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26 July 2023

Dear Department of Industry, Science and Resources,

## **Governance Institute of Australia response to the 'Safe and Responsible Artificial Intelligence (AI) in Australia' discussion paper.**

### **Who we are**

Governance Institute of Australia (Governance Institute) is a national professional association, advocating for our network of 43,000 governance and risk management professionals from the listed, unlisted, public, not-for-profit and charity sectors.

As the only Australian provider of chartered governance accreditation, we offer a range of short courses, certificates and postgraduate study. Our mission is to drive better governance in all organisations, which will in turn create a stronger, better society.

Our members have primary responsibility for developing and implementing governance frameworks in public listed, unlisted and private companies, as well as not-for-profit organisations and the public sector. They have a thorough working knowledge of the operations of the markets and the needs of investors. We regularly contribute to the formation of public policy through our interactions with Treasury, the Attorney General's Department, the Department of Home Affairs, ASIC, APRA, ACCC, ASX, ACNC and the ATO.

### **Our activities in this area**

Governance Institute members have both a strong interest and involvement in digital technology and cyber security policy and take the governance and risk management of privacy, data protection and cyber security in all sectors very seriously. We have advocated for some time for digital transformation and modernisation in many areas of corporate regulation, including supporting virtual and hybrid AGMs, digital document execution, digital shareholder communications, and the introduction of Director ID numbers. Many of our members work as governance and risk professionals in a range of organisations that are part of or connect with the digital economy, from the largest ASX-listed companies responsible for critical infrastructure to small businesses and not-for-profits, who are nonetheless all affected by developments in AI. They are experienced in considering the industry and economy-wide implications of cyber security, data and technology governance and digital transformation.

We produce a range of thought leadership and industry guidance in relevant areas. In recent years Governance Institute's Risk and Technology policy committee has published Good Governance Guides on the topics of cloud services, digital transformation, digital trust, technology strategy, technology governance, cyber security, data as an asset, and ethical use of AI. Our 2020 Report on the future of the risk

management professional identified cyber security, AI and digital disruption as key trends likely to impact on risk management professionals by 2025.<sup>1</sup>

This Submission does not respond to all the questions set out in the Discussion Paper but to those of interest and concern to our members.

## **Executive summary**

- Governance Institute's members welcome the opportunity to make this submission on the critical issue of ensuring safe and responsible use of AI. We support the aims of the Government in working towards ensuring that any regulation does not unnecessarily curb the productivity opportunities afforded by AI, while also legislating necessary guardrails for the use of AI and thereby building trust in the technology.
- We recommend the development of a well-designed, well-targeted and fit for purpose AI governance standard supported by guidance suitably tailored for organisations of differing sizes.
- Our members consider that ensuring any Australian regulatory regime must be coordinated with international regulatory efforts.
- A 'risk based' approach to AI regulation is the best way to ensure safe usage and community trust in this technology.
- Public sector entities should have increased regulatory requirements and standards when implementing AI.
- Government should significantly escalate investment in research and development relative to AI to ensure Australia does not miss this economic opportunity.
- Government should establish a dedicated and Independent AI Safety Commissioner and Agency.
- Government should move to finalise the new Privacy Law regime to ensure no regulatory gaps are left to be exploited.

## **General comments**

Despite Australia being behind international efforts to centralise AI regulation, there are benefits to moving later as we can assess these international regulatory developments to establish the best possible regime. The rapid deployment of AI in everyday life has led to our members considering the establishment of a dedicated Australian framework for ethical usage of AI overdue. The government needs to establish a flexible, regulatory system to build users' trust and confidence in the use of AI to avoid missing out of the economic benefits afforded by AI.

Businesses need clarity. AI is rapidly becoming a necessary tool to remain commercially competitive, but organisations are not always procuring AI or systems in which AI is inbuilt with an understanding of the risks and threats it brings. Guardrails, that not just frame ethical implementation of AI by a business, in addition to appropriate guidance material to help businesses use AI responsibly is required.

Governance Institute's members agree that harmonising the technology neutral approach as proposed in the UK White Paper, with the AI specific developments in China, to find a middle ground similar to that of

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<sup>1</sup> Governance Institute, 2020, *Future of the Risk Management Professional*, p. 19.

the risk-based approach of the European Union that is neither tech neutral nor technology specific prescriptive regulation is the best way forwards for regulating AI in Australia.<sup>2</sup>

The benefit to following the EU's AI Act is that Australia can learn from the issues it faced designing their framework. Implementing these lessons will be critical.

