

26 July 2023

Technology Strategy Branch  
Department of Industry, Science and Resources  
GPO Box 2013  
Canberra, ACT, 2601

[Via online portal](#)

Dear Technology Strategy Branch

### Safe and responsible AI Discussion Paper

Thank you for the opportunity to comment on the Safe and Responsible AI Discussion Paper (**Discussion Paper**).

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership of more than 50,000 includes directors and governance leaders of not-for-profits (**NFPs**), large and small businesses (**SMEs**) and the public sector.

The AICD welcomes consultation on developing a fit-for-purpose regulatory approach in Australia.

The AICD has previously engaged extensively on Government consultations and proposed reforms in related areas including data management and cyber security policy, including the Parliament's inquiry on the Influence of international digital platforms, the Privacy Act 1988 (Privacy Act) and strengthening Australia's cyber security regulation and incentives.<sup>1</sup>

This submission reiterates many of the key points made by AICD in those previous consultations.

### Summary

The AICD recognises the importance of timely adoption of AI in Australia to remain competitive in the global market and boost national productivity and economic growth.

The potential of AI offers many benefits but also comes with the potential for increased exposure to new and emerging risks. As highlighted in the World Economic Forum (WEF) AI toolkit there is a need to address this emerging tension and strike a balance between AI development and implementation, whilst concurrently mitigating the possible abuse of this technology.<sup>2</sup> To strike an appropriate policy balance, multi-stakeholder consultations with members of the innovation sector, corporate Australia, public sector, regulators and civil society will be critical.

With a balanced regulatory approach Australia will be able to navigate foreseeable AI risks more effectively but importantly, also foster innovation through providing regulatory certainty for Australian businesses to invest in AI research and development.

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<sup>1</sup> AICD submission to the Privacy Act Review Final Report, available [here](#); AICD submission to the 2023-2030 Australian Cyber Security Strategy, available [here](#); AICD submission to the Inquiry into the influence of international digital platforms, available [here](#)

<sup>2</sup> World Economic Forum (January 2022) Empowering AI Leadership: AI C-Suite Toolkit, Available: [https://www3.weforum.org/docs/WEF\\_Empowering\\_AI\\_Leadership\\_2022.pdf](https://www3.weforum.org/docs/WEF_Empowering_AI_Leadership_2022.pdf)

In summary, the AICD makes the following key points in this submission:

1. In our view, **Australia has an existing legislative framework** which provides regulatory oversight of AI development and use, which should be **reviewed and updated** before considering the introduction of a new AI specific laws. In particular, more work needs to be done to raise awareness and provide guidance on the existing obligations (such as around privacy and data protection) and how they apply in the AI context.
2. The AICD recognises the importance of Australia closely monitoring **international regulatory developments** including in Europe, the United States, the United Kingdom and Canada, amongst other nations. Broad regulatory alignment with key overseas markets is important for us to remain competitive with international markets and facilitate interoperability with our trading partners and to mitigate any comparative regulatory lag. Following **a review of our existing framework**, if legislative gaps necessitate the adoption of a new regulatory approach, this should be informed by **evidence-based recommendations**.
3. The AICD recognises **good AI governance that is robust yet flexible to changing innovation extends beyond legislation and regulatory frameworks**. Other mechanisms such as domestic and global standards and industry codes, with appropriate oversight, also serve an important function in supplementing and/or complementing existing laws. On an organisational-level, the AICD is focused on promoting the importance of responsible and informed AI.

## Australia's existing regulation of AI

Australia does not currently have AI-specific laws but there are existing regulatory frameworks in place that provides oversight of AI throughout its life cycle including design, development and deployment. These frameworks have the potential to be improved and adapted with appropriate amendments to address issues likely to emerge in the near future with AI products, services and practices.

The current framework is comprised of a range of technologically-neutral laws which address the potential for system errors or misuse of AI systems including the *Copyright Act 1968*, *Privacy Act 1988* (**the Privacy Act**), *Competition and Consumer Act 2010*, *Fair Work Act 2009* and laws related to anti-discrimination, cyber, data protection, tort and contracts. Sector-specific laws also have application to AI including: financial services laws; laws for administrative and public sector; and laws related AI applications, such as surveillance and health medical device laws.

