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Senate Select Committee on Adopting Artificial Intelligence (AI)
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Dear Committee Secretary

Inquiry into the opportunities and impacts for Australia arising out of the uptake of AI technologies

Thank you for the opportunity to provide a submission to the Senate Select Committee's Inquiry into the opportunities and impacts for Australia arising out of the uptake of AI technologies (**Inquiry**).

The AICD's 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 52,000 reflects the diversity of Australia's director community, comprised of directors and leaders of not-for-profits, large and small businesses and the government sector.

1. Executive Summary

The AICD recognises the significant opportunities of artificial intelligence (AI) and the need to incentivise the development and use of AI to remain competitive in the global market and boost national productivity. However, AI's far-reaching impact and the presence of unique risks require careful management.

Maximising the benefits and opportunities of AI whilst mitigating against its risks requires a proportionate and coordinated policy approach. To achieve this purpose, we welcome the allocation, in this week's Federal Government budget, of almost \$40 million over five years from 2023–24 for the development of policies and capability to support the adoption and use of AI technology in a safe and responsible manner.

The Productivity Commission has set out five policy levers the Government can use to support the uptake of AI applications and innovations in Australia to enhance productivity.¹ Our submission focuses on and builds on three of these levers, being: (1) addressing regulatory uncertainty; (2) ensuring a balanced approach to data access and governance; and (3) building foundational capabilities to support AI uptake. In summary, the AICD makes the following key points:

- 1. Addressing regulatory uncertainty:** Existing laws should be reviewed to ensure they appropriately address the unique characteristics of AI systems. If necessary, AI-specific legislation should be proportionate, effective and risk-based, such that high-risk AI uses are heavily scrutinised whilst low-risk AI uses are not subject to unnecessary regulation. Safe and responsible AI governance should continue to be implemented at both the AI-user and AI-developer level.

¹ See Productivity Commission (January 2024) [Making the most of the AI opportunity: Research paper, no. 1 – AI uptake, productivity and the role of government](#) at page 10 (PDF page 12).

- 2. Ensuring a balanced approach to data access and governance:** The reliance of AI on data highlights the importance of a robust regulatory framework which proportionally regulates the collection and use of personal information within AI systems. A comprehensive economy-wide national data strategy, as recommended by the Productivity Commission,² may be needed to ensure a holistic approach to data governance is taken. The interplay between intellectual property law and AI (particularly for AI training purposes) should also be carefully considered.
- 3. Uplifting AI capability and competency:** AI skills and competency, including amongst directors, remains highly varied. The Government should consider designing and implementing a strategy for the development of AI skills and capability domestically, as well as attracting overseas AI talent to address relevant gaps and to assist in the domestic uplift. The AICD is committed to lifting awareness, education and competency of directors on AI governance, and is partnering with the Human Technology Institute (HTI) to issue guidance in June 2024.

2. Addressing regulatory uncertainty

Existing regulation to be reviewed to identify any gaps arising from AI

AI development and use is already regulated, to some degree, by existing legislation covering privacy, cybersecurity, consumer protection, anti-discrimination, duty of care, and work health and safety obligations. As stewards of organisational strategy and risk management, directors' duties to act with due care and diligence and in the 'best interests' of the company will also extend to the organisation's use of AI.

Notwithstanding the application of existing laws, research shows that the application of existing laws to AI is not well understood.³ To address this perception gap, we recommend that work is done to raise awareness and provide guidance on how existing laws apply to AI development and use.

The existing legal framework should then be reviewed to assess whether there are any gaps that apply to AI which would necessitate the introduction of AI-specific laws.

AI-specific laws to be proportionate, effective, and risk-based

Given existing regulatory complexity and its accompanying compliance burden, it is important to avoid the introduction of new legislation where existing regulation covers the field and/or can be suitably modified.⁴ In particular, ensuring consistency with the current cybersecurity and privacy law reform will be important to reduce regulatory burden and complexity (we discuss this further below).

Given the scale of AI's potential application and the presence of explainability, bias, and hallucination issues within AI systems that can lead to harmful outcomes, it may be necessary to establish specific AI regulations. We concur with the Productivity Commission's three-pronged approach⁵ to the consideration of any new AI-specific regulation, being (1) consider if existing regulatory frameworks (including regulations and regulators) adequately address the identified risks; (2) consider if existing regulation can be clarified or amended to bridge any gaps; and (3) consider the net benefits of new regulation against a risk-based approach, and that new regulation should be introduced if there is a net benefit from the regulation.

