COMMUNICATIONS ALLIANCE LTD

Communications Alliance Submission

to the Department of Industry, Science and Resources

Safe and responsible AI in Australia

Discussion Paper

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Communications Alliance

Communications Alliance is the primary communications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, platform providers, equipment vendors, IT companies, consultants and business groups.

Its vision is to be the most influential association in Australian communications, co-operatively initiating programs that promote sustainable industry development, innovation and growth, while generating positive outcomes for customers and society.

The prime mission of Communications Alliance is to create a co-operative stakeholder environment that allows the industry to take the lead on initiatives which grow the Australian communications industry, enhance the connectivity of all Australians and foster the highest standards of business behaviour.

For more details about Communications Alliance, see http://www.commsalliance.com.au.

Introduction

Communications Alliance welcomes the opportunity to make a submission to the Department of Industry, Science and Resources (DISR) Discussion Paper *Safe and Responsible AI in Australia* (Discussion Paper).

In this submission we do not provide responses to the specific questions raised on pages 34 and 35 of the Discussion Paper but instead share our feedback on approaches to ensure a safe and responsible use of artificial intelligence (AI) in Australia more generally.

In doing so, we will be using the term AI to describe all types of artificial intelligence without further distinguishing specific AI technologies or approaches unless necessary in the given context.

In summary, we recommend the following:

1. Build trust in AI and focus on the positive transformational powers of AI. Sections 1.8 and 1.9 provide details on the key actions that we believe are required to achieve this.

2. Leverage internationally agreed terminology and definitions. Adopt an internationally acknowledged terminology throughout Government and industry to minimise friction.

3. Clearly delineate AI from other technologies and approaches but consider limiting the use of AI-specific definitions to ensure longevity of regulation and a focus on the purpose AI rather than the technology itself.

4. At this early transformational stage of AI, opt for a voluntary and 'light-touch' approach to AI regulation to avoid stymying innovation.

5. Leverage existing (technology-neutral) laws and regulations to the extent possible. Where required, build new regulation on working legal concepts. Perform a thorough gap analysis to understand where, if at all, new regulation would be required.

6. Align with international standards and frameworks to focus on appropriately mitigating risk of high-risk use cases.

7. Ensure that any existing and new regulation appropriately addresses the responsibilities for the use of AI in the supply chain. This includes considerations around developers and deployers of AI.

8. Focus a risk-based approach to AI regulation on the purpose of the AI instead of the activities that the AI performs.

9. Establish a single, centralised 'AI capacity unit' to assist all participants in the ecosystem with the unique challenges that AI will pose.

10. Streamline and coordinate AI-related policy and legislative activities to minimise duplication, confusion and/or inconsistency.

1. AI – a force for good

1.1. The recent advancements in and accessibility to general consumers to generative AI based on large language models (LLM) and multimodal foundation models (MfM) have been well publicised, nationally and internationally. Often the impression generated for those who are not involved with the technology more deeply is that AI is a 'new phenomenon'.

1.2. However, AI was first developed more than 70 years ago and already powers significant aspects of everyday life (e.g., social media, real-time traffic and direction tools and translation tools etc.) and, increasingly, specialist applications, for example, around climate prediction, in healthcare and quantum computing.

1.3. The most recent changes in AI development are likely to be transformational, bringing with them so far unthinkable opportunities, but also bearing the risk of increasing inequality, increased security risks and mis- and disinformation.

1.4. The Discussion Paper raises questions as to how Australia can build a safe and responsible AI environment. It is important that the Australian Government is considering the development of AI as nations promoting critical new technologies for public benefit are more likely to excel and flourish than those who limit their development, be it on the basis of uncertainty, potential or actual risks, lack of resources or simply inertia.

1.5. The questions raised by the paper largely focus on the minimisation of the risks associated with AI. It is appropriate and necessary for Government to raise these questions and we will provide thoughts on how we believe an AI environment ought to be approached, at least in the short and medium-term.

1.6. However, Australia risks not reaping the full benefits of AI if we do not manage to shift the debate from a focus on risks to the opportunities that AI affords us as a society – the tendency of human nature to focus on the risks (especially of things that we do not readily understand) will take care of the debate not being silenced.

1.7. Therefore, it is imperative that all stakeholder groups – Government, industry and academia – make substantial efforts to build trust in these technologies. The development of a well-functioning legal and regulatory framework is part of this trust-building exercise but is not all.