Directors of companies subject to Chapter 2D of the *Corporations Act 2001* (*Cth*) (**Corporations Act**) have legal obligations related to their company's use of AI and the related areas of cyber security and data governance. Under section 180 of the Corporations Act, company directors have a legal duty to exercise reasonable care and diligence in the carrying out of their duties. To satisfy the objective standard of this duty, directors of regulated companies that utilise AI systems will be required to put in place appropriate arrangements to manage risks including proper AI governance.<sup>3</sup>

Further, per section 181 of the Corporations Act, directors must act in the best interests of a company which can include stakeholder and corporate reputation considerations. This is particularly the case when directors consider the long-term interests of a company, as addressing potential reputational risks are linked to protecting shareholder value.<sup>4</sup> Accordingly, the duty requires directors to consider how AI is used in their business model, its potential to negatively impact on a range of stakeholders such as customers, and respond accordingly, such as establishing organisational AI governance

<sup>3</sup> Solomon, L and Davis, Professor Nicholas, *The State of AI Governance in Australia*, p36

<sup>4</sup> Bret Walker and Gerald NG, *Australian Institute of Company Directors The Content of Directors' "Best Interest" Duty* (Memorandum of Advice, 24 February 2022), p4

frameworks. For more information, see AICD's [Practice Statement on Directors' "best interests" duty in practice](#), which provides current guidance for directors on discharging the duty.

### **Improving awareness of existing regulatory frameworks that govern AI systems**

Despite the existing legislation, a report recently released by the Human Technology Institute (HTI) found Australian corporate leaders have a general perception that there is a lack of AI-specific regulation and enforcement under the current laws, leading some to perceive there being an 'AI Wild West' in Australia.<sup>5</sup>

We believe that focusing on raising awareness amongst AI developers and deployers on existing legal obligations is a critical step that Government should focus on.

### **Updating the existing regulatory framework to be fit-for-purpose**

The AICD recognises there is potential to enhance the existing framework through the following steps:

- Improving regulatory adaptability to prevent regulatory lag in addressing new harms and risks of AI, which are differentiated to other technologies. Examples of these risks are outlined below.
- Supplementary and complementary guidance to support Australian businesses understand their regulatory obligations when dealing with AI systems including further guidance on liability to remove uncertainty when AI specific risks arise; and
- Amendments to incorporate past inquiries and reports including the Privacy Review (expanded on below).

### **Implementing past inquiries and reports**

Consistent with our recent submissions on the Privacy Act Review and new *Cyber Strategy 2023-2030* we consider that coordinated decision making across AI, data governance and management and cyber security is crucial.<sup>6</sup> Our view is that the Government should not consider the development of new AI focused regulation without consideration of how this could be aligned or harmonised with the suite of amendments contemplated under the Privacy Act Review, notably on the use of personal information in automated decision-making (ADM).

We particularly note work to update the Privacy Act via the Privacy Act Review Report that is currently awaiting a response from Government. The Privacy Act Review Report included a chapter on privacy implications in the use of ADMs that utilise personal information and made several recommendations related to ADMs including:

- Privacy policy information should set out the types of personal information that will be used in ADM processes which has a legal, or similarly significant effect on an individual's rights (proposal 19.1)
- Individuals should be given a right to request how these decisions are made (proposal 19.3)
- Provide information about targeting including the use of the algorithms and profiling to recommend content to individuals (proposal 20.9)<sup>7</sup>

<sup>5</sup> Solomon, L and Davis, Professor Nicholas, *The State of AI Governance in Australia*, p33

<sup>6</sup> AICD submission to the Privacy Act Review Final Report, available [here](#); AICD submission to the 2023-2030 Australian Cyber Security Strategy, available [here](#)

<sup>7</sup> Attorney-General's Department (AGD) (2023) Privacy Act Review Report 2022, p 126

## International regulatory developments

As referenced above, AI presents significant risks due to the speed and widespread scale for which it can be developed and deployed as well as the nature of applications for which it can be used.<sup>8</sup> We also note AI in some cases presents unique risks compared to other emerging technologies, when adequate guardrails are not in place, this includes (but is not limited to):

- the risk of AI presenting invented information as fact (also known as “hallucinations”);
- the ability of AI to continually train on datasets throughout its life cycle, which can particularly cause challenges if good data governance is not observed;
- the risk of algorithmic bias by which AI is trained on datasets that are not representational of the broader community and thereby, entrenches further biases through automated decision-making; and
- the potential for AI to independently develop its own emergent goals contrary to the intended goals of the AI deployer and which may be against the wider interests and ethics of individuals or society, also known as “the alignment problem.”

