AUSTRALIAN
RETAIL
CREDIT
ASSOCIATION

Technology Strategy Branch

Department of Industry, Sciences & Resources

26 July 2023

Dear Sir/Madam

AUSTRALIAN RETAIL CREDIT ASSOCIATION (ARCA) SUBMISSION – SAFE & RESPONSIBLE AI IN AUSTRALIA – DISCUSSION PAPER

Thank you for the opportunity to provide a submission in response to this important topic.

The Australian Retail Credit Association (ARCA) is the peak industry association for businesses using consumer information for risk and credit management. Our Members include banks, mutual ADIs, finance companies and fintech credit providers, as well as all of the major credit reporting bodies (CRBs) and, through our Associate Members, many other types of related businesses providing services to the industry. ARCA's Members collectively account for well over 95% of all consumer lending in Australia.

ARCA, upon request of the Office of the Australian Information Commissioner (OAIC), has acted as Code Developer for the Privacy (Credit Reporting) Code 2014 (the CR Code) which gives effect to Part IIIA of the Privacy Act (which, in turn, sets out the legislative framework for credit reporting in Australia). ARCA is also the author and administrator (through its subsidiary entity) of the Principles of Reciprocity and Data Exchange (PRDE) which sets out industry agreed rules and standards for participation in comprehensive credit reporting (CCR). ARCA has both a deep understanding of the operation of the Privacy Act (particularly Part IIIA), as well as an understanding and experience of industry self-regulation as concerns the contribution of data.

ARCA's background and experience, as well as the breadth and experience of our Membership, means we are well-placed to comment on issues raised by this discussion paper.

Definitions

ARCA broadly agrees with the definitions used in the paper. We would observe that, from our discussions with our Members, AI use remains principally focussed upon machine learning (for instance, the use of credit scoring algorithms, or natural language processing to help categorise incoming customer calls). It also appears that the application of generative AI may occur as part of a process which then feeds back into existing machine learning or

manual processes. That is, in its application, AI may involve a mix of different technologies, rather than a distinct technology and process.

We highlight this because we consider one of the challenges in driving transparency and consumer trust in AI is ensuring that the definitions used do not pose a barrier to that understanding and trust.

Potential gaps in approach

Based on ARCA's experience in credit reporting regulation in Australia, our view is that prescriptive regulatory frameworks dealing with complex technical areas can be problematic. In the credit reporting context, Part IIIA was introduced in 2012 (and commenced operation in 2014) as a highly prescriptive piece of legislation to tightly control the collection, disclosure and use of credit related personal information. The desire for prescription was due in part to concerns about misuse of data, and, as a result, the necessity for strong consumer protection (concerns which ARCA shares).[1]

However, such tightly prescribed legislation can result in adverse consequences. These include an inability to readily adapt to change when it occurs, simply because the legislation was not drafted with this change in mind. Further, it can also be that assumptions which have informed the drafting later may later prove incorrect or deficient.

For instance, Part IIIA was drafted before Buy Now Pay Later products existed, and also without any reference to the use of soft enquiries to support lending activity. Attempts to adapt to these developments have relied on unintended interpretations of the prescriptive legislation. As such, the law now requires amendments to 'retrofit' it to subsequent developments in a way that ensures it is interpreted and applied consistently.

ARCA's experience has also been that complex areas of law – credit reporting being a prime example (legislating a data ecosystem) – can be difficult to get right, and even more difficult to explain to others (including those within industry, and also consumers).

Applying this experience to AI, ARCA's view is that the following approach should be adopted:

- Rely on existing regulation as much as possible, which for AI will include anti-discrimination legislation, the Privacy Act and the Australian Consumer Law. Bespoke regulation for AI creates a risk of regulatory arbitrage, which is likely to lead to more issues than it resolves. Furthermore, bespoke regulation would potentially mean losing the benefit of existing consumer comfort and understanding in the application of law, as well as the existing jurisprudence being applied. For example, as one of the key risks in AI may be technologies behaving in a discriminatory fashion, it is important that the existing anti-discrimination framework be applied. This reinforces the importance of the existing framework, and the fact that it applies regardless of whether the source of discrimination is technology rather than an independent human.
- There may be aspects of AI which do require standalone regulation (for instance, ethical rules framework). Where any new regulation is required, ARCA's view is that the preferable approach is that primary legislation is principle-based, with operative

[1] For instance, we agree with the need for strict protections in relation to the collection, use and disclosure of credit information. However, highly prescriptive drafting can create an inflexible regime that cannot adapt to changes in the environment.

rules contained in regulations or legislative instruments.[2] This approach recognises that the fundamental principles which underpin regulation should be less likely to change, and thus embedding them in primary legislation is appropriate. By comparison, operative rules are likely to change as technologies evolve and systems develop (for example, the introduction of new players in the financial services market). For this reason, changes to these rules ought to be able to be made in timely manner, reducing the risk of gaps emerging between practice and regulation.