1.8. In our view, the opportunities of AI will best be harnessed through decisive action in three key areas:

- the promotion of and investment in AI technologies to grow innovation and Australia's international competitiveness;

- building systems that are trustworthy and secure-by-design, using a risk-based approach with a focus on high-risk use cases/purposes;

- an educated and aware society that is prepared for the step-changes ahead, including the required changes to Australia's labour force, and is focused on sharing the benefits of AI across society; and

- a legal and regulatory framework that promotes such innovation and investment while sufficiently safeguarding against the risks of harm from AI. This framework ought to apply existing legislation and regulation to AI as far as possible and, where new regulatory approaches are required, be based on international standards and frameworks.

1.9. Specifically with regard to the last point, the legal and regulatory framework is, in our view, most likely to instil confidence in the Australian economy and ecosystem if:

- the privacy law is proportionate, adequately protecting personal information and enabling international data transfers;

- the regulatory framework allows for safe harbours where public and private sectors collaborate for the purpose of research to improve the safety of AI, and the incidental use of data on the WWW for training purposes;

- the copyright framework allows for fair use of copyrighted content while providing content creators sufficient control over their works; and

- the framework clearly assigns liability for mis/abuse of all forms of AI by the participants in the AI ecosystem.

2. Definitions of AI

2.1. The Discussion Paper proposes to use a number of definitions in relation to AI. These definitions are based on three different sources. The Paper contains definitions for:

- 'artificial intelligence', based on a respective definition by the International Organisation for Standardization (ISO) (*ISO/IEC ISO/IEC 22989:2022*);

- 'machine learning' based on a respective definition by ISO (ibid)

- 'algorithm', based on a respective definition by ISO (*ibid*);

- 'generative AI', based on the definition in Bell, G., Burgess, J., Thomas, J., and Sadiq, S. (2023, March 24). *Rapid Response Information Report: Generative AI - language models (LLMs) and multimodal foundation models (MFMs)*;

- 'large language model (LLM), based on the definition in Bell, G., Burgess, J., Thomas, J., and Sadiq, S. (ibid);

- 'multimodal foundation model (MfM),' based on the definition in Bell, G., Burgess, J., Thomas, J., and Sadiq, S. (ibid); and

- 'automated decision making (ADM)', based on the definition in Commonwealth Ombudsman, Australian Government (2020), *Automated Decision-Making: Better Practice Guide*.

2.2. Irrespective of whether the used definitions adequately and correctly define the respective technologies and/or forms of AI, the use of a number of different sources – including national sources – ought to be critically considered.

2.3. The rapid proliferation of AI through a multitude of applications is a global development. To fully harness the benefits of AI and to optimally address potential risks emanating from it, it will be critical to minimise differences in the understanding of the terminology used, be it in standards development or in legislation and regulation.

2.4. Consequently, and drawing on previous stakeholder feedback in relation to cyber security, we suggest that Government adopt a common lexicon based on the OECD AI principles that Australia was involved in developing.

2.5. To ensure that Australia is aligned with international best practice approaches to AI, Australia should adopt international standards and definitions of AI. Where audits, assessments and/or certification schemes are being used, it is key to ensure that those instruments as well as the practitioners and developers delivering them are applying trusted (international and interoperable) standards and frameworks.

2.6. In this context, it is important to highlight that the European Union's *Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts* (proposed EU AI Act), limits itself in the definition of AI-related terms. The proposed EU AI Act broadly applies to 'artificial intelligence systems' (albeit it requires a range of definitions for AI-powered activities).

Article 3 (1) reads:

"'*artificial intelligence system' (AI system) means software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with;*"

with Annex I listing three techniques/approaches:

"*(a) Machine learning approaches, including supervised, unsupervised and reinforcement learning, using a wide variety of methods including deep learning;*
(b) Logic- and knowledge-based approaches, including knowledge representation, inductive (logic) programming, knowledge bases, inference and deductive engines, (symbolic) reasoning and expert systems;
(c) Statistical approaches, Bayesian estimation, search and optimization methods."

