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To whom it may concern,

Thank you for the opportunity to provide feedback on the Review of AI and the Australian Consumer Law. The NSW Small Business Commissioner ('the Commission') is an independent statutory office of the NSW Government. It provides strategic advice, advocacy and affordable dispute resolution across NSW.

The Commission anticipates that small business adoption of AI technologies is likely to become of increasing importance to remain competitive in an increasingly sophisticated and dynamic marketplace. Whether as consumers, suppliers or manufacturers; the application of the Australian Consumer Law (ACL) to AI-enabled products has the potential to introduce new ambiguities and risks. The Commission welcomes the review as an opportunity to ensure the ACL remains fit for purpose and responsive to emerging challenges.

More generally the proliferation of AI technologies pose both benefits and risks for small businesses, and the Commission recently released the guide '[Can Artificial Intelligence help your business?](#)' to address some of these risks and emphasise the responsible use of AI technology.

Principles-based approach is generally fit for purpose and should be retained

The ACL adopts a principles-based approach, offering broad, flexible protections that apply across diverse contexts. This approach promotes efficient market outcomes while safeguarding consumer interests. Unlike more prescriptive approaches, the principles-based approach allows the ACL to apply in a universal manner, adapting to emerging technologies and new business practices.

The flexibility inherent in a principles-based approach is particularly advantageous in addressing the challenges posed by AI technologies. AI-driven goods and services often involve novel and rapidly changing features, making prescriptive requirements ill-suited to their dynamic nature. Prescriptive frameworks risk becoming outdated or irrelevant as technology advances, potentially creating gaps in consumer protection. Conversely, the ACL's principles-based foundation enables it to adapt while retaining its core protections, ensuring consistency and fairness across varied industries and contexts.

However, it is essential to acknowledge that a principles-based approach may not always provide the clarity or certainty needed in specific markets or for particular risks. In such cases, supplementary measures can address areas of acute need. The Competition and Consumer Act (CCA) already accommodates this flexibility, allowing for tailored interventions where the ACL alone is insufficient,

including through information standards and prescribed industry codes. While these should be used sparingly, it may be preferable to leverage these tools to address specific concerns and protect the integrity of the principles-based approach.

Understanding AI technologies

A clear conceptual foundation should underpin assessments of whether AI technologies warrant change to both the ACL and other regulatory frameworks. This includes distinguishing between AI technologies and other digital technologies and services, and contemplating how future developments in AI may impact consumer outcomes.

In many instances, the issues raised in the consultation paper reflect attributes that are common to other digital technologies and they are not unique to AI. For example, it has been suggested that AI products may have the potential to blur the line between goods and services, such as in circumstances where a product combines both hardware and software elements. However, these challenges are not new and it is generally clear how the ACL applies. As previously noted, any regulatory gaps resulting from emerging business models and technologies may be better addressed through industry or product specific regulation, such as the Motor Vehicle Service and Repair Information Sharing Scheme, to retain the principles-based focus of the ACL.

As with any new technology or evolving marketplace, emerging areas of uncertainty can be addressed through updated guidance and education. AI technologies may pose questions which have not previously been contemplated under the ACL. For example, in some instances, there may be a need to clarify the scope and how the ACL applies where a product acquires attributes that were not present at the time of purchase but that develop over time once owned by a consumer. This includes autonomous learning technologies could lead to harm if there is a learning error, but where it is unclear whether the harmful attribute is the responsibility of the supplier (given it developed after purchase, similar to a pet having an unwanted attribute that develops over time).

While matters involving product safety require more robust protections, it is important for the benefits of AI technology to be realised by accepting that some degree of risk is unavoidable. Where the consequences of a materialised risk are within reasonable limits, care should be taken to ensure the ACL does not have a chilling effect on the supply of beneficial technologies within the Australian market. For example, a regulatory sandbox could allow AI developers to explore how AI systems react under different conditions or handle novel inputs and to support the development of domestic research and innovation capability.

Third party services

The Commission anticipates the proliferation of AI technologies and capabilities will increase the complexity of goods and services offered by small businesses and create new dependencies on third-party providers, many of which are located outside of Australia. This complexity arises because AI-driven products and services often rely on multiple layers of technology, with individual components or features sourced from separate providers. For example, a small business may offer a software product that integrates a third-party AI feature, such as image recognition or natural language processing, to enhance its functionality.

In such scenarios, ambiguities may arise where the use of a specific AI feature results in consequential losses for a customer. Under the ACL, the supplier of the product would ultimately bear responsibility for meeting consumer guarantees, even though the issue may have been caused by the third-party provider of that specific feature. Where the third-party provider is located offshore, enforcing contractual rights

against them may be impractical or impossible, leaving the supplier exposed to significant liability they may be unprepared for.

There should be flexibility under the ACL for suppliers to take reasonable steps to manage risk and liabilities resulting from a third party supplier, particularly where the root cause of a consumer guarantee failure may lie beyond their control. As AI technologies continue to evolve, it may be important to clarify how the ACL applies in such contexts. Specifically, suppliers should have the ability to define, through their terms and conditions, how liabilities related to specific third-party features are allocated, ensuring the framework remains practical without requiring amendments to the ACL itself.

Thank you for the opportunity to make a submission. If you require further information, please contact Megan Bennett, at either megan.bennett@smallbusiness.nsw.gov.au or (02) 9372 8767.

Yours sincerely

Chris Lamont
Commissioner
NSW Small Business Commission

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