² See Productivity Commission (January 2024) [Making the most of the AI opportunity: Research paper, no. 3 – AI raises the stakes for data policy](#) at page 17 (PDF page 19): "Such a [national data governance] strategy would hold even greater potential to enhance productivity were it to encompass the access and use of data across the economy (not limited to government.) A national strategy could set out agreed intentions for access, maintenance and use of all data collected in Australia, and to clarify rights of data subjects, curators and users."

³ See Human Technology Institute (2023), [The State of AI Governance in Australia](#) at page 33 (PDF page 35).

⁴ In the [latest AICD Director Sentiment Index \(H1 2024\)](#), 30% of respondent directors listed legal and regulatory compliance as number 1 issue "keeping them up at night" (see page 52).

⁵ Productivity Commission (January 2024) [Making the most of the AI opportunity: The challenges of regulating AI, Research paper, no. 2 – The challenges of regulating AI](#) at page 6 (PDF page 8).

If, after undertaking such an analysis, the Government concludes that AI-specific regulation is needed, we concur with the views of the Productivity Commission that such regulation should be **proportionate, effective and risk-based**.⁶

To maintain competitiveness, the Productivity Commission has recommended against Australia adopting an AI regulatory approach that is inconsistent with or more stringent than that of overseas markets.⁷

We make a number of broad observations relevant to the design of any AI-specific legislation:

- **Risk-based:** The nature and scope of regulatory requirements should be dependent on the risk of a harmful outcome occurring from an AI use. That is, high-risk AI uses should be heavily scrutinised, whilst low-risk AI uses should be allowed to continue relatively uninhibited. For the most high-risk AI uses, pre-approval by relevant authorities may be necessary. Definitions and categorisations of risk should consider both the probability of harm and the magnitude of the harmful outcome relative to a 'real world' counterfactual.⁸ Regulating speculative or potential harmful uses or penalising outcomes that were likely to occur absent AI use should be avoided.⁹ It would also be beneficial if there was a practical mechanism whereby entities seeking to use AI in certain contexts could voluntarily seek confirmation from relevant authorities that it does not cause regulatory concern. Such a pre-vetting process would likely encourage greater AI use and development, as it would give relevant organisational decision-makers greater comfort that potential harms had been mitigated to the regulator's satisfaction.
- **Definition of 'high risk' use:** Australian policymakers should consider learnings from regulatory approaches overseas, such as the European Union (EU). For instance, initially, there was some criticism of the EU AI Act's decision to presume that all AI use within certain sectors (such as life and health insurance risk assessment and pricing) were high risk. Some critics stated that this was an overly prescriptive approach which failed to acknowledge that the risk of harmful AI outcomes may vary within sectors, depending on the context of application.¹⁰ There was also some concern that the identification of certain sectors, but not others, appeared arbitrary, incomplete and may quickly become out of date as AI use cases continue to develop. In its latest reiteration, the EU has attempted to negate this concern by being more specific about high-risk use cases within sectors, and by providing that those within "high-risk" categories will not be "high risk" if they "*do not pose a significant risk of harm to the health, safety or fundamental rights of natural persons,*" although the interpretation and enforcement of this test remains unclear (noting that the EU has committed to issuing guidance clarifying this).
- **Coordination and alignment with proposed privacy and cyber security reforms:** The Government is currently contemplating significant reform of the *Privacy Act 1988 (Privacy Act)* as well as new cyber security regulation, including amendments to the *Security of Critical Infrastructure Act 2018*. It is critical that any new AI regulation is coordinated and aligned with these separate reforms. For instance, the Privacy Act Review has proposed that individuals have a 'right of erasure' and also a new fair and reasonable test applying to the collection of personal information. It is unclear how the development and use of

⁶ Productivity Commission (January 2024) Making the most of the AI opportunity: The challenges of regulating AI, [Research paper, no. 2 – The challenges of regulating AI](#) at page 1 (PDF page 3).

⁷ Ibid at page 11 (PDF page 13).

⁸ Ibid at page 3 (PDF page 5).

⁹ Ibid at page 1 (PDF 3) and pages 3-4 (PDF 5-6).

¹⁰ See, for instance, Clifford Chance (2023) [The EU Act: concerns and criticism](#), including the February 2023 Joint statement from European insurance entities raising concerns as to the categorisation of all AI usage in the insurance sector intended to be used for risk assessment and pricing in the case of life and health insurance as 'high risk'.

generative AI systems would work, or be compatible with, these proposals. Additionally, advanced AI systems, particularly frontier AI systems,¹¹ are likely to present both significant opportunities and heightened risks for the cyber security resilience of Australian organisations of all sizes. New cyber security regulation and any AI-specific regulation should recognise this dynamic and retain flexibility to respond to emerging cyber security risks.