2.7.   Similarly, the *US Blueprint for an AI Bill of Rights* opts for an approach that captures a multitude of systems, software and processes under the umbrella term of 'automated system':

"*AUTOMATED SYSTEM: An "automated system" is any system, software, or process that uses computation as whole or part of a system to determine outcomes, make or aid decisions, inform policy implementation, collect data or observations, or otherwise interact with individuals and/or communities. Automated systems include, but are not limited to, systems derived from machine learning, statistics, or other data processing or artificial intelligence techniques, and exclude passive computing infrastructure. "Passive computing infrastructure" is any intermediary technology that does not influence or determine the outcome of decision, make or aid in decisions, inform policy implementation, or collect data or observations, including web hosting, domain registration, networking, caching, data storage, or cybersecurity. Throughout this framework, automated systems that are considered in scope are only those that have the potential to meaningfully impact individuals' or communities' rights, opportunities, or access.*"

2.8.   While we do not seek to comment on these definitions themselves at this stage (i.e., whether the types of techniques, approaches, systems, software or processes included are appropriate and sufficiently clear), it is interesting to note that both proposals do not rest on precise definitions of models and types of technology (in the manner proposed in the Discussion Paper) but rather have opted to broadly capture all AI systems and, in the case of the proposed EU AI Act, to subsequently apply a risk-based rules lens to the activities that are undertaken by means of all such systems.

2.9.   This definitional approach deserves consideration as it avoids blurring lines between techniques and approaches and appears, within the realm of what is possible for such a rapidly developing technology, reasonably future-proof.

It is also likely to be appropriate within a regulatory framework that focuses the regulation of AI, where necessary, on the purpose of the AI, rather than the activities that the AI performs.

We provide further thoughts on the regulation of activities (as opposed to purpose of the AI used) in section 3 below.

2.10. It is, however, imperative to clearly delineate AI as a technology from other approaches to decision making, including policy-driven approaches to decision making, which may use AI but are not synonymous with AI. Accordingly, in the telecommunications sector, the European Telecommunications Standards Institute (ETSI), the International Telecommunications Union (ITU), the 3rd Generation Partnership

Project (3GPP) and Internet Engineering Task Force (IETF) clearly separate automation (ADM) from autonomous capabilities. This separation rests on an understanding that policy can be human driven, and the intelligence resides within the human defining the policy, versus autonomous approaches where the AI is defining a policy without further involvement of a human.

3. Approach to AI regulation

3.1. AI is not a new technology. In fact, AI has been used in its earliest forms since the 1950s (e.g. with IBM's 'Deep Blue' for playing games against a human opponent). Since then, AI has evolved and found application in a wide variety of use cases. AI will be one of the most transformational technologies we will encounter in our generation, and it will play a significant role in addressing societal and economic problems, improve the provision of services, and drive innovation.

3.2. Importantly, AI has so far quite capably been regulated through existing technology-neutral legislation and regulation. These legislations cover privacy and data protection, anti-discrimination, cyber security, copyright, consumer and competition law as well as criminal, tort and contract law, just to mention a few.

3.3. This technology-neutral, economy-wide legislative framework is supplemented by sector-specific legislation, for example the regulation of specific critical infrastructure sectors for purposes of enhancing the resilience of networks and national security more broadly. Existing laws and regulations – such as to promote competition, consumer protection, fundamental rights – should continue to apply. Regulators should have the capacity and resources to enforce existing technology-neutral laws to AI in the first instance.

3.4. However, the speed of evolution of AI and the development of new applications powered by such evolved AI, that have the capability to impact individuals and societies in new ways, means that it is appropriate to consider whether the existing legal framework is likely to be suitably equipped to deal with these new applications of AI and what, if any, gaps are arising.

3.5. Such a gap analysis ought to take into account a number of considerations, including:

- whether the existing legislation is capable of appropriately assigning responsibility across the AI supply chain, including the different responsibilities for 'developers' vs 'deployers' of AI (similar to the considerations around 'data controller' and 'data processor' in privacy law);

- whether the unlawful and illegal use of AI applications – be it intentional or unintentional – is appropriately prevented (to the extent possible) or mitigated by existing legislation; and

- whether sufficient transparency, explainability and contestability is afforded to individuals affected by decisions through or interactions with AI.

3.6. While AI can pose real risks, which are being extensively discussed in the media and partly also the Discussion Paper, AI has the potential to positively transform our societies. (Also refer to our thoughts at section 1.) At the same time, the recent leaps in the evolution of AI and its use in new applications mean that we are yet to grapple with what exactly we are (potentially) seeking to regulate.

3.7. Early regulation of this new era of AI poses significant risks of 'getting it wrong' and, as a result, stymying investment and innovation, leaving Australia to fall short of its potential and behind peer nations.

3.8. It is, therefore, key to undertake a thorough gap analysis, as highlighted above. Where gaps have been identified, it ought to be considered whether existing (working) legal concepts and approaches can be applied to the new applications of AI.

3.9. It is equally important to carefully observe international approaches and to learn the lessons from other nations that may have opted for specific approaches to AI regulation. We believe that there is merit for Australia in refraining from taking on leading role in AI regulation.

