time the manufacturer supplied the goods because there was insufficient scientific or technical knowledge at that time ('state of the art defence')
- the safety defect only existed because a mandatory standard was complied with.

In response to the *Safe and responsible AI in Australia* discussion paper, some stakeholders have questioned whether the unique characteristics of AI systems necessitate a reconsideration of certain aspects of manufacturer liability as it applies to AI-enabled goods, particularly to address issues relating to evidentiary burden and defences.

Evidentiary burden

As noted above, to be successful in an action against a manufacturer of defective goods a person who has suffered loss or damage must establish a causal link between the safety defect and any loss or damage suffered. However, when AI is interposed between the act or omission of a manufacturer and the loss or damage, the specific characteristics of certain AI systems, such as opacity, autonomous behaviour and complexity, may make it more difficult to meet this burden of proof.

Example – Causation and the AI-enabled vacuum cleaner

A consumer acquires a hypothetical AI-enabled vacuum cleaner. The vacuum cleaner uses speech recognition allowing the consumer to control the product by voice command. The consumer suffers loss when, during use, the vacuum cleaner failed to change direction and collided with an item of furniture, causing an item to fall and break.

The consumer would like to recover the cost to repair the item from the manufacturer of the vacuum cleaner. To do this, the consumer would have to establish (i) that the vacuum cleaner had a safety defect and (ii) that there was a causal link between that defect and their loss.

For the consumer to succeed, one approach may be to show the manufacturer knowingly trained the AI-system integrated within the vacuum cleaner using data which was unrepresentative of the conditions in which the product was to be used. However, establishing this (or similar) arguments may be difficult where the consumer does not have access to the training data set or information relating to how testing and risk management have been undertaken.

The challenge of ensuring that individuals suffering loss from AI-enabled goods have equal access to redress as other consumers is not unique to Australia. For example, in the European Union the proposed AI Liability Directive (AILD) includes a 'presumption of causality' principle to reduce the burden on individuals suffering harm caused by AI. If implemented, the AILD would require a causal link to be presumed where a number of conditions are met, shifting the onus to the manufacturer to demonstrate that no causal link exists.[18]

Defences

Two separate issues have been raised when considering the defences available to manufacturers in defective goods actions in the context of AI-enabled goods.

Firstly, the defence that a safety defect did not exist at the time the goods were supplied by their actual manufacturer reflects that, for traditional goods, the manufacturer retains little or no ongoing control over the goods once they have been supplied. This premise may not hold for some AI-enabled goods which may be updated and augmented post-supply through software updates.[19]

Secondly, it has been suggested that the 'state of the art' defence may find an unintentionally broad application in relation to AI-enabled goods. For example, a manufacturer may seek to raise this defence on the basis that the AI outputs which caused the harm were unable to be predicted at the time of supply, potentially as a result of the AI system learning over time. It has been suggested that access to this defence for AI-enabled goods and services be limited in circumstances where manufacturers of AI goods have not taken steps to mitigate against unpredicted or self-learning behaviours that may cause damage in future.

18 European Commission, AI Liability Directive, 28 September 2022.

19 V Ulfbeck, 'Product Liability and AI', in E Lim and P Morgan (eds), *Private Law and AI*, Cambridge University Press, 2024.

Other issues

Questions

10. What other issues not raised in this discussion paper relating to the application of the ACL to AI-enabled goods and services should be considered?

11. Are there international developments in consumer protection law and policy to which Australia should have particular regard when considering the application of the ACL to AI-enabled goods and services?

This discussion paper has considered several high-level issues relating to the application of the ACL to AI-enabled goods and services. These issues have been raised by stakeholders with government, in the academic literature and by government agencies. However, the areas of focus emphasised in this paper are intended as a starting point for discussion. Treasury welcomes views from interested stakeholders on other issues relating to the application of the ACL to goods and services.

Australia is not the only country considering the emergence of AI-enabled goods and services and the implications for consumer protection laws. While Australia's history and culture influence our own laws, many of the issues under consideration are similar to those being examined in other jurisdictions. In this regard, submissions reflecting on the effectiveness of analogous international developments or approaches would also be welcomed.

Attachments

Attachment A — Examples of AI-enabled goods and services in Australia

Smart Home Devices

Smart speakers use AI to manage tasks, control other smart devices and provide information.

Smart phones use AI for facial recognition, voice assistants and photo enhancements.

Smart TVs use AI for voice control, personalised recommendations and accessibility features.

Wearable devices use AI to monitor health, track fitness, and provide personalised insights.

Automotive

AI navigation systems offer real-time traffic updates and personalised route suggestions.

Healthcare

Online telehealth services utilise AI for virtual consultations and health monitoring.

AI diagnostics tools are used in diagnostics and imaging to assist doctors detect conditions.

Education and Training

AI tutoring platforms use AI to provide personalised learning experiences.

Language learning apps use AI to adapt lessons based on user progress and learning patterns.

Entertainment

Streaming services use AI for content recommendations based on user preferences and viewing/listening history.

Gaming is using AI to create more realistic and adaptive game environments.

Business Solutions

Customer relationship management solutions incorporate AI for customer insights, lead scoring, and sales forecasting.

Web analytics use AI to provide deeper insights into user behaviour and business performance.

Transportation and Logistics

Ride-sharing apps use AI for route optimisation and dynamic pricing.

Fleet management software use AI to optimise logistics and delivery routes.

Attachment B — Key terminology

Term	Definition
AI-enabled goods and services	Goods and services which, when made available to consumers, involve a consumer directly interacting with an AI system. *For example: A security system which uses facial recognition is an AI-enabled good and an online chatbot to assist with consumer queries is an AI-enabled service.*
AI system	A machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptiveness after deployment. The tools or techniques AI systems can employ vary widely and may include: machine learning, computer vision, natural language processing, expert systems and speech recognition.
AI model	The raw, mathematical essence that is often the 'engine' of AI applications. *For example, the ChatGPT app is an AI system. Its core engine, GPT-4, is an AI model.*
Deployer	An individual or organisation that supplies or uses an AI system to provide a product or service. Deployment can be for internal purposes or used externally impacting others, such as customers or individuals.
Developer	An organisation or individual who designs, builds, trains, adapts, or combines AI models and applications.
Generative AI	An AI model with the capability of learning to generate content such as images, text, and other media with similar properties to its training data.
Large language model (LLM)	A type of generative AI that specialises in the generation of human-like text.

Attachment C — Related work and supporting materials

Further guidance on the ACL

Unfair business practices including unfair contract terms, false or misleading claims and unconscionable conduct:

- Unfair business practices

Consumer guarantees:

- Consumer rights and guarantees

Product safety and liability:

- Product safety
- Product Safety Australia
- Product liability

Other AI initiatives

Department of Industry, Science and Resources

- Safe and responsible AI in Australia, Discussion paper
- Safe and responsible AI in Australia, Proposals paper for introducing mandatory guardrails for AI in high-risk settings
- Voluntary AI Safety Standard

Australian Competition and Consumer Commission

- Digital Platform Services Inquiry – September 2024 interim report
- Digital Platform Services Inquiry – March 2025 final report

Department of Health and Aged Care

- Safe and responsible AI in Health Care – Legislation and Regulation Review

Therapeutic Goods Administration

- Clarifying and strengthening the regulation of AI – Review of Therapeutic Goods Legislation

Digital Platform Regulators Forum

- Working paper 2 – Examination of technology – Large language models
- Working paper 3 – Examination of technology – Multimodal foundation models