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In this issue:

Feature articles

Regulars

Australia's AI policy breakthrough raises governance questions

By Daniel Popovski, Senior Policy and Advocacy Advisor and AI Lead

Artificial intelligence could add more than $100 billion to Australia's economy over the next decade, but experts from Governance Institute Australia warn that without clear governance, the benefits may be uneven and the risks significant.

Treasurer Jim Chalmers confirmed this month that the government will conduct a review into AI regulation to assess whether new laws are required or if existing frameworks can be adapted. The announcement followed the Productivity Commission's advice to pause work on mandatory guardrails for high-risk AI until gaps in current laws are better understood.

A moment of progress

At the government's productivity roundtable, the Australian Council of Trade Unions and the tech sector reached an agreement to design a model that ensures Australian creatives are paid when their work is used to train AI.

ACTU secretary Sally McManus described the deal as a "breakthrough" and urged a worker-centric approach to managing the technology.

Industry leaders also acknowledged the stakes. Australian Industry Group chief executive Innes Willox noted that risks extend beyond job losses, with some businesses facing "their own future or extinction" in the face of rapid change.

The governance imperative

The Governance Institute of Australia's AI policy and advocacy lead, Daniel Popovski, said the rise of agentic AI demands urgent attention.

"Agentic AI is not just about producing content like chatbots do. These are autonomous systems run on very little human oversight. That raises new and urgent questions about accountability, transparency, and workplace governance that cannot be ignored," he said.

Popovski warned against framing the AI debate purely in terms of job losses.

"In reality, there is enormous potential for growth and augmentation if the transition is managed well. The challenge is making sure Australians are prepared and supported through these changes so that AI works for people, not against them," he said.

He added that a national strategy is needed to provide direction.

"We need a national AI strategy that sets out how the government will manage these challenges and opportunities. Good governance should be human-centric. It should support organisations that adopt AI responsibly and make sure the gains flow to all workers," Popovski said.

Global comparisons

Australia's cautious approach contrasts with more decisive moves overseas.

The European Union has already introduced binding regulation through the AI Act, while the United States and United Kingdom are investing in retraining programs and exploring proportionate oversight. China recently called for stronger international cooperation through a Global AI Governance Action Plan, and New Zealand has published its first national AI strategy aligned with OECD principles.

Looking ahead

With AI expected to lift labour productivity by 4.3 per cent, Australia faces a crucial choice: whether to lead in governance or risk falling behind more ambitious peers.

As Popovski stresses, the next steps must ensure growth is inclusive, transparent, and guided by sound governance.

Contracts help, but trust transforms

By Daniel Popovski, Senior Policy and Advocacy Advisor and AI Lead

Trust doesn't come from signatures on paper. It is earned when we collaborate, listen and create value together.

When I was appointed CEO at Container Exchange (COEX) in January 2023, I joined a young organisation with momentum, a clear target and huge potential to mature and scale.

As the government-appointed administrator of Queensland's container refund scheme, Containers for Change, COEX has a unique responsibility.

We are a not-for-profit entrusted with delivering a product stewardship scheme that is 100 per cent funded by beverage manufacturers and ensures eligible drink containers can be returned for recycling.

With that comes a public and high bar for accountability. Our governance has to consider public and stakeholder trust, compliance with legislation and the commitment to deliver environmental, social and economic value for all Queenslanders.

COEX has a legislated target; recovering 85% of eligible beverage containers sold in Queensland. But when I joined the organisation, there was no clear path to achieving that.

On paper, the scheme was delivering and growing year-on-year. We had strong brand recognition and clear public value. But as with most 'startups', we had areas that need focus and attention, particularly our critical partnerships with key stakeholders.

Our operators, of which there are more than 85, who run the scheme's public-facing container refund points were delivering frontline impact, but many felt disconnected from the broader business. I quickly realised we needed to do more than manage the scheme. We needed to lead a network and build trust from the ground up.

So, I hit the road. I travelled extensively across Queensland, meeting operators, community leaders, councils, and logistics partners. I asked what was working, what wasn't, and where we had fallen short.

The feedback was honest and, at times, confronting. But it was also generous, and solutions focused. I realised we needed to reposition our relationships as partnerships, jointly collaborating on the future of the scheme, rather than a purely contractual vendor-supplier arrangement.

We introduced regional forums to ensure face-to-face engagement with operators and established reliable feedback loops. As those relationships strengthened, performance improved. Operators who once felt disengaged became vocal advocates for the scheme.

Reconnecting with our partners was just one element of change required. We needed to reimagine our model from the inside out to turn purpose into progress.

The first step was to redesign the organisation to align our structure to our strategy and build accountability by clarifying roles and responsibilities. This created both cohesion and momentum and the impact of this change has been both measurable and meaningful.

In April we surpassed 10 billion containers returned through our container refund network, which has put more than $1 billion in 10-cent refunds back into the Queensland community. Our scheme has also created more than 1,580 jobs, including 90 jobs for First Nations Queenslanders.

We also leaned into transparency. When a parliamentary inquiry into improving the container refund scheme was announced earlier this year, we welcomed it.

Queensland has maintained one of the strongest container recovery rates in Australia, yet systematic barriers continue to stand in the way of reaching our legislated recovery rate of 85%. While no container refund scheme in Australia has achieved 85%, including South Australia's almost 50-year-old scheme, Queensland faces a unique set of challenges that we must address to unlock our full potential.

Queensland does not offer a planning exemption for container refund infrastructure, making it difficult to establish new convenient return points in the high-density areas where they're most needed. We have recommended a statewide planning policy to bring Queensland in line with other states and enable streamlined, consistent approval pathways for infrastructure rollout.