3.10. At this stage, it is premature to develop general AI-specific legislation (similar to the proposed EU AI Act) or to rush into new sector-specific legislation.

3.11. The development of the proposed EU AI Act, with amendments to previous versions of the proposal to now include LLMs/MFMs and general-purpose AI, highlights the difficulties of devising a technology-focused legislation that does not require constant updating to maintain relevance.

3.12. The development of AI-specific regulation, especially at an early stage, also risks creating duplication and overlap with existing general and sector-specific regulation, thereby adding to regulatory burden, operational complexity and even uncertainty in case legislation is not perfectly aligned or inconsistent.

3.13. Consequently, in our view, Australia would benefit most from the full potential of AI, (while appropriately limiting harm from the technology) by adopting voluntary or 'light touch' approaches to AI use, coupled with guidance from well-qualified organisations and institutions to assist entities with the implementation of AI within a framework of strong ethical principles.

3.14. Doing so would align with the UK (and Singapore) voluntary, pro-innovation approaches to AI. The UK deliberately opted against statutory intervention but instead decided for a framework that allows Government to monitor and analyse the interaction of AI innovation, harms and legislation. The UK framework is underpinned by five principles (safety, security and robustness; appropriate transparency and explainability; fairness; accountability and governance; and contestability and redress) which are, unless an evidenced need arises, not incorporated into statute. If a need arose, the UK anticipates introducing a statutory duty on regulators requiring them to have due regard to these principles.

3.15. The UK approach is bolstered by a number of centralised functions that include monitoring and evaluation, sandboxes, education and awareness raising, and analysis of interoperability and coherence of legislation, nationally and internationally.[1] (Also refer to our comments on coordination and cooperation at section 4.)

3.16. AI is used for a multitude of applications and its use and the types of applications are set to increase substantially in the future. It is key to recognise that while AI may pose risks, it is equally – or rather more so – a 'force for good' and enables many applications that are highly beneficial to our societies. Often the same AI that can be used to create harm is deployed to combat that same harm. For example, while AI can be used to generate or proliferate harmful online material (e.g., deep fakes or child sexual exploitation material), the same technologies may also be utilised to detect and remove such material from the internet.

3.17. Consequently, any future risk-based approach to regulation of AI ought to be based on the purpose for which AI is being used as opposed to the activities undertaken by the AI. The proposed EU AI Act appears to combine an activities and purpose-based approach. (Note that Attachment B of the Discussion Paper summarises the proposed EU AI Act activities with a tendency to (insufficiently) reflect the purpose element contained in the proposed EU AI Act.)

3.18. A strong focus on activities undertaken by AI bears the risk of requiring a very high degree of definitional precision for an ever-increasing number of activities, in addition

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[1] Refer to UK Department of Science, Innovation & Technology, Policy Paper, *A pro-innovation approach to AI regulation*, 29/03/2023 as accessed at https://www.gov.uk/government/publications/ai-regulation-a-pro-innovation-approach/white-paper on 05/07/2023.

to the inherent difficulties that the same activity that is using the AI may be used for beneficial as well as harmful purposes.

3.19. Regardless of the risk focus of AI regulation, it is important not to regulate an activity or purpose performed/achieved by AI if the same activity or purpose would be permitted if performed manually or trough other technologies. Consider, for example, Title II, Article 5, 1(a) of the proposed EU AI Act which prohibits:

> *"the placing on the market, putting into service or use of an AI system that deploys subliminal techniques beyond a person's consciousness in order to materially distort a person's behaviour in a manner that causes or is likely to cause that person or another person physical or psychological harm;"*

Arguably, many would consider that advertising for some products or services (for example, advertising for gambling) may use the above subliminal techniques with the likelihood to cause the mentioned harms, even though such advertising may not use AI.

3.20. The above highlights the difficulties of any general AI-specific legislation as such legislation inherently deviates from the technology-neutral approach to legislation/regulation that Australia has, so far, sought to take with the aim to address the outcome, not the means by which that outcome is achieved. If any AI (risk-based) regulation is required, a purpose-based approach appears to remain more closely aligned with this outcomes-oriented approach.

3.21. Much of the above points to a need to focus attention, especially in the current early stage of 'transformative uses' of AI, onto appropriate transparency around the use of AI, i.e., the provision of information when, where and for what purpose specific types of AI are being used. However, given the expected proliferation of AI, it will become increasingly difficult to provide meaningful information in an easily understandable manner to persons interacting with the AI without causing 'AI-notice fatigue' or making the receipt/acknowledgement of the information a box-ticking exercise.

