Dr Francina Cantatore

Associate Professor

Faculty of Law

Bond University

Australia

fcantato@bond.edu.au

Technology Strategy Branch

Department of Industry, Science and Resources

Australian Government

DigitalEconomy@industry.gov.au

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Dear Committee Members

Safe and responsible AI in Australia - Discussion Paper

I welcome the opportunity to make a submission in relation to the enquiry into the safe and responsible use of artificial intelligence (AI) in Australia. This submission is made in my personal capacity as an Australian academic and legal practitioner with expertise in legal education, consumer law and intellectual property law. I address the issue of risk-based approaches as proposed in Annexure C of the 'Safe and responsible AI in Australia Discussion Paper' ("the Discussion Paper") specifically, referring to consumer protection in general as well as specific instances of AI application management, for example in the legal profession. I also briefly comment on the related issue of AI and intellectual property (IP) rights management, which, although excluded from this enquiry, is relevant to this discussion insofar as human involvement has remained a legal requirement for recognition of IP rights.

A consumer centered approach

Developments in AI engineered technology have increased risks to consumers in a number of ways, often amplified by a lack of awareness on the part of online platforms users. It has been established that there is a substantial disconnect between how consumers think their data should be treated and how it is actually treated.[1] For example, digital platforms such as Google and Facebook have been found to employ AI to utilise users' personal information in their business models for marketing purposes, causing the Australian Competition and Consumer Commission's Digital Platforms Inquiry

[1] Australian Competition and Consumer Commission ('ACCC'), *Digital Platforms Inquiry* (Final Report, June 2019) 3 <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf> ('*DPI Final Report*').

Final Report ('DPI Final Report') to recommend more oversight of digital platforms.[2] Consumers are increasingly affected by breaches of the *Australian Consumer Law* ('ACL')[3] by online marketing organisations, such as misleading or deceptive conduct perpetrated by comparison websites.[4] In addition, consumer rights could be adversely affected by online, AI-led market collusion and breaches of the *Competition and Consumer Act 2010* (Cth) ('CCA') in the digital marketplace.[5]

A prior publication by the author[6] assessed the impact of AI-led technology on consumer rights in the context of the current Australian regulatory framework, by focusing on the CCA and ACL,[7] as well as the recommendations made in the DPI Final Report.[8] It also considered the effect of the Consumer Data Right legislation and investigated whether the reach of the existing laws, together with the recommendations of the DPI Final Report, would be adequate to protect consumer rights in the future, and how online threats to consumer welfare were likely to evolve in response to ongoing technological developments.

As noted in the Discussion Paper, algorithmic bias has been identified as one of the biggest risks or dangers of AI in the Australian Human Rights Commission's Human Rights and Technology Report in 2021.[9] In view of the observation that customer-centric applications of machine learning are currently the most common use of AI,[10] and the proliferation of AI-led technology on digital platforms, there remain numerous challenges facing regulators in the area of consumer rights. The adverse impact of irresponsible use of AI-led technology on consumers' personal data and privacy rights — as well as their ability to access fair and accurate product information and choices — can be significant. The findings in the DPI Report illustrated convincingly that not only is ongoing vigilance against online abuses required by consumers in a technology driven marketplace, but also that a proactive approach by regulators has become paramount. The approach would require a combination of regulation and self-regulation, depending on the industry or sector.

A Comments in relation to risk-based approaches proposed in Annexure C of the Discussion Paper

I address the risk-based approaches proposed in Annexure C by responding to questions 14 – 18 and question 20 in turn below.