This should be the responsibility of a dedicated AI Safety Agency and Commissioner.

If the Government decides to legislate a tiered risk approach, further consultation with industry and stakeholders is also needed to ensure any new regulation can be seamlessly introduced.

We have the following comments on the proposals for regulatory and legislative reform set out in the Consultation Paper:

- **Approach to AI regulation**

A significant chasm exists between the divergent regulatory approaches across the developed world, which threatens the safety and plausibility of managing AI in the future. Governance Institute members therefore, regard harmonising Australia's regulatory efforts with similar frameworks and regulation to that being developed overseas is the most appropriate approach.

Regulating any emerging technology without considering the cross-border nature of the technology is short sighted and creates additional burden for businesses. New regulations can become a de facto international standard if appropriately harmonised with enough other regimes.<sup>3</sup>

Governance institute's members are of the view that prioritising codifying an ethical usage of AI framework and avoiding serious societal threats should be the first priority of Government. Industry self-regulation, similar to that being pursued by the UK, and suggested by industry leaders in the UK lacks transparency and coherence and is not sufficient to protect consumers nor build society wide trust in using AI.

Australia has the opportunity to act to ensure that AI development and use is governed in ways that align with human values, prevent harm, and safeguard public trust, thus, any regulation must be underpinned by an agreed framework of ethical AI usage:

*'AI Ethics Framework should be codified, to help ensure that those who benefit from AI are subject to the burden of proof that their technology is compliant and also have a clear understanding of their obligations. This will help both discourage detrimental applications of the technology while providing certainty to drive innovation'.*<sup>4</sup>

Government also needs to consider the significant impact regulating emerging technologies, such as AI, will have on other, less developed nations.<sup>5</sup> Governance Institute members work in many international jurisdictions and are concerned that Australia's efforts to manage the responsible growth of AI may not properly account for the risks to these stakeholders. Developing responsible AI initiatives by considering only early mover international regulatory initiatives potentially undermines the impact that participation of Global South stakeholders needs to have to effectively ensure ethical AI's development and usage.

Relying solely on the EU Act, the UK policy white paper, China's AI prescriptive regulations and other developed nations' efforts does not completely take into account these stakeholders. It is important to

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<sup>2</sup> See [Corrs Chambers Westgarth: Calculated risk: Australia's new approach to regulating AI?](#)

<sup>3</sup> See Michael Veale, Kira Matus and Robert Gorwa's paper '[AI and Global Governance: Modalities, Rationales, Tensions](#)' in the Annual Review of Law and Social Science, vol 19, 2023.

<sup>4</sup> See KPMG – [2022 Submission to the Digital Technology Taskforce's Issues paper on Automated Decision Making and Artificial Intelligence regulation.](#)

<sup>5</sup> See Michael Veale, Kira Matus and Robert Gorwa's paper '[AI and Global Governance: Modalities, Rationales, Tensions](#)' in the Annual Review of Law and Social Science, vol 19, 2023.

engage meaningfully with less developed nations to gauge how responsible AI can be framed in their context.<sup>6</sup>

- **Benefits of a risk-based approach**

Governance Institute's members are of the opinion that Government must help build public trust in AI as it will be involved in most aspects of life going forwards. As such, trustworthiness has emerged as a dominant prerequisite for Government policy regarding AI. Our members consider that leaving regulation to industry will not increase society's trust in AI.

For this reason, our members prefer the middle ground 'risk-based' approach that is neither technology neutral nor technology specific, prescriptive regulation. This is most easily compared to the EU approach via their AI Act.<sup>7</sup>

Susannah Wilkinson and Julian Lincoln of Herbert Smith Freehills summarise that *'the approach taken in the EU's AI Act recognises that it is impractical to regulate the technology itself, so focuses on regulating the use of the technology where AI applications and systems present a high or unacceptable risk.'*

*The AI Act sensibly recognises that compliance with legal principles is often challenging in the case of rapidly evolving technology.*<sup>8</sup>

The AI Act and its risk-based approach are also likely to become the de facto international standards for AI regulation, similarly to the General Data Protection Regulation for privacy.<sup>9</sup>

Our members maintain this approach provides Government with the opportunity to limit the potential for new risks or harms as well as removes the regulatory gaps AI can exploit.

A risk-based approach will also allow the Government to ensure that AI systems able to perform social crediting are prohibited under Australian laws.