- **Technology-neutral:** Regulation should, at first instance, avoid setting prescriptive requirements over specific technologies as such an approach will likely lead to overregulation which may stifle innovation and competition. It will also be ineffective given the pace of technological change - as new technologies are introduced, legislation based on regulating a particular type of technology may become superseded.
- **Obligations on General-purpose AI systems:** The breadth of application of General-purpose AI systems (such as Chat GPT) and their underlying explainability, bias and hallucination issues has meant that some jurisdictions, such as the EU, are seeking to regulate these systems irrespective of risk. There has been some criticism of this approach, which some consider will stifle innovation.¹² Australian policymakers should consider the need for such regulation and whether and/or how it aligns with a proportionate, risk-based and technology-neutral approach to AI regulation.
- **Broad industry consultation is critical:** Regulatory design should be subject to consultation with a broad range of stakeholders, including AI developers, industry users, civil society and those impacted by its use, such as consumers.

3. Ensuring a balanced approach to data access and governance

Data is the key input into AI systems. AI's impact on data is two-fold.

First, AI is changing how data is being collected and used. General purpose models such as Chat GPT rely on a vast amount of data to train their models and produce output. Whether and how to regulate access to data to train such models and the quality of the data being used are important considerations for Australian policymakers. This should be factored into currently proposed reforms to data collection, de-identification, use and retention requirements under the Privacy Act Review (see the March 2023 AICD [submission](#) to the Privacy Act Review consultation). In particular, policymakers should consider whether and how transparency requirements should be integrated into any AI-specific regulation.

Early engagement with relevant authorities, such as the Office of the Australian Information Commissioner and the E-safety Commissioner, will be critical to lifting public trust in AI and how it uses data.

Consideration should also extend to whether and how copyright law impacts the data available to train general-purpose models. For instance, some jurisdictions have implemented a Text and Data Mining (TDM) copyright infringement exception for AI training purposes.¹³ We agree with the Productivity Commission's observation that "*Australia should learn from international experience of copyright arrangements to improve accessibility of data for commercial and non-commercial uses, while protecting incentives in creative industries.*" We are pleased to see the establishment of the [Copyright and Artificial Intelligence Reference Group](#) in December 2023 and would expect

¹¹ Such as those the subject of the [Bletchley Declaration](#) which Australia and 27 other countries (including the US, UK and China) signed in November 2023.

¹² See Productivity Commission (January 2024) Making the most of the AI opportunity: The challenges of regulating AI, [Research paper, no. 2 – The challenges of regulating AI](#) at page 10 (PDF page 12).

¹³ See the [Industry Joint Statement](#) dated November 2023 voicing concerns on the Draft EU Act's regulation of General purpose AI models. and the EU Act Productivity Commission (January 2024) [Making the most of the AI opportunity: Research paper, no. 3 – AI raises the stakes for data policy](#) at page 11 (PDF page 13).

that this Group would consider such issues, in collaboration with industry.

Second, AI use amplifies and/or creates additional data-related risks. These risks include bias and the misuse of information, leading to privacy, confidentiality, and copyright breaches. Again, a coordinated approach to regulating copyright, data collection, de-identification, use and retention requirements will be critical. Policies should focus on incentivising the use of high-quality data within AI systems and encouraging organisations using AI to adopt robust data governance processes. It is important to recognise that existing anti-discrimination, consumer protection and privacy laws do, and will continue to, apply and may address a substantial number of data-related risks arising from AI use. As noted above, a comprehensive review of existing laws to (1) clarify their application to AI; and (2) identify any regulatory gaps that need to be addressed, should be a high priority for the Government.

More broadly, we support the Productivity Commission's suggestion of a comprehensive economy-wide national data strategy,¹⁴ noting that the [Data and Digital Government Strategy](#) applies only to the (federal) Australian Public Service (APS).

4. Upskilling AI capability and competency

Current levels of AI and digital competency of Australian business leaders and employees remain fairly low.¹⁵ However, the use of AI by and within organisations is estimated to exponentially increase - while 24% - 35% of Australian employees are currently using AI in their work,¹⁶ this is estimated to grow by over 80% by 2030.¹⁷ Notably, according to [IBM's 2023 Global AI Adoption Index](#), Australian organisations rank second lowest in active AI use.