The voluntary nature of the scheme also means that many containers that are consumed out-of-home still end up as landfill or litter. To achieve behaviour, change at scale, stronger incentives are required for businesses, otherwise containers from spaces like workplaces, and event and hospitality venues will continue to be under-recovered.

Of course, even the best governance structures will falter without the right culture. If governance is the scaffolding, then culture is the engine that keeps an organisation moving forward.

Culture is a leadership priority at COEX. We have invested significantly in leadership development, inclusion and ensuring our values are the backbone of everything we do. We launched a senior leadership program, formed a working group for diversity and belonging, and refined our recruitment approach to prioritise values as well as capability.

These improvements have led us to be recognised as an Inclusive Employer by the Diversity Council of Australia, receive accreditation as "A Great Place to Work" and our employee Net Promoter Score has increased by almost 90 points.

But the most powerful shift hasn't been in the data. It is in how our people now show up with pride, energy and a renewed connection to purpose.

Recycling is our trade, but trust has become our true currency.

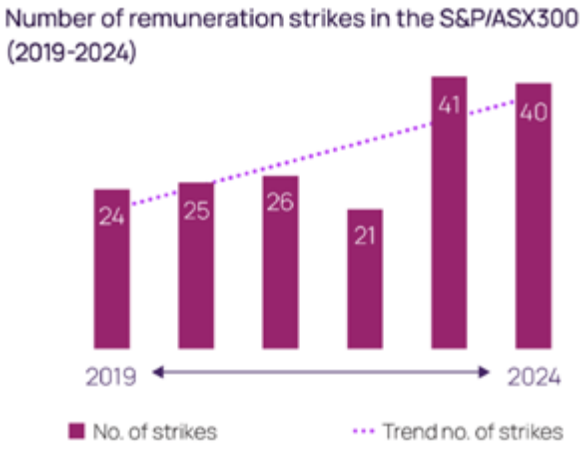
It is only when governance is responsive, partnerships are collaborative and culture is lived, that true transformation becomes possible.

Considerations for the peak 2025 AGM season

By Scott Hudson, Managing Director, Australia and New Zealand, Georgeson

Companies and their boards are increasing their engagement with investors as Australia's peak Annual General Meeting (AGM) season approaches.

Analysis by investor engagement firm Georgeson, a part of the Computershare group, offers some key considerations to help companies prepare for the coming proxy season. These include an increase in shareholder opposition to key management proposals during the past two years, shareholders' focus on climate issues and the importance of engaging with investors consistently throughout the year. Heightened shareholder dissent on executive remuneration



Heightened shareholder dissent on executive remuneration

In particular, shareholder opposition to executive compensation remained heightened during the past two years.

Among S&P/ASX300 companies, there were significantly more strikes, when 25% or more shareholder votes are cast against the adoption of the board's remuneration report, against executive pay in 2024 (40) and 2023 (41), than in the previous seasons. They also accounted for 10% of S&P/ASX300 remuneration report votes during the AGM 'mini season' between January and June 2025 (five strikes in total).

Companies that experience a strike can face a number of consequences, including negative media coverage, higher public scrutiny and, potentially, exposing the company to a full 'spill' of all board positions.

Investors who participate in remuneration strikes may be expressing concerns over executive pay. They could also be articulating broader dissatisfaction with a company's governance, culture, conduct or financial performance.

Be mindful of accountability votes against directors

Companies may also consider instances in which shareholders have expressed opposition to board-endorsed director candidates at recent S&P/ASX300 AGMs.

A majority (71.7%) of board-endorsed director candidates across the S&P/ASX300 received 95% or more support for their nomination in 2024.

However, 98 board-endorsed candidates faced significant votes against their election (which Georgeson classifies as 10% or more shareholder votes against). This was down from 123 in 2023 but higher than the totals in 2022 (83) and 2021 (59), and on par with 2020 (98).

During the first six months of 2025, 11.3% (22 out of 194) of board-endorsed director candidates faced significant votes against their election. Despite this being lower than the same window in 2024 (13.4%) and 2023 (18.8%), it is a notable proportion.

Some of the themes underpinning institutional investors' voting decisions on director elections in recent years include concerns about a lack of board gender diversity, director independence, related-party influence and 'over-boarding' (when a candidate already sits across five or more boards at listed companies).

Companies may wish to gather investor feedback, especially from those who voted 'against' a director, after the AGM, to fully understand the underlying reason for opposition.

Climate remains a topic, but NGO campaign strategies have evolved

A company's approach to climate risk remains another consideration for Australian companies this proxy year.

Shareholders submitted proposals relating to climate or nature to just six companies across the S&P/ASX300 in 2024. This was the same number as in 2023 and 2022, but significantly lower than the peak of 21 in 2021.

However, this does not mean climate matters are less relevant to investors. It is likely an indication that activist non-governmental organisations (NGOs) are turning to other methods to make their voices heard, including opposing executive pay and director elections.

The Australian government's introduction of mandatory climate disclosures from FY26 may also mean that environmental, social or governance (ESG) advocacy groups have felt less inclined to make company-specific disclosure demands, focusing instead on industry-wide policy measures.

The value of connecting with investors year-round

Companies can help mitigate shareholder opposition at their AGM by engaging with shareholders throughout the year.

Such engagement helps proactively identify and address investor concerns before a company's meeting and ensures their organisational priorities can be aligned with those of shareholders more broadly.

Companies may also wish to consider proactively engaging with investors when there are significant changes, including to board or management team composition, organisational strategy initiatives or significant changes in market conditions.

Companies could also consider conducting peer analysis to benchmark how investors are responding to other companies with a similar size, scope and market. In addition, it is important to take into account any changes to key investors' voting policies, as well as the policies of the major proxy advisors.

As companies prepare for their AGMs, it's worth considering recent trends in shareholder opposition to key management-sponsored proposals and analysing how peers approach issues to help meet shareholder expectations.