- **Our concerns regarding regulation**

Our members consider that involving industry in the process of developing regulation usually provides the best opportunity for legislation to be developed and adjusted as required. Particularly with such a fast-moving industry, our members see benefits from an approach not involving strong regulation. The EU's AI Act is not without problems. Our members are concerned about the lack of flexibility in the sectoral implementation of a risk-based approach.<sup>10</sup>

A poorly designed legislated regulatory framework can also negatively impact the ability of businesses to innovate. With AI rapidly evolving and the rapid development of quantum computing, it is important to ensure that any regulation does not unnecessarily burden businesses, by stifling innovation and limiting Australia's ability to access cutting edge technological advances. The productivity benefits of these advances, predicted to be over \$315 billion to the Australian economy by 2028 are too significant to build regulation that curbs productivity.<sup>11</sup>

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<sup>6</sup> See Marie-Therese Png's paper ['At the Tensions of South and North: Critical Roles of Global South Stakeholders in AI Governance'](#).

<sup>7</sup> See the European Union ['AI Act'](#)

<sup>8</sup> See Herbert Smith Freehills Legal Briefing ['Momentum is building \(again\) for AI Regulation in Australia'](#)

<sup>9</sup> See Lander and Rogers ['Artificial intelligence: A fractured regulatory environment'](#).

<sup>10</sup> See Alex Engler research published by Brookings ['The EU and U.S. diverge on AI regulation: A transatlantic comparison and steps to alignment'](#)

<sup>11</sup> See the Department of Industry, Science, Energy and Resources discussion paper ['An AI Action Plan for all Australians'](#).

Our members, however, are increasingly concerned with the safety impact AI will have on both individuals and businesses, as well as the economic impacts of not harmonising our approach with international approaches. This is why the risk-based model of regulation, with a centralised expert agency and the ability to adapt risk classifications and metrics is our preferred approach.

One option to review if the 'risk based' approach is not pursued is to ensure everyone has access to AI development by supporting open-source model development. This could allow more people with a wider variety of expertise to help identify and counter threats. Our members do not favour this option, but it should be considered if the outcome of this consultation is a less restrictive, non-regulatory framework.

- **Guidance**

Any new regulation should be supported by guidance suitably tailored for organisations of differing sizes. The Office of the Australian Information Commissioner's Guidance on Privacy Impact Assessments is a good example of this type of guidance.<sup>12</sup> It will be important for any standard to find a 'home' within an appropriate framework and under the authority of an appropriate regulator or agency with the relevant areas of expertise.

This will require careful coordination by Government, Federal, State and Territories having regard to the various overlapping areas of policy, areas of law, the various programs of work currently underway by different areas of government, and the wide array of regulated entities and affected stakeholders.

- **Investment**

Government should not shy away from AI as a tool to improve productivity across the economy. Without significant investment, including research and development (R&D), integration and a serious growth in expertise across the public sector, Australia will be left behind. Australia was the first mover in launching a responsible AI network but is now lagging internationally in creating an AI ecosystem that ensures ethical usage.<sup>13</sup>

Accordingly, investment in AI to accompany new regulatory initiatives should be the immediate priority. Investment should be made to grow the responsible AI network, build regulatory sandboxes, increase AI R&D grants and provide comprehensive guidance for businesses incorporating AI.

- **Independent AI Safety Commissioner and Agency**

Our members support the establishment of a centralised, independent agency, dedicated to the ongoing policy, guidance and monitoring of AI in Australia.

Our members endorse the Australian Human Rights Commission 'Human Rights and Technology Report'<sup>14</sup> proposal for an AI Safety Commissioner and contend the Commissioner should sit within its own agency.

The roles of the Commissioner and Agency would be:

- To support regulators, policy makers, governments, and businesses in applying laws and other standards for AI-informed decision making.
- Provide a centralised regulatory body responsible for developing and enforcing AI policy and legislation.<sup>15</sup>

These regulatory functions should be partnered with sandboxes and assurance frameworks which can assist businesses in the governance and mitigation of AI risks in the design, development, testing and

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<sup>12</sup> See [OAIC](#) website.