- It is critical that any regulatory framework is supported by regular reviews both of the operative rules but also the principles-based primary legislation. The cadence of these reviews should also reflect the nature of each instrument. Reviews of operative rules should occur as often as required depending on the overall state of regulation and the need to test and check in: depending on complexity and maturity of the system, this could be anywhere between 2 to 5 years. However, the regulatory of the review of the principles would be less frequent – perhaps every 6 to 8 years.
- Any regulatory framework should also embed within it reporting mechanisms to support the collection of data and supporting information which helps to track and substantiate the effectiveness of regulation. As much as possible, any such reporting mechanisms need to be developed in conjunction with the reporting entities, to ensure that the mechanisms make sense and align easily with the existing systems. Further, reporting mechanisms should reflect the expectations of policy makers and Government as to what effective operation of the regulatory framework looks like, and how best data can illustrate the effectiveness of this operation.

Target areas

Regarding question 8, ARCA's view is that risks inherent in use of AI ought to fundamentally be managed in a similar way, noting the solution may affect the size and scale of the risk, but otherwise the risk itself should be similar. In that regard, ARCA's view is that testing for risk and associated risk management should be based on understanding of the potential risk, mitigations for these risks – and then appropriate monitoring. For instance, generative AI processes may be seen as more risky, but if the generative AI process was applied in the context of a low risk activity, this should be less of a concern.

Regarding question 9(b), ARCA has first-hand experience through its consumer education website, CreditSmart (www.creditsmart.org.au) of the importance of providing consumers with impartial, informative – yet simple – explanations to build their trust and confidence in credit reporting. We think these insights have direct application to the roll-out of AI in Australia. In particular:

- It is critical to approach the need for transparency with the understanding that the base level of consumer understanding or engagement is likely to be low. Furthermore, our experience is that often consumers will not seek out information or education until such time as they are directly affected (in the credit reporting context, that may be when the consumer experiences financial hardship or is rejected for credit because of adverse information on their credit score). It is therefore important that, at any point that the consumer is engaging with the system, they are not simply given the explanation relevant to their immediate enquiry, but efforts are made to impart some basic information.

[2] This aligns with the proposals of the Australian Law Reform's Commission's review of the Legislative Framework for Corporations and Financial Services Regulation: see Interim Report B in particular.

- It is also important that any messaging for consumers is given context. Concepts such as AI for most consumers will be new, and potentially conjure up images of sinister robots taking over the world. The reality is obviously far less interesting, but nonetheless it is equally important that consumers understand that reality rather than fear the unknown.
- Consumers also need simple, easy-to-understand explanations. Our experience is that part of the challenge of consent-based frameworks such as the Consumer Data Right has been the difficulty in reducing the explanations and consents for use of data to highlight the key things consumers need to understand. There is little point listing each and every possible use of data and seeking consent, if the end result is to overwhelm the consumer and make them confused or uncertain about what they are even consenting to.
- To reinforce, to build trust and confidence it is necessary to develop base level understanding first, maintain consistency in messaging (this means arming all organisations using AI with assistance in messaging, to support consistency), and key simple messages. Messaging should be developed so that it is provided in different forms – videos, graphics as well as words – and also so that it is accessible (including different languages, as well as accessible to vulnerable customers).

Risk-based approaches

ARCA considers a risk-based approach to AI regulation is appropriate. To ensure the appropriate rollout and implementation – in particular of new AI use cases – a conservative approach may be warranted. Taking a risk-based approach also reinforces the need for rigorous testing and monitoring to support the ongoing rigour of the regulatory framework. We would stress, however, the same approach does not need to be applied to any existing machine learning use cases which are well-established, tested and producing good outcomes.

ARCA further would highlight that the objective of any risk-based approach should not be to ensure there is no risk at all. Instead, a risk-based approach should be focussed on identifying what an unacceptable risk is (e.g. discriminatory outcomes which may prevent particular people getting credit), avoiding that risk as much as possible, but otherwise, weighing up risks against benefits of the use of AI. For example, the use of natural language processing may be beneficial, in that it would support more efficient and effective monitoring of high-volume calls, while also leading to the risk that customers may be misclassified.

It may not be appropriate to rely wholly or principally on industry self-regulation in this context. However, self-regulatory approaches may have a role to play; if so, the success of any industry self-regulation may depend on:

- The extent to which competitors/ industry can create enforcement mechanisms which works, isn't subject to competition, but is trusted and credible.
- Whether there are industry incentives to solve the problems the regulation is trying to solve
- Whether there are limited risks of the self-regulatory framework being used as a barrier to entry / in an anti-competitive manner
- The severity of the risks of harm the regulation is trying to mitigate.

Beyond that, industry self-regulation has the advantage of people with deep knowledge and understanding, and application, being the arbiters of what is acceptable.

ARCA would not support regulation being voluntary. Our view is that the best way to support new technology and initiatives is to ensure that industry and consumers have assurance that everyone is playing by the same rules. Making regulation voluntary means it may not deter those who have the most to gain from harmful conduct.

We would welcome the opportunity to discuss this submission further.

Yours faithfully

Elsa Markula

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