Ongoing engagement with shareholders also helps companies align their corporate strategy with investor expectations and acts as an early alert to potential issues before the annual meeting stage.

From red tape to resilience: Governance lessons in housing productivity

By Dr Turlough Guerin FGIA

The *National Construction Code* (NCC) is one of Australia's most important regulatory instruments. It sets consistent national standards for safety, health, amenity, and sustainability in the built environment. Its role is indispensable – not just as a technical standard but as a cornerstone of public trust in the construction system.

That is why the federal government's decision to pause NCC changes until 2029 while fast-tracking approvals for 26,000 new homes deserves close attention. Builders and industry welcomed the pause as relief from regulatory churn. From a governance perspective, however, it illustrates the risks of treating the NCC as a lever for short-term productivity rather than embedding it in a long-term system of standards, planning, and resilience.

The NCC itself is not the problem. On the contrary, it is part of the solution. The danger lies in how governments and boards sometimes treat standards as if they were pressure valves – quick releases to ease political or industry frustration – rather than load-bearing foundations that support long-term value. For governance professionals, this is a familiar dilemma. Quick fixes create optics, but they often embed liabilities that surface years later.

Quick fixes and false economies

Freezing NCC updates may reduce compliance costs in the short run. But it also delays the integration of new carbon and energy reduction standards. That creates a dangerous false economy. Homes built under frozen standards will be more expensive to run, less durable in extreme weather, and more costly to retrofit when requirements inevitably tighten.

These liabilities cascade across the system. Homeowners face higher bills. Investors risk asset devaluation. Governments confront fiscal pressure to fund large-scale retrofits. For boards, the lesson is clear: the temptation of the quick fix is powerful, but good governance requires asking whether today's savings are embedding tomorrow's costs.

A standard under pressure

The NCC is regularly criticised from two directions. Industry groups argue it is too complex, too lengthy, and updated too frequently, driving compliance costs and slowing supply. Sustainability advocates argue it has been too slow to mandate stronger energy efficiency, embodied carbon standards, or innovation. Think of it as a floor, not a ceiling, for housing performance.

Neither critique is misplaced. For smaller builders, a 2,000-page document and a three-year update cycle are difficult to navigate. For households and investors, delays in sustainability standards lock in higher costs and emissions.

This dual critique matters for governance because it highlights the need to balance certainty for industry with the innovation and resilience Australia requires. That balance is not easy – but it is essential.

Trade-offs and sequencing

Housing reform demonstrates the reality of trade-offs. Faster approvals risk lower oversight. Cheaper builds mean higher lifecycle costs. More supply can come at the expense of resilience. Pausing carbon and energy standards may ease today's pipeline but locks in tomorrow's emissions.

Boards face similar dilemmas every day. The governance challenge is not just to recognise trade-offs, but to sequence decisions so they reinforce one another rather than clash.

Approvals reform without carbon standards creates stranded liabilities. Prefabrication standards without planning reform mean innovation stalls. Superannuation flows without regulatory certainty mean capital stays offshore.

This is why governance requires a full toolbox. That toolbox includes prevention to avoid embedding liabilities, resilience to build adaptive capacity, standards to set benchmarks that build trust, sequencing to ensure reforms reinforce each other, and capital leverage to multiply value.

Forward liabilities: two examples every director should know

Forward liabilities are the hidden debts of governance. They are the costs ignored today that resurface tomorrow, larger and harder to manage. These examples are not niche technical issues; they are headline lessons for boards.

PFAS contamination: PFAS, the "forever chemicals," were used for decades in firefighting foams across Australia. Risks were known but action was delayed. The result: widespread contamination, billions in cleanup costs, class actions, and property values falling by up to 15% in affected areas.

Governance lesson: hidden environmental liabilities don't vanish, they mature. Boards must treat them like debt. If not surfaced and managed, they will accumulate and erode trust, value, and social licence.

Disaster resilience underinvestment: The Black Summer bushfires and 2022 floods highlighted the cost of underinvestment in disaster preparedness. Reports show every $1 spent on prevention

saves $5–$10 in recovery. Yet Australia has persistently underinvested, leaving governments with ballooning recovery bills and communities losing insurability.

Governance lesson: resilience is not optional. Failure to invest early creates liabilities that hit balance sheets, stakeholders, and reputations.

These examples make the concept tangible: costs that were foreseeable but ignored until unmanageable. They show why directors must integrate forward liabilities into risk registers and disclosures.

The resilience dividend

Resilience should not be seen as a cost. It is a dividend.

Resilience means more than just structural safety. It is the ability of homes, organisations, and systems to withstand and recover from shocks – physical, financial, and environmental. That means assets that remain safe in floods and heatwaves; enterprises that keep operating under stress; and infrastructure that adapts to new carbon and energy requirements without crippling retrofit costs. In short, resilience is durability, affordability, and adaptability.

In earlier work (Guerin, 2024), I highlighted how builders, developers, suppliers, and financiers each face barriers to net-zero housing, and how governance must address both supply and demand drivers. For boards, resilience should be integrated into risk frameworks not as compliance but as value creation. Resilience preserves trust, reduces volatility, and builds licence to operate. It is the governance equivalent of compound interest: small investments today generate outsized dividends tomorrow.

Innovation, investment, and capital allocation

The government's commitment to develop new prefabrication standards is welcome. As I argued in my recent submission to the Manufacturer Certification Scheme for Modern Methods of Construction (MMC), certification should not only assure safety, but embed ethics, governance, climate resilience, and circular economy outcomes. Standards framed this way can unlock innovation, reduce costs, and deliver public value, but only if aligned with planning reform and finance.