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[2] Ibid 2.
[3] *Competition and Consumer Act 2010* (Cth) Sch 2, Australian Consumer Law.
[4] See e.g., *Trivago NV v ACCC* [2020] FCAFC 185.
[5] Rod Sims, 'The ACCC's Approach to Colluding Robots' (Speech, Australian Competition and Consumer Commission, 16 November 2017) <https://www.accc.gov.au/speech/the-accc%E2%80%99s-approach-to-colluding-robots>; Ariel Ezrachi and Maurice E Stucke, 'Artificial Intelligence and Collusion: When Computers Inhibit Competition' [2017](5) *University of Illinois Law Review* 1775.
[6]Francina Cantatore and Brenda Marshall (2021) "Safeguarding consumer rights in a technology driven marketplace", *Adelaide Law Review*, Volume 42, Issue 2, 467-502.
[7] With due reference to the equivalent consumer protection provisions of the ASIC Act (n 3).
[8] The DPI was followed by the Digital Advertising Services Inquiry and the Digital Platform Services Inquiry, both announced in February 2020, with the latter releasing its first interim report in September 2020 as an update to the DPI Final Report in relation to search and social media platforms: see ACCC, *Digital Platforms Services Inquiry* (Interim Report, September 2020) 1. <https://www.accc.gov.au/publications/serial-publications/digital-platform-services-inquiry-2020-2025/digital-platform-services-inquiry-september-2020-interim-report> ('*DPSI Interim Report*').
[9] Australian Human Rights Commission (AHRC), 'Human Rights and Technology: Final Report', AHRC website, 2021.
[10] Algorithmia, *2020 State of Enterprise Machine Learning* (Report, 2019) 5 <https://info.algorithmia.com/hubfs/2019/Whitepapers/The-State-of-Enterprise-ML-2020/Algorithmia_2020_State_of_Enterprise_ML.pdf?hsLang=en-us> 2.

14. Do you support a risk-based approach for addressing potential AI risks? If not, is there a better approach?

I support a risk-based approach in principle provided it has national application and is underpinned by a robust ethical and human rights centred framework, which will be enforceable across sectors. There is currently a diversity of approaches as outlined in Annexure A, ranging from industry codes to best practice frameworks in different sectors; however, there needs to be a consistent approach in the ethical application of AI, as well as enforceable AI regulation applicable to each sector. In addition, as noted in the Discussion Paper, privacy protection laws and access to quality data must be carefully balanced to enable fair and accurate results and minimise unwanted bias from AI systems.

15. What do you see as the main benefits or limitations of a risk-based approach? How can any limitations be overcome?

As noted in the Discussion Paper, there is an international direction towards a risk-based approach for governance of AI. Australia is well-placed to adopt this approach, based on current initiatives and drawing on international developments in, for example, the European Union and Canada. In relation to consumer law Australia has often followed in the footsteps of the UK or European Union. For example, the approach in Consumer Data Right regulation of data now aligns the Australian approach with the European framework in relation to data rights, allowing Australian consumers to control their data in the marketplace.[11]

Benefits

The Australian government will be able to draw on the risk-based approaches currently being implemented in the European Union and in Canada to support policy development. It may also draw on current frameworks in different sectors of Australia to inform its approach, based on the scale and diversity of sectors.

It is encouraging that the 2023-24 Budget provided funding to extend the National AI Centre and its role in supporting responsible AI usage through developing governance and industry capabilities. The framework and six pillar approach provided by the Responsible AI Network (RAIN) will be instrumental in providing Australian businesses with best practice guidance, tools and learning modules, provided these practices are monitored and applied consistently.

Limitations

Different Australian sectors are subject to diverse regulatory structures, and there is a lack of consistency between enforcement practices in relation to issues of privacy and data management. This diversity may both support and hinder a risk-based approach. A national standard may be required to determine how ethical AI considerations and standards should be applied in organisations, ensuring a consumer centred approach.

Approaches in other jurisdictions such as the European Union have been subject to different regulatory structures than Australia. For example, in relation to Consumer Data Rights in Australia, Meese et al have stated that '[w]hile there are privacy safeguards in place, the ultimate value of the reform is presumed to be generated through a consumer's greater purchasing power and ability to better choose between commercial competitors.'[12] This commercial approach is in contrast to the European General Data Protection Regulation [2016] OJ L 119/1 (GDPR) which has protection of

[11] James Meese, Punit Jagasia and James Arvanitakis, 'Citizen or Consumer? Contrasting Australia and Europe's Data Protection Policies' (2019) 8(2) *Internet Policy Review* 1, 5.
[12] Ibid 11.

consumer data privacy as its key focus, as a result of its fundamental human rights approach.[13] In Australia, because of the absence of a Bill of Rights or a national Human Rights Act, regulation of AI use in consumer data control has to be approached based on existing legislation rather than a focus on human rights. Consequently, the differences in jurisdictional regulation may impact on the usefulness of risk-based approaches in other jurisdictions such as the UK and Canada.

16. Is a risk-based approach better suited to some sectors, AI applications or organisations than others based on organisation size, AI maturity and resources?