As we continue to learn more about these new class of AI risks and how to mitigate them, in future it may be appropriate for the Government to draw on the regulatory approach of other jurisdictions to address outstanding legislative gaps. In the interim, the European Union (EU), United States (US), United Kingdom (UK) and Canada are still at various stages of establishing and improving their AI regulatory frameworks.

In the absence of an overseas regulatory framework that enjoys wide stakeholder support, the AICD cautions against Australia taking an advanced position, especially given our relative size, developing innovation sector and reliance on the global economy.

We recommend Government continue to closely monitor the EU Artificial intelligence Act (EU AI Act) which is currently at its final stage of passage, and the recently announced Blueprint for an AI Bill of Rights in the United States.

## Promoting good practice in AI governance

The AICD supports the use of non-regulatory mechanisms (such as principles, standards and codes) to supplement and complement the regulatory framework for responsible AI.

Broadly, we support the underlying principles and objectives of the **OECD AI Principles** (which sets standards for AI that are aligned with human rights and democratic values) and **Australia’s Artificial Intelligence Ethics Framework** (which provides high level principles to guide the responsible design, development and implementation of AI).

We also welcome the establishment of the **Australian Government’s Artificial Intelligence Action Plan**, which provides a national vision for supporting the innovation and regulation of responsible AI. We are aligned with the key measures in the plan including the implementation of Australia’s Artificial Intelligence Ethics Framework and updating the Privacy Act.

To facilitate the continual development and updating of best practice AI governance principles, the AICD recognises the need for wider collaboration across sectors including between government, regulators and industry. On a global front, we also support the Australian Government’s involvement in

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<sup>8</sup> Cihon, P; Schuett, J & Baum, S.D (2021) Corporate Governance of Artificial Intelligence in the Public Interest, Available: <https://doi.org/10.3390/info12070275>

global AI coordination bodies, partnerships and initiatives such as the Global Partnership on AI (GPAI), Group of Seven Summit (G7) and upcoming Global Summit on AI Safety<sup>9</sup> to facilitate shared learnings and approaches to AI safety and governance.

In respect of business and industry, we believe there is a need for further guidance for leadership including directors and boards of organisations to invest in establishing and/or strengthening their capability to responsibly deploy AI in compliance of existing regulatory requirements. Accordingly, we support the development of industry and/or sector-specific standards and guidance.

On an organisational level, we also endorse proactive efforts by companies to implement governance of AI systems including clear lines of responsibility and accountability of AI decision makers in an organisation.<sup>10</sup> We believe companies should also aim to bring together related areas of governance (e.g. cyber security and data governance) to support a holistic approach. What will be key is lifting the level of understanding and board and senior executive level regarding what AI is, how it is being developed and deployed, as well as the unique challenges and opportunities posed by such technologies.

With that in mind, the AICD is rolling out a series of resources to support our members to upskill in the field of AI governance, including our upcoming webinar this August on [Understanding AI in the Governance Context](#), to be presented by Professor Nicholas Davis (Human Technology Institute, University of Technology Sydney). We also regularly publish articles on contemporary governance issues related to the intersection of AI and business (available: [here](#)) and will be developing further resources for directors on effective governance of their organisation's development and use of AI, in collaboration with industry experts.

## Next steps

We hope our submission will be of assistance. If you would like to discuss any aspects further, please contact, Melissa Lewandowski, Senior Policy Adviser at [mlewandowski@aicd.com.au](mailto:mlewandowski@aicd.com.au), or Christian Gergis, Head of Policy, at [cgergis@aicd.com.au](mailto:cgergis@aicd.com.au).

Yours Sincerely,



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<sup>9</sup> Prime Minister's Office, 10 Downing Street and The Rt Hon Rishi Sunak MP (7 June 2023) Press Release: UK to host first global summit on Artificial Intelligence, Available: <https://www.gov.uk/government/news/uk-to-host-first-global-summit-on-artificial-intelligence>

<sup>10</sup> World Economic Forum (January 2022) Empowering AI Leadership: AI C-Suite Toolkit, Available: [https://www3.weforum.org/docs/WEF\\_Empowering\\_AI\\_Leadership\\_2022.pdf](https://www3.weforum.org/docs/WEF_Empowering_AI_Leadership_2022.pdf), p63