The same applies to capital. Superannuation funds, with nearly $4 trillion under management, could be powerful partners in housing supply. Yet they remain cautious. Planning delays, shifting regulations, and uncertain carbon and energy standards make projects riskier and returns unpredictable. Many funds invest offshore, where frameworks are clearer and long-term returns more reliable.

Governance lesson: capital avoids uncertainty. Boards that want innovation and investment must provide stability, predictability, and clear standards. Misallocated capital is a governance failure, money spent on activities that don't deliver outcomes erodes productivity and trust.

Standards as governance levers

Standards rarely make headlines. They are often dismissed as red tape. Yet they are among the most powerful governance tools.

In my recent Treasury submission on Standards Reform, I argued that reforms spanning renewable energy standards, community-led natural resource management, biosecurity surveillance, and embodied carbon requirements in infrastructure could deliver more than $2 billion annually in avoided costs and productivity gains. These gains flow from embedding stewardship, scope 3 carbon accounting, MERI-aligned governance, and First Nations co-governance into the standards framework, reducing duplication, preventing hidden liabilities, and building investor confidence.

Standards align fragmented systems. They reduce uncertainty. They prevent hidden liabilities. They provide the trust investors, consumers, and regulators rely on.

Prefabrication standards can unlock innovation. Carbon and energy standards can reduce retrofit costs. Renewable energy grid standards can prevent stranded assets.

Governance lesson: directors should back standards not as compliance burdens, but as enablers of trust, resilience, and competitiveness. The NCC exemplifies this role: a single national instrument that builds confidence in an otherwise complex system.

Implications for governance professionals

Guard against false economies. Quick fixes may look attractive, but they often save money in the short term by embedding larger costs into the future. Directors should interrogate whether immediate savings or regulatory relief are creating liabilities that will later appear on the balance sheet or in reputational damage.

Think in systems and sequence. Governance is not about isolated wins. It is about understanding how initiatives connect, in what order they are pursued, and whether they reinforce resilience. Boards should be asking: how does this initiative fit into the wider system, and what must move with it to ensure success?

Surface forward liabilities. They must be treated like debt. Environmental, carbon, ESG, and trust risks that remain hidden will eventually mature into real costs. Directors need to ensure forward liabilities are mapped, disclosed, and governed with rigour.

Optimise capital allocation. Capital should be directed where it multiplies value, not simply where it is easiest to deploy. MERI frameworks help ensure investment is tied to outcomes, not just activities.

Back standards and resilience. Standards should not be dismissed as bureaucracy; they align systems, reduce uncertainty, and build trust. Resilience – durability and adaptability – is not a cost but a dividend: a source of long-term value that strengthens organisational trust and competitiveness.

Conclusion

Freezing the NCC may look like a win on red tape. But it is really a patch on a deeper foundation problem. It defers standards, embeds liabilities, and risks leaving households, investors, and governments with costly retrofits.

The metaphor holds true in governance. Boards that patch over problems for short-term optics risk embedding liabilities that erode trust, value, and competitiveness. Governance is about reinforcing the foundations: sequencing, resilience, standards, and capital alignment.

The test of governance is not whether we can patch the roof convincingly. It is whether we can build strong enough foundations to carry organisations and communities through change. Only then can governance rise above quick fixes to deliver smart simplicity, trading patchwork repairs for the steady work of building resilience and trust.

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Dr Turlough Guerin FGIA is a non-executive director, board advisor and an Honorary Fellow at the University of Melbourne.

Acting for you, September 2025

By Catherine Maxwell FGIA FCG, General Manager, Policy & Advocacy, Governance Institute of Australia

Modern Slavery

Following some delay that Attorney General released a consultation paper on Strengthening the Modern Slavery regime. The Paper outlines options to enhance the framework, simplify and improve reporting, and target non-compliance, drawing on and responding to feedback received from the review of the Act conducted by Professor John McMillan. The Government has agreed, in full, in part, or in principle, to 25 of the 30 recommendations and noted five recommendations.

Our Submission expressed strong support for the Regime on the basis that the Act is an important step towards eradicating modern slavery in Australia's supply chains. We provided comment on the proposed recommendations being considered under stream A of the reforms but emphasised the need for greater public scrutiny and expedited efforts to implement and consult on the bulk of recommendations proposed to strengthen the Act. We expressed broad support for the recommendations in the Consultation Paper but also suggested some minor amendments to improve the Act's effectiveness.

We recommended:

- That reporting entities be able to cross-reference existing financial reports on ownership, control and structure to avoid duplication.
- The introduction of a transitional period for newly acquired entities or entities that are having to report for the first time to provide sufficient time and scope for the collection and analysis of data.
- The need for further guidance on the information sought about grievance mechanisms without compromising victim privacy and safety.
- While broadly supportive of the regulator having additional powers to require entities to lodge reports and take actions where reports are materially flawed, we consider the regulatory entity requires definition in the Act.

- The adoption of measured and proportionate powers to regulate entities focusing on entities that are failing to report, or report on compromised data, or lack appropriate governance processes to identify and assess risks.
- Graduated penalties for non-compliance according to the size and complexity of the reporting entity, the seriousness of the conduct and whether the wrongdoing is consistent with deliberate, sustained non-compliance and intentional misconduct.
- There be maximum flexibility for entities to report under the approach that best suits their corporate structure and circumstances.
- Allowing entities reporting on a voluntary basis to revoke their status as a voluntary reporting entity at any time by providing notice.
- Against an obligation to provide notice when an entity is no longer providing a statement on the basis it is inconsistent with other reporting frameworks

We will continue to keep members updated on this issue.