Notwithstanding the growing demand for AI and digital skills across the economy,¹⁸ companies have struggled to provide adequate AI training to their employees.¹⁹ The inability of existing employee upskilling and new employee entrants to keep pace with rising digital and AI workforce demand has led experts to predict a 'digital worker shortfall' of anywhere between 370,000²⁰ and 495,687.²¹

[Jobs and Skills Australia](#) has recognised the need for education policy to address the growing importance of digital and AI skills. It has called out digital transformation and the emergence of AI as a "key megatrend" requiring a response.²² We appreciate that there are many existing

¹⁴ Ibid at page 17 (PDF page 19).

¹⁵ A [2023 KPMG and University of Queensland study](#) found that 59% of Australian respondents reported a low understanding of AI and when it's being used (page 6); 29- 36% of employees surveyed in a [2024 RMIT and Deloitte Access Economics study](#) stated that they did not have the relevant digital skills required, or that their skill was out of date (at page 4). Globally, a [2023 Boston Consulting Group study](#) found that 59% of executives stated that they have limited or no confidence in their executive team's proficiency in the use of Generative AI.

¹⁶ Estimates of current AI use by employees vary. A [2023 global KPMG and University of Queensland study](#) found 24% of Australian respondents stated that AI is used in their employing organisation (Figure 29 at page 46 or PDF page 48), whilst a [PersonKelly study](#) found that 35% of Australian employees used AI (at page 4 or PDF page 3). Another study by Deloitte found that 32% of employees are using Generative AI specifically, with nearly two-thirds believing their managers are unaware of their use (known as 'shadow AI') (cited in the [2023 Australian Computer Society and Deloitte study \(ACS and Deloitte Study\)](#) at page 12).

¹⁷ A [2024 Amazon Web Services survey of Australian workers \(AWS Report\)](#) found that 86% of employees expect to use AI in their daily work by 2028, of which 25% expect to use it "extensively" (at page 5). The [ACS and Deloitte Study](#) concluded that 86% of occupations have skills that will be affected by AI technologies, and 25% of all work time will be affected, and 52% of occupations will have at least 20% of their work time impacted by AI (at page 21).

¹⁸ According to the [AWS Report](#), hiring AI-skilled talent is a priority for 63% of Australian employers, of which 75% cannot find the AI talent they need (at page 5). According to a [NAIC 2023 AI ecosystem report](#), Australia is among the global leaders in terms of AI job postings, with 1.2% of all job postings in 2022 being AI-related. Demand for AI jobs has also been going faster in Australia relative to overseas, with the share of AI-related job postings in Australia increasing by more than 7 times between 2014 and 2022 (at page 24, PDF page 26).

¹⁹ According to the [AWS Report](#), 73% of employers state they do not know how to implement an AI workforce training program, while 76% of workers say they are not sure of what AI training programs are available to them (page 5).

²⁰ See the Digital Skills Organisation (June 2023) [Growing Australia's digital workforce Report](#) at page 8.

²¹ See the [ACS and Deloitte Study](#) at page 28.

²² Jobs and Skills Australia (2023), [Annual Jobs and skills report 2023](#) at page 12.

initiatives to uplift digital skills, such as the [Future Skills Organisation](#) (within Jobs and Skills Australia) and the [Australian Digital Capability Framework](#). Consideration should be given as to how AI skills can be incorporated into these initiatives. Consideration may need to be given to three facets: (1) uplifting the skills of existing workforce participants; (2) developing the skills of new workforce entrants; and (3) attracting overseas AI talent to fill any shortfall and/or to assist in the uplift. One approach may be to design and implement a National Digital Skills Strategy.

Given the rising demand for digital and AI capabilities, consideration should be given as to what role domestic investment and capability building in AI plays in the [Future made in Australia](#) strategy.

Uplifting AI capability amongst regulators should also be prioritised to ensure existing laws and any future AI-specific laws are being adequately enforced.

[AICD AI Governance for Australian directors](#)

At a board and director-level, the AICD is committed to lifting awareness, education and competency on AI governance. The AICD is working with the Human Technology Institute (HTI) to release an AI governance resource and webinar for directors in June 2024. The AICD has also previously produced an [AI governance webinar series](#), as well as [articles](#) on AI governance. We anticipate rising member interest in AI governance as Australian organisations embrace AI throughout their value chain.

5. Next Steps

If you would like to discuss these matters further, please contact Christian Gergis, Head of Policy at cgergis@aicd.com.au or Anna Gudkov, Senior Policy Adviser at agudkov@aicd.com.au.

Yours sincerely,



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