Yes, in a broad sense; however, some risks may not be scalable. In high-risk sectors such as the health industry the prevention of harm is pivotal as the risk of harm through AI usage may outweigh potential benefits. Clearly, disadvantageous use of AI in health services could have potentially devastating effects. However, consumer centric sectors such as the banking industry could also suffer potentially detrimental effects of inappropriate AI practices in relation to customer assessment practices and impact, as well as data management. All industries which deal with private consumer information should be subject to strict regulation, which may militate against a risk-based approach. Also, all sectors and organisations which through AI usage could potentially negatively impact the quality of consumers' lives should be subject to a consistent national standard of regulation, rather than self-regulation.

17. What elements should be in a risk-based approach for addressing potential AI risks? Do you support the elements presented in Attachment C?

The elements proposed in Annexure C are appropriate in a risk-based approach. However, 'Public Education' undertaken by the government should be included as an important element in addition to 'Explanation', as a preventative measure.

'Impact assessments' of AI use should include the impact on human employability and the economic viability of the human economy, i.e., the impact of AI systems on humans' ability to earn a living in the future. This is particularly relevant to developers of AI systems.

18. How can an AI risk-based approach be incorporated into existing assessment frameworks (like privacy) or risk management processes to streamline and reduce potential duplication?

A national taskforce involving all sectors would be appropriate to advise on the best way to integrate an AI risk-based approach into existing assessment frameworks. In doing so consideration should be given to existing frameworks and best practices guidance in each sector.

20. Should a risk-based approach for responsible AI be a voluntary or self-regulation tool or be mandated through regulation? And should it apply to: a. public or private organisations or both? b. developers or deployers or both?

A risk-based approach for responsible AI should be applied through national regulation in the case of both public and private organisations, especially in relation to developers. In addition to risk management, developers should be required to comply with transparency requirements in the disclosure of their product development, processes, and applications.

Developers

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[13] Matthew Humerick, 'Taking AI Personally: How the E.U. Must Learn to Balance the Interests of Personal Data Privacy and Artificial Intelligence' (2018) 34(4) *Santa Clara High Technology Law Journal* 393, 395.
[13] *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and repealing Directive 95/46/EC (General Data Protection Regulation*) [2016] OJ L 119/1.

Developers should be subject to more stringent regulation and checks and balances than deployers of AI. The extent of regulation should depend on the sector, the possibility of harm to the user and the benefits to consumers. As there is currently a lack of empirical data on the impact of AI application, self-reporting measures may assist in informing the longitudinal study of the effects of AI technology; however, risk should be mitigated in favour of the consumer.

Deployers

In relation to deployers the extent of regulation should depend on the type of industry and the risk of harm to the consumer. Apart from the obvious risks of physical harm in (for example) the health sector, the impact of AI is more far-reaching and can affect consumers' ability to earn a livelihood (e.g. through employment practices), affordability and reliability of services (e.g. provision of legal services). Depending on the type of industry a combination of regulation and self-regulation may be appropriate.

Case study: The Legal Profession

In the legal profession it should be mandatory for all providers of legal services to have an AI Policy which conforms with accepted national standards. For example, the Queensland Law Society has issued a useful AI Policy template to its members which provides guidance on the appropriate use of generative AI technologies in our law firms. The policy aims to "ensure that we maintain the highest standards of professional conduct and ethics, as outlined in the Australian Solicitors' Conduct Rules 2012 (ASCR), while taking advantage of the latest advances in AI technology."

It is suggested that it would be desirable for the Australian Law Reform Commission to establish a national standard for responsible AI use in the legal industry, and for State and Territory based professional bodies to ensure that their members comply with the national standards. Enforcement could be State based and enforced by the Australian Law Commissioner.

The Future of Law Report ALRC dealt with AI automated decision making in various industries in its 2019 Report[14] (updated in 2020)[15]. However, this report preceded the implementation of generative AI platforms such as Chat GPT and may need to update its recommendations considering the adoption of generative AI, including how generative AI should be applied in the legal profession.

B The relevance of intellectual property (IP) rights management in the current context

Although intellectual property (IP) rights are excluded from this enquiry, is relevant to this discussion insofar as human invention or creation has remained a legal requirement for recognition of copyright and patent rights. It is suggested that the approach in IP law can inform considerations of the importance of the human element in administering AI systems, in particular in relation to the suggested element in Annexure C, "Human in the loop/Oversight assessments" which envisages having humans in the loop or involved in reviewing or monitoring an AI systems' operations are important for minimising potential risks and supporting public trust and confidence.