Cyber Security

In November 2023, the Australian Government released the 2023-2030 Australian Cyber Security Strategy and Action Plan with a vision for Australia to be a world leader in cyber security by 2030. The launch of the Strategy in 2023 responded to a call by the Australian public for greater action on cyber security as the rate and severity of cyber attacks continued to accelerate in Australia and abroad. Following the delivery of a range of initiatives. The Australian Government is seeking feedback from businesses, citizens and community groups on the cyber security outcomes required for Australia and how to best achieve them over Horizon 2 (2026 – 28).

Governance Institute will provide a response on the Exploratory Impact Study questionnaire and keep members updated on this issue.

Our Submission highlighted that the *Corporations Act 2001* is no longer fit for purpose and shrouded in complexity and obfuscation.[1] Australia requires an agile and independent corporate and securities law reform body that can keep pace with the fast and dynamic period of change in the corporate, financial and securities markets landscape. The current approach of notional amendments and the creation of conditional exemptions creates more problems and confusion than they aim to solve. We called for the establishment of an independent, expert Corporate Law Reform Body to drive corporate, financial and securities law reform. Finally, referring to the ASIC Simplification Consultative Group we recommended Government encourage agencies to adopt Simplification Consultative Group models and regulatory initiatives grids by coordinating across regulatory agencies and operating closely with industry bodies through consultative and integrated committees (ASCG)

Governance Institute will keep members updated on this important issue.

Transition planning

Treasury has released a Consultation Paper seeking feedback on the direction and design of guidance on best practices for climate-related transition planning. Treasury has commented that the guidance aims to support international alignment to make it easier to compare transition plans, outline domestic policy and regulatory considerations, balance encouraging high ambition with providing flexibility and take a climate first but not only approach. The Paper is in two parts:

- Part A – outlines the role of transition planning and proposed design approach.
- Part B – provides illustrative draft guidance aligned with the proposed approach.

Governance Institute will make a Submission to the consultation.

Submissions

Attorney General's Department – Strengthening the Modern Slavery regime – 1 September 2025

Privacy and governance in a fragmented age: Reconciling individual rights with collective stewardship

By Sean M Johnson and Robbie Sinclair

Abstract

This paper explores the enduring and irreconcilable paradigms at the heart of contemporary privacy governance: individual rights and collective stewardship. While dominant regulatory frameworks continue to emphasise individual autonomy, consent, and legal protection, emerging challenges, including systemic data risks, surveillance capitalism, and collective harms, require a broader governance lens grounded in ethical responsibility and institutional legitimacy. Rather than seeking to resolve this paradigmatic tension, the authors argue for its deliberate navigation. Drawing on legal history, Indigenous knowledge systems, and contemporary governance theory, the paper sets out two internally coherent but incompatible conceptual models of privacy: one grounded in liberal individualism and legal codification; the other in collective infrastructure, democratic deliberation, and ethical design. To assist governance professionals in navigating this complex landscape, the authors propose a four-part framework for collective privacy stewardship comprising normative alignment, civic infrastructure, professional stewardship, and legitimacy design. Through case studies such as My Health Record and COVIDSafe, the paper illustrates the practical implications of these competing paradigms. Ultimately, it calls on governance professionals to act as institutional translators capable of operating across legal, ethical, and systemic domains. In an age of complexity, the future of privacy governance depends not on theoretical synthesis but on the capacity to manage pluralism with integrity, foresight, and public trust.

Key takeaway

This paper argues that privacy governance rests on two irreconcilable paradigms: individual rights and collective stewardship. Rather than resolving this tension, governance professionals must learn to navigate it. Legal compliance alone is insufficient in an era of systemic data risks. Effective governance requires operating across both domains, protecting autonomy while enabling ethical, trust-based infrastructure. The future of privacy lies not in coherence, but in the deliberate management of complexity.

Introduction: Embracing theoretical tension

Privacy governance suffers from a fundamental theoretical schism that the literature consistently attempts to resolve rather than acknowledge. This paper takes a different approach: we argue that privacy simultaneously operates as both an individual right requiring legal protection and a collective public good demanding ethical stewardship, and that these paradigms are not just different but fundamentally incompatible.

For governance professionals, this creates an uncomfortable reality: you cannot govern privacy coherently using a single theoretical framework. Instead, effective privacy governance requires consciously operating across two distinct domains, each with its own logic, mechanisms, and measures of success.

"Governance professionals", as used in this paper, refers broadly to those involved in governance oversight and institutional integrity, including directors, executives, company secretaries, risk, compliance, and quality leaders, rather than a single occupational category.

Rather than paper over this contradiction, we embrace it. The tension between individual rights and collective stewardship reflects genuine philosophical differences about human agency, social responsibility, and the proper role of institutions. Attempting to synthesise these paradigms produces the theoretical muddle that characterises much contemporary privacy discourse.

This paper deliberately separates these approaches into two distinct parts, each internally coherent but ultimately irreconcilable with the other. We conclude by exploring how governance professionals must navigate both domains simultaneously, not by resolving the tension, but by managing it productively.

Epistemological note: A deliberate dual perspective

This paper is written from a deliberately pluralistic standpoint, reflecting the distinct professional and philosophical orientations of the two authors. One author brings an institutional governance lens shaped by legal design, ethical pluralism, and civic-republican traditions. The other approaches privacy from a risk intelligence perspective grounded in systems thinking and practical decision-making frameworks. Rather than reconcile these viewpoints into a single paradigm, we allow them to coexist and inform each other. This methodological openness reflects our broader thesis: that privacy governance itself must operate across irreconcilable worldviews, and that meaningful practice often arises from working within, rather than resolving, such tensions.

Part I: Privacy as individual right – the heritage of autonomy and control

"To be left alone is the most precious thing one can ask of the modern world." (Burgess 1984)

Ancient foundations: The spatial logic of privacy

Privacy as an individual right has deep historical roots in the spatial organisation of social life. In ancient Greece and Rome, elites structured their homes to separate public and private spheres, the distinction between the agora and the domestic realm, between civic duty and personal autonomy. This spatial logic established privacy as fundamentally about individual control over access and information.