<sup>13</sup> See Toby Walsh '[Let's not pause AI](#)' in Inside Story

<sup>14</sup> See Australian Human Rights Commission '[Human Rights and Technology Report](#)'

<sup>15</sup> See King & Wood Mallesons '[Developments in the Regulation of Artificial Intelligence](#)'

implementation of AI.<sup>16</sup> In its Report, the Australian Human Rights Commission sets out the responsibilities of the AI Safety Commissioner as:

*'An AI Safety Commissioner would provide technical expertise and capacity building. As an independent statutory office that champions the public interest, including human rights, an AI Safety Commissioner could help build public trust in the safe use of AI.*

*It should:*

- *work with regulators to build their technical capacity regarding the development and use of AI in areas for which those regulators have responsibility.*
- *monitor and investigate developments and trends in the use of AI, especially in areas of human rights risk.*
- *provide independent expertise relating to AI and human rights for Australian policy makers.*
- *issue guidance to government and the private sector on how to comply with laws and ethical requirements in the use of AI.*

*And:*

- *be independent from government in its structure, operations and legislative mandate, but may be incorporated into an existing body or be formed as a new, separate body.*
- *be adequately resourced, wholly or primarily by the Australian Government.*
- *be required to have regard to the impact of the development and use of AI on vulnerable and marginalised people in Australia.*
- *draw on diverse expertise and perspectives including by convening an AI advisory council.'*<sup>17</sup>

Our members find these proposals to be critical for the ongoing trust of businesses in any regulatory efforts.

## • **Privacy Laws**

A complicating factor in regulation in this area is the current privacy reform agenda in Australia. There should not be piecemeal reform of the 1988 Privacy Act to coincide with any new AI regulatory regime. While Government has committed to reform of Australia's Privacy regulations, legislation has yet to be finalised.<sup>18</sup>

The EU privacy regime was in place prior to its enacting AI regulation. The EU's GDPR requires companies to obtain consent from individuals before collecting and using their personal data, which is a critical component of AI development and the current output of large language models.<sup>19</sup>

The scale of recent cyber-attacks has demonstrated that far too many organisations including Government departments and agencies hold unnecessary amounts data for much longer than they need. Our members advise that there needs to be a concerted whole-of-Government approach to privacy reform and data governance to secure government systems and guide private entities on how to secure data in the advent of rapidly improving AI tools.

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<sup>16</sup> See Gilbert and Tolbin ['AI Regulation in Australia: A centralised or decentralised approach?'](#)

<sup>17</sup> See Australian Human Rights Commission ['Human Rights and Technology Report'](#)

<sup>18</sup> See Gilbert and Tobin's ['Privacy Act Review Report: Highlights And Hot Takes'](#)

<sup>19</sup> See European Union's GDPR [guide](#)

- **Opportunity and Governance**

Australia is at an important crossroads. We have an opportunity to build global competitive advantage by increasing investment in AI while leading the move towards responsible creation and usage of AI, or by pursuing a light touch system which does not have the benefits safe and responsible AI will produce.

There needs to be analysis of AI's impact on corporate governance and the gap between corporate accountability and ethics in the use of AI in any regulatory design. The commercial benefits of incorporating AI into a business do not come without significant risk of regulatory, commercial and reputational harm.<sup>20</sup> Non-regulatory principles of ethical AI use are not sufficient to ensure proper governance processes are followed. Regulatory guardrails, therefore, are required.

The lack of specific AI driven regulation today has created the perception that there is little regulation relevant to the use of AI, when in fact the use of AI is covered by many areas of regulation.

Scattered regulatory frameworks do not, however, help build the necessary trust or compliance by business to engage in proper responsible AI use. This is why a centralised AI specific ethical framework is crucial.

The codifying of a Responsible usage of AI Framework, will assist in ensuring that ethics, human rights and proper governance are at the core. This will equip Australian businesses with the toolkit to build and deploy safe and ethical AI solutions, in an economic opportunity not seen for decades.<sup>21</sup>

Rather than limit innovation, approaching this area using a risk-based approach to regulation will provide both businesses and consumers with trust and confidence in their use of an interaction with AI and allow the implementation of best practice governance.<sup>22</sup>

Please contact me or Catherine Maxwell, GM Policy and Research if you have any questions in connection with this submission.

Yours faithfully,



Megan Motto

CEO

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<sup>20</sup> See the Human Technology Institute at UTS Report '[The State of AI Governance in Australia](#)'

<sup>21</sup> See 2023 CSIRO Report '[Implementing Australia's AI Ethics Principles report](#)'

<sup>22</sup> See 2023 CSIRO Report '[Implementing Australia's AI Ethics Principles report](#)'