The question also arises to what extent persons will have a real choice as to whether they would like to interact with the AI if the only alternative is not to use the service that uses the AI.

4. Coordination and Cooperation

4.1. Given the future omni-presence of AI in all sectors of the Australian economy and areas of society, it is inevitable that technical and legal/regulatory questions around the use of AI will arise frequently. It is, in our view, also inevitable that such issues will not be focused on specific industry sectors but rather will be cross-sectoral.

4.2. We expressed our preference for a voluntary or 'light-touch' approach to regulating AI and, where required, for general, purposed-based AI regulation that, to the extent possible, re-utilises existing legal concepts and applies those within existing legislation or regulation. This approach ought to be complemented by technical guidance to assist with the identification of AI uses associated with higher risk and the subsequent application of (existing) international standards and frameworks to mitigate against such risk.

4.3. We also anticipate that AI will require a substantial amount of technical and legal subject matter expertise that is unlikely to be present in currently existing agencies or regulators or, if so, may not constitute sufficient resources to deal with the demand for such expertise that is likely to be experienced.

4.4. Consequently, consideration ought to be given to the creation of a new single central 'AI capacity unit' to maximise cross-sectoral legislative/regulatory consistency and coordination, facilitate education and awareness, provide a central point for research

coordination, assist with AI risk management within public and private sector organisations, create sandbox environments etc.

4.5. The rapid speed of AI development and the transformational changes of our societies that occur as a result are likely to mean that many organisations will lack the ability and capacity to understand the changes in their specific operating environments, and to reflect those appropriately in their governance, risk management and regulatory compliance practices. A substantial amount of guidance and assistance will be required.

4.6. Key to the success of a central 'AI capacity unit' will be:

- governance arrangements that allow the greatest degree of independence from the executive of Government possible;

- close cooperation with industry and academia, which in turn (and from experience) are likely to engage more freely where the unit is perceived as operating without interference from and independent of regulators and the executive of Government; and

- sufficient funding to attract qualified experts (in particular from industry) and to maintain effective and efficient operations.

4.7. It is, in our view, unlikely that an increased dialogue between existing regulators, similar to the Digital Platforms Regulators Forum, will be able to fulfil the needs of industry, Government and academia in relation to AI.

4.8. In line with the above, the 'AI capacity unit' ought also to be designed and empowered to provide sector regulators with the necessary technical advice. Conversely, appropriate processes within sector regulators ought to be established to facilitate and require the seeking of such advice. We recommend that the unit work closely with the CSIRO and Standards Australia.

4.9. Therefore, we recommend that an analysis of similar units (including for different purposes) nationally and internationally be undertaken in order to identify best-practice approaches.

4.10. With regard to optimised coordination, we note with a certain unease the Discussion Paper's statement that

> *"[t]his consultation does not seek to consolidate or replicate the development of existing general or sector-specific regulations and governance initiatives across the Australian Government. While this consultation is underway, portfolios will continue to explore and consider AI developments specific to their governance area."*

4.11. We are concerned that the parallel consultation and development of legislation and regulation in areas that are affected by AI, e.g., the concurrent review of the *Privacy Act 1988,* the finalisation of Digital Identity legislation, the review of the *Online Safety Act 2021* and any potentially impending regulation in relation to age verification, will lead to unnecessary duplication of efforts and confusion.

4.12. In a similar vein, it is unclear how the current and previous AI-related pieces of work, such as this consultation, the NSW Parliamentary Inquiry into Artificial Intelligence, the AI Ethics Framework, the OECD Principles on AI etc., interact with each other. We welcome guidance on this point.

4.13. Against this background, we encourage the federal Government to encourage alignment of state-based AI-related policy with federal objectives to minimise fracturing of the AI ecosystem.

5. Conclusion

Communications Alliance looks forward to continued engagement with DISR and other relevant stakeholders on ensuring that Australians will be able to enjoy the tremendous opportunities that AI affords while being appropriately protected from the risk of harm that may accompany some applications of AI.

A sustained dialogue between all stakeholders will be required to ensure that Australia strikes the right balance between a 'light-touch' approach to AI governance allowing innovation to thrive, and ensuring appropriate safeguards for users who are knowingly or unknowingly interacting with AI.

Importantly, while Australia may not be well-placed to lead AI regulation at this stage, it will be critical for Australia to remain engaged at the highest levels with a broad range of AI-related fora and legislative, regulatory and standards developing approaches to ensure Australia's future AI governance regime aligns with international approaches to the greatest extent possible.

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General