The evolution from agrarian to urban societies reinforced this individualistic conception. With the rise of cities, literacy, and personal reflection, privacy became associated with the inner life, a space for reading, contemplation, prayer, or dissent. Privacy meant the right to withdraw from social observation and control one's self-presentation.

This individualistic foundation shapes how we understand privacy today in most western cultures: as a boundary that individuals draw around themselves, a zone of autonomy that others, whether neighbours, employers, or governments, must respect.

Legal codification: Warren and Brandeis's enduring framework

The legal conceptualisation of privacy crystallised in 1890 when Samuel Warren and Louis Brandeis published "The Right to Privacy" in the Harvard Law Review. Their foundational insight was that privacy constituted a distinct legal right, "the right to be let alone", worthy of protection in its own right.

Warren and Brandeis were responding to new technologies that threatened individual control: "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life." Their solution was legal: courts should recognise privacy torts and provide remedies for its violation.

This legal framework established several principles that continue to govern privacy law:

- Individual autonomy over personal information: Warren and Brandeis emphasised the right "to be let alone" and individual control over personal facts, though they did not describe this as ownership in a strict sense.
- Consent as a limitation: They acknowledged that consent to publication would generally defeat a privacy claim.
- Harm-based remedies: They envisaged remedies for mental distress or other harm suffered as a result of a privacy breach, including injunctive and monetary relief.
- Balancing private rights with public interest: The right to privacy was not absolute and did not extend to matters of legitimate public concern or public figures.

Although the United States Constitution does not contain an explicit right to privacy, the Supreme Court has developed a privacy jurisprudence through decisions such as *Katz v United States* (389 U.S. 347 (1967)), which held that the Fourth Amendment protects a person's "reasonable expectation of privacy." This principle has shaped U.S. law primarily in the context of state surveillance and criminal procedure.

In Australia, there is no express constitutional right to privacy, and Katz has no direct application. However, the "reasonable expectation of privacy" standard has exerted *persuasive influence* in the development of Australian privacy norms. Australian privacy law is primarily governed by statute, particularly the Privacy Act 1988 (Cth) and associated Australian Privacy Principles (APPs), rather than by tort law. That said, there have been developments in Australian common law toward a tort of privacy, notably in *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 and subsequent commentary.

Thus, while Australia and the U.S. have diverged in doctrinal pathways, Warren and Brandeis's conceptual foundation continues to resonate, particularly in ongoing debates over consent, autonomy, and harm-based remedies in the digital era.

Modern regulatory frameworks: Consent and control

Contemporary privacy regulation builds directly on this rights-based foundation. The European Union's General Data Protection Regulation (GDPR), which came into force in May 2018, represents the most sophisticated expression of individual rights logic applied to digital privacy.

GDPR expands traditional privacy rights for the digital age:

- Enhanced consent mechanisms requiring clear, specific, and freely given agreement
- Individual control rights including access, rectification, erasure ("right to be forgotten"), and data portability
- Transparency obligations requiring organisations to explain data practices in accessible language
- Accountability frameworks placing responsibility on data controllers to demonstrate compliance

Australia's Privacy and Other Legislation Amendment Act 2024 (Cth) follows similar logic, introducing a "fair and reasonable" test for data handling while maintaining consent as the primary basis for legitimate data processing.

As Bennett and Raab (2006) have shown, privacy governance varies significantly across jurisdictions, with policy instruments ranging from command-and-control regulation to self-regulation and co-regulatory hybrids. These instruments reflect underlying commitments to individual autonomy and state intervention, reinforcing the rights-based model that dominates modern regulatory regimes such as GDPR.

The individual rights paradigm: Strengths and internal logic

The individual rights approach offers several compelling advantages:

Clarity of responsibility: Rights create clear obligations. If individuals own their personal information, organisations must seek permission before using it and provide remedies when they fail to do so.

Democratic legitimacy: Rights-based frameworks align with liberal democratic traditions that prioritise individual autonomy and limit institutional power over personal choices.

Practical enforceability: Legal rights provide actionable remedies through courts, regulatory agencies, and compensation schemes when privacy is violated.

Technological neutrality: Rights-based frameworks can adapt to new technologies by focusing on individual control rather than specific technical measures.

The limits of individual rights: Systemic failures

However, the individual rights paradigm faces increasingly evident limitations in governing contemporary privacy challenges:

Consent theatre: The proliferation of privacy notices and consent mechanisms has created what scholars call "consent theatre", formal compliance with individual choice requirements that provides little meaningful protection. Users cannot realistically evaluate thousands of privacy policies or make informed choices about complex data ecosystems.

Power imbalances: Individual rights assume rough equality between data subjects and data controllers. In practice, individuals face technology companies with vast resources, sophisticated legal teams, and network effects that make meaningful choice illusory.

Collective harms: Many privacy violations cause collective rather than individual harm. When Cambridge Analytica harvested Facebook data to influence political campaigns, the damage was to democratic processes rather than identifiable individual rights holders.

Transaction costs: Rights-based privacy governance imposes enormous transaction costs on individuals who must navigate complex consent regimes, privacy settings, and legal protections across multiple platforms and jurisdictions.

Case study: Consent breakdown in public health infrastructure

Australia's experience with My Health Record and the COVIDSafe app highlights the structural limitations of consent-based privacy governance in contexts where public benefit depends on widespread participation.

My Health Record began as an opt-in digital health system but was relaunched under an opt-out model after low uptake. While this shift aimed to maximise health benefits through greater data availability, it triggered public backlash over inadequate consent, ambiguous data-sharing rules, and complex withdrawal procedures. Although legally compliant, the system suffered

legitimacy failures rooted in public distrust and a misalignment between individual autonomy and collective benefit.