The discussion below is based on a submission made by the author to the World Intellectual Property Organization on 'The Impact of artificial intelligence on IP' in February 2020. It is relevant to the current Discussion Paper as the treatment of AI in IP rights to date is an indication of the ongoing resistance to recognizing AI as a 'creator' or 'inventor', instead requiring human creativity as a

[14] Australian Law Reform Committee (2019) Future of Law Reform Report, https://www.alrc.gov.au/wp-content/uploads/2019/11/Future-of-Law-Reform-Final-Report_v3web.pdf, accessed 25 July 2023.
[15] Future of Law Reform Update (2020), < https://www.alrc.gov.au/publication/future-of-law-reform-update/>.

necessary requirement for creating IP. This issue has also been canvassed in recent publications by the author.[16]

It was noted that as technological developments in AI bring new challenges to the traditional concepts of "author" and "inventor", it raised the fundamental question of whether there is a need to reshape the current legislative framework and its interpretation to promote, rather than deter technological developments. As the law currently stands it assumes that a human author is involved in the creative process. The idea of assigning legal personality to AI itself is fraught with difficulties and uncertainties. From a legal perspective the assumption of rights and liabilities would not be viable unless there is some form of human involvement and accountability (e.g. in the form of directorship in corporate entities, who can assume liability for any claims brought against AI). Much has been written on the difficulties of assigning tortious liability to AI (which falls outside the scope of this enquiry); however, the assumption of risk is a practical consideration that needs to be borne in mind when suggesting that legal personality be accorded to an AI application or technology.

It has been suggested that AI systems should only have rights and obligations that are strictly defined by legislators[17] for reasons of commercial and legal certainty. The suggestion that the term "inventor" or "author" be expanded to include a legal person (such as a corporation) controlling the AI process[18] is a feasible solution, provided there are checks and balances in place. This would mean setting up legal entities to control any IP rights evolving from AI - but with a human element involved to provide the possibility of intervention and control.[19] In Australia, the UK and the US, the concept of AI holding legal personality is not currently possible. What *is* possible is to create legal entities (such as corporations) and for those entities to hold or be assigned the IP rights in copyrightable or patentable outcomes, provided there is a *human* author or inventor. The problem of course is that this approach does not address creative content produced autonomously by an AI system. To remedy the problem the law will need to be amended to expand the definition of "authorship" to include non-human creativity.

It should be acknowledged that the value of IP rights in AI is significant. The International Data Corporation[20] had estimated that the AI market would grow from $8 billion in 2016 to more than $47 billion in 2020. It is desirable that there should be a clear way forward to protect these important intellectual assets that are being created on a global scale, which will require a multilateral approach to align existing IP frameworks in different jurisdictions. Furthermore, in order to promote ongoing creativity and encourage new inventions and creations, the incentives and structures in an expanded IP regime will need to be clearly defined.[21] The primary justification for IP rights is utilitarian in nature, the purpose being to reward and promote creation and innovation.[22] This is also relevant in

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[16] Francina Cantatore & William Van Caenegem (2023) "Is AI capable of original creativity? A critical discussion of the real impact of AI on IP regulation", *Australian Intellectual Property Law Journal* (2023) 33(3) AIPJ; and Francina Cantatore, (2021) "Creative Machines: AI and IP rights in digital authorship and patentable inventions", *Australian Intellectual Property Law Journal,* Vol 31 3, 176-188.

[17] Paulius Čerka, Jurgita Grigienė and Gintarė Sirbikytė, 'Is it Possible to Grant Legal Personality to Artificial Intelligence Software Systems?' (2017) 33(5) *Computer Law and Security Review* 685.

[18] Beat Weibel, *AI Created Inventions – Digital Inventor Computer-Implemented Simulations – Digital Twin*, WIPO/IP/AI/GE/19/P2.4 (30 September 2019) <https://www.wipo.int/meetings/en/details.jsp?doc_id=51767>.

[19] Ibid.

[20] The IDC is a global provider of market intelligence, advisory services, and events for the information technology, telecommunications, and consumer technology markets, see e.g., Rebecca Segal, 'IDC's Top 10 Worldwide Services 2020 Predictions', *IDC* (Blog Post, 18 November 2019) <https://blogs.idc.com/ 2019/11/18/idcs-top-10-worldwide-services-2020-predictions/>.