Similarly, the COVIDSafe app was developed to support pandemic contact tracing with strong legal privacy protections. However, despite these safeguards, the app experienced low adoption and limited effectiveness. The shortfall was not primarily technical, but social: lacking broad community engagement and trust, the initiative failed to generate the collective participation needed for public health impact.

Both cases underscore a critical point: consent mechanisms alone are insufficient when the effectiveness of data systems depends on collective uptake. Without sustained public dialogue, trust-building, and governance mechanisms aligned with social values, technically privacy-compliant solutions may still fail to achieve their intended purpose.

Part II: Privacy as collective infrastructure – the ethics of systemic stewardship

Relational privacy: Beyond individual ownership

While Part I traced privacy's development as individual right, alternative traditions understand privacy as fundamentally relational and collective.

Collective governance of privacy has even deeper roots that the individualist approach. In many Indigenous societies, or "Eastern" societies, privacy was governed by kinship boundaries, community protocols, and shared responsibility rather than individual ownership.

Individual consent cannot adequately govern information that is inherently collective. For example, in health genomics, an individual's decision to share their genetic data can inadvertently expose information about biological relatives who have not consented, raising ethical concerns about shared risk, familial autonomy, and intergenerational rights. Similarly, in Indigenous knowledge systems, stories, names, and ceremonial data are often held collectively and governed by kinship protocols, making the notion of individual ownership culturally incoherent and potentially harmful.

In many Indigenous traditions, privacy is not individual but relational, governed by protocols that determine who may speak, share, or even know, particular forms of knowledge. Information is embedded in kinship networks and custodial responsibilities: who can tell a story, access a name, or witness a ceremony is not determined by personal autonomy, but by collective rights and obligations tied to family, country, and law. As Kukutai and Taylor (2016) observe, Indigenous approaches to data and knowledge prioritise collective benefit and custodianship over individual rights. This fundamentally challenges Western privacy models based on consent and individual control and reinforces the case for governance frameworks that acknowledge privacy as embedded in social and cultural infrastructure.

While the collective and relational dimensions of Indigenous privacy are well established, it is vital to recognise that Indigenous privacy frameworks are not monolithic. In Australia, the Aboriginal and Torres Strait Islander communities exhibit significant diversity in cultural protocols, kinship structures, linguistic heritage, and local governance traditions, with localised interaction with, adaption to, or resist to externally imposed governance models depending on historical relationships with government, local

priorities, and self-determination initiatives. (Office of the Victorian Information Commissioner. 2021). These differences reflect distinct histories, geographies, and contemporary social contexts across Australia.

Contemporary digital technologies have made this relational dimension impossible to ignore. Social media, digital tracing, and algorithmic systems operate on networked data, where one person's actions affect the privacy of everyone in their network. Thus, the governance of privacy increasingly demands frameworks that recognise both individual and collective rights, responsibilities, and risks.

Surveillance capitalism: Privacy as social infrastructure

Shoshana Zuboff's analysis of "surveillance capitalism" reveals how digital business models have transformed privacy from an individual concern into a question of social infrastructure. (2005. See also Nissenbaum 2010).

Surveillance capitalism operates by:

- Claiming private human experience as free raw material for extraction and analysis
- Converting behavioural data into predictive products sold to third parties
- Deploying these products to influence future behaviour for commercial and political purposes

This system cannot be addressed through individual rights because it operates at the level of social systems and economic structures. When Google processes billions of search queries to predict behaviour, or when Facebook's algorithms shape information exposure across populations, the impacts are collective rather than individual.

The problem is not that individuals lack control over their own data, but that privacy has become essential social infrastructure that cannot be governed through market mechanisms or individual choice.

Ethics-based governance: Beyond consent to stewardship

Ethics-based governance requires a shift in the questions institutions ask, moving beyond technical compliance toward reflective, values-driven decision-making. Rather than focusing solely on legality or business value, governance professionals must consider:

Not merely *"Do we have consent?"* but "Should we be collecting this data at all?"

Not *"Is this lawful?"* but "Is this legitimate and socially beneficial?"

Not *"Can users opt out?"* but "Have we respected their right not to be surveilled in the first place?"

Not *"Are we compliant?"* but "Are we worthy of trust?"

This reframing invites a deeper commitment to public interest and legitimacy, beyond the minimal thresholds of regulation, anchored in transparency, accountability, and relational responsibility.

A framework for collective privacy stewardship

Building on this ethical foundation, we propose four interdependent priorities for privacy governance:

1. Normative alignment: Values before compliance

Organisations must align privacy practices with social values rather than minimum legal thresholds. This requires ongoing dialogue about what constitutes legitimate data use, not just whether proposed practices are technically permissible.

Practical application: Boards should regularly assess whether organisational data practices align with stated values and public expectations, even when legally compliant.

2. Civic infrastructure: Institutional capabilities for trust

Organisations must build institutional capabilities that support transparency, accountability, and democratic participation in privacy governance. This goes beyond privacy notices to create meaningful opportunities for stakeholder engagement in privacy decisions.

Practical application: Establish advisory groups, public consultation processes, and ongoing dialogue mechanisms that give affected communities voice in privacy governance, and related policy, like Codes of Conducts, etc.

3. Professional stewardship: Expertise in service of public interest

Privacy professionals and governors more generally must understand their role as stewards of public trust rather than mere compliance officers. Professional bodies should develop standards that prioritise public benefit over organisational advantage and make them transparent so that due acknowledgment can be noted.

Practical application: Professional development programs that emphasise ethical decision-making, public interest considerations, and long-term trust-building rather than technical compliance.

4. Legitimacy design: Building sustainable trust

Privacy governance must be perceived as fair, trustworthy, and adaptive by those it affects. This requires proactive trust-building rather than reactive damage control when problems arise.

Practical application: Regular assessment of public perception, proactive communication about privacy decisions, and willingness to modify practices based on community feedback.

Recent work on meta-governance highlights the importance of legitimacy as a designed institutional condition, not merely a by-product of compliance or communication. Governance systems that sustain privacy trustworthiness over time must deliberately embed feedback loops, transparency structures, and normative alignment across both formal and informal mechanisms (Johnson, 2025). This perspective reinforces the need for legitimacy to be treated as a design problem, not a reputational or reactive concern.

Case study: Contact tracing and collective privacy benefits

The COVID-19 pandemic demonstrated both the potential and challenges of collective privacy governance. Contact tracing applications offered significant public health benefits but required broad population participation to be effective.

Individual consent mechanisms proved inadequate because the benefits were collective while the privacy costs were individual. Successful programs (such as in South Korea and Taiwan) relied on collective decision-making processes, strong institutional trust, and explicit social contracts about temporary privacy limitations for public health benefits.

In contrast, Australia's COVIDSafe app demonstrated the limitations of consent-based models in the absence of institutional trust. Despite strong legal privacy protections, the app saw low uptake and limited effectiveness – highlighting that without public engagement, transparency, and social legitimacy, even privacy-preserving technology may fail to deliver collective benefits.

The Australian experience with COVIDSafe:

- Supports the core thesis of this case study – that individual consent models alone are inadequate in contexts requiring collective action.
- Underscores a failure to build democratic legitimacy or social trust, making even privacy-respecting technology ineffective without broader engagement.
- Illustrates a "missed opportunity". Australia had legal guardrails but lacked public conversation, community buy-in, and transparency, which South Korea and Taiwan better achieved (albeit via different norms).

These cases illustrate how collective privacy governance can enable socially beneficial data sharing while maintaining democratic legitimacy, but only when institutions invest in trust-building rather than relying on technical compliance alone.

The collective paradigm: Strengths and challenges

Ethics-based collective privacy governance offers several advantages:

Addresses systemic harms: Focuses on preventing collective privacy harms rather than only compensating individual violations after they occur.

Democratic legitimacy: Creates space for public deliberation about privacy trade-offs rather than leaving decisions to markets or experts.

Adaptive governance: Enables ongoing adjustment of privacy practices based on social learning and changing circumstances.

Long-term sustainability: Builds institutional trust that supports beneficial data sharing while maintaining democratic oversight.

However, this approach also faces significant challenges:

Implementation complexity: Ethics-based governance requires sophisticated institutional capabilities and ongoing stakeholder engagement that many organisations lack.

Democratic deficits: Public participation in privacy governance remains limited, creating risks of elite capture or technocratic decision-making.

Efficiency concerns: Collective deliberation and consensus-building can slow decision-making and increase costs compared to compliance-based approaches.

Managing irreconcilable paradigms

The persistent tension

Individual rights and collective stewardship represent genuinely different approaches to privacy governance that cannot be synthesised into a single coherent framework. They rest on incompatible assumptions about human agency, social responsibility, and the proper relationship between individuals and institutions.

Individual rights prioritise autonomy, choice, and legal protection. Collective stewardship emphasises social responsibility, democratic deliberation, and ethical obligation. These paradigms will sometimes recommend contradictory approaches to the same privacy challenge.

Practical implications for governance professionals

Rather than seeking false reconciliation, governance professionals must learn to operate productively across both paradigms:

Domain recognition: Understand which privacy challenges are best addressed through individual rights mechanisms and which require collective stewardship approaches. Discrete commercial transactions may work well with consent-based governance, while social infrastructure decisions require democratic deliberation.

Stakeholder Mapping: Identify when privacy decisions affect individual rights holders versus collective interests and engage appropriate governance mechanisms for each domain.

Institutional design: Build governance structures capable of operating in both paradigms, legal compliance systems for individual rights protection alongside deliberative processes for collective privacy decisions.

Professional development: Develop capabilities in both legal compliance and ethical deliberation rather than treating them as equivalent approaches. This shift requires more than ethics training; it demands a foundational understanding of trust itself.

Mayer, Davis, and Schoorman's (1995) integrative model of organisational trust highlights three core dimensions: ability, benevolence, and integrity. These attributes offer a practical lens for evaluating professional stewardship beyond technical competence.

A governance professional's trustworthiness stems not only from expertise, but from their perceived alignment with public interest and their institutional integrity over time. Expertise alone does not guarantee trustworthiness. For governance professionals, sustained trust depends on their ability to act in ways that reflect public values, uphold institutional integrity, and foster accountability – even when doing so may challenge internal or political convenience.

The future of privacy governance

The digital transformation of society will continue generating privacy challenges that existing governance frameworks cannot adequately address. Rather than seeking theoretical purity, governance professionals must become comfortable with paradigmatic complexity.

This requires intellectual humility about the limits of any single approach, practical wisdom in choosing appropriate governance mechanisms for specific contexts, and institutional creativity in building governance systems that can operate across incompatible paradigms.

Privacy governance is not a technical problem with optimal solutions, but an ongoing democratic challenge requiring continuous negotiation between competing values and interests. The future will be shaped not by resolving the tension between individual rights and collective stewardship, but by learning to navigate it skilfully.

In this context, governance professionals serve as institutional translators, helping organisations understand when they are operating in the domain of individual rights requiring legal compliance versus collective stewardship demanding ethical deliberation. This translation function is essential for maintaining both legal legitimacy and social licence to operate in an increasingly complex privacy landscape.

The choice is not between individual rights or collective stewardship, but between conscious navigation of both paradigms versus unconscious drift between them. Governance excellence lies in making these choices deliberately rather than by default.

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