[21] Francina Cantatore and Elizabeth Crawford-Spencer, *Effective Intellectual Property Management for Small to Medium Businesses and Social enterprises: IP Branding, Licences, Trademarks, Copyrights, Patents and Contractual Arrangements* (Brown Walker Press, 2018) 11.

[22] Francina Cantatore, *Authors, Copyright and Publishing in the Digital Era* (IGI Global, 2014) 42.

considering the impact of AI-generated content. As Simpson stated, "At the end of the day, the rights of copyright are an award for innovation, creativity and risk taking."[23]

Arguably, the same considerations should apply in relation to AI-generated content, although not all commentators share this viewpoint.[24] There is a compelling argument for maintaining the correlation between authorship and originality. Examples such as Google's "Deep Dream Generator," (DDG) which is labelled as a Human/AI collaboration,[25] illustrate the potential for conflicting rights claims and the need for clear regulatory guidelines when dealing with IP rights in AI-generated creations, especially as the applications of deep neural learning are expanding constantly, demanding a proactive, rather than reactive approach.

It was suggested that on a practical level, the best way to manage potential uncertainties regarding AI use management and IP rights in this context would be to clearly set out ownership and user rights in the IP in commercial agreements, licensing agreements and terms of use for the system.[26] Given the number of entities which could be involved in the design, training and use of an AI system, it was proposed that these issues would need to be addressed at the outset of an AI project and applied at each stage as the project develops. Another solution would be to award copyright to the owners of the AI itself, which would operate in a similar manner as employer/employee relationships, where employers automatically own the work their employees produce.[27]

In the same way, when considering safe and responsible AI use in general, companies using AI systems should be required to consider potential impacts, rights and liabilities from the outset, with human involvement and accountability being foundational requirements (as with directors and company officers in corporations). Consequently, both developers and deployers of AI platforms and applications should be accountable, based on the potential impact of their contributions.

C Conclusion

In conclusion, whilst I am in principle supportive of a risk-based approach, for the reasons set out above I submit that the importance of human oversight in any risk management framework should not be underestimated. I am supportive of a national framework to address ethical AI use as proposed by the NAIC;[28] however, national consumer-centric regulation should be implemented across all industry sectors to ensure these practices are uniformly implemented. Previously, the DPI Final Report recommended broad reform of Australian privacy law and a strengthening of the protections in the *Privacy Act*; an enforceable code of conduct governing dealings between digital platforms and media organisations; a mandatory code on copyright enforcement by platforms; Government-funded programs to improve digital media literacy in the community; and ongoing monitoring and

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[23] Shane Simpson, *Review of Australian Collection Societies* (Report, Minister for Communications and the Arts and the Minister for Justice, July 1995) 8.
[24] Such as Samuelson: See Pamela Samuelson, 'Allocating Ownership Rights in Computer-Generated Works' (1986) 47(4) *University of Pittsburgh Law Review* 1185, 1208.
[25] See <https://deepdreamgenerator.com/>.
[26] See Cantatore and Crawford-Spencer (n 21) 103.
[27] Robert David Hart, 'If an AI Creates a Work of Art, Who Owns the Rights to It?', *Quartz* (online, 16 August 2017) <https://qz.com/1054039/google-deepdream-art-if-an-ai-creates-a-work-of-art-who-owns-the-rights-to-it/>.
[28] National Artificial Intelligence Centre (2023) "Implementing Australia's AI Ethics Principles: A selection of Responsible AI practices and resources", <https://www.csiro.au/en/work-with-us/industries/technology/National-AI-Centre/Implementing-Australias-AI-Ethics-Principles-report#:~:text=The%20report%20explores%20some%20of%20the%20practical%20steps,the%20roles%20that%20are%20key%20to%20successful%20implementation>, accessed on 25 July 2023.

investigation of conduct by digital platforms likely to cause consumer harm.[29] As a starting point, implementing these recommendations, together with a considered risk-based AI regulation strategy as proposed in Annexure C of the Discussion Paper will support the objectives raised in the Discussion Paper.

Thank you for the opportunity to make a submission on these issues.

Yours sincerely

Dr Francina Cantatore

(PhD MA BA LLB GDLP)

Associate Professor

Faculty of Law, Bond University

Australia

[29] ACCC, *DPI Final Report* (n 8) 31-36.