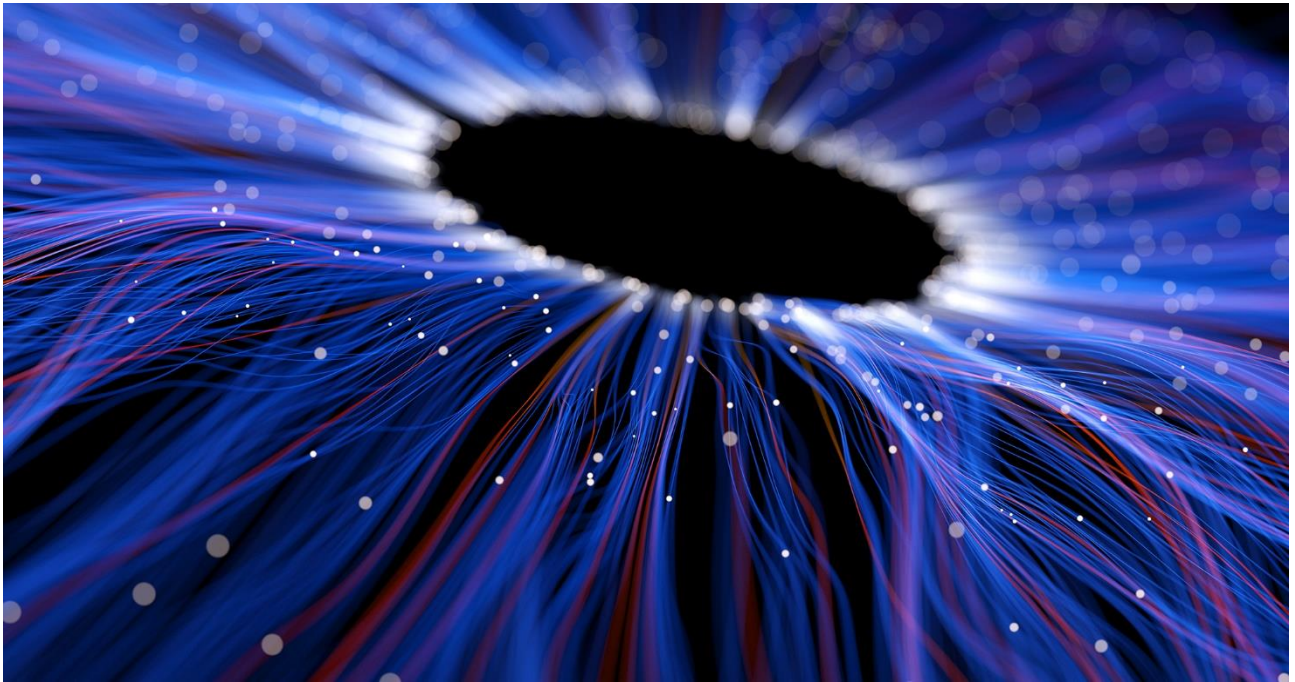




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# Herbert Smith Freehills submission

An AI Action Plan for All Australians:  
Discussion Paper

27 NOVEMBER 2020



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Australian Government  
Department of Industry, Science, Energy and Resources

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## Our submission to the Discussion Paper

Herbert Smith Freehills appreciates this opportunity to respond to the Discussion Paper on Australia's AI Action Plan (the **Discussion Paper**) published by the Australian Government Department of Industry, Science, Energy and Resources (the **Department**) on 29 October 2020.

As the Discussion Paper notes, AI has the potential to deliver significant social and economic benefits to all Australians. However, in order to fully realise these benefits, a coordinated and cohesive national strategy is needed to ensure the safe, responsible and inclusive development, adoption and use of these technologies across our economy. For this reason, we strongly support the formulation of an AI Action Plan for Australia, and the goals outlined in the Discussion Paper.

The topics covered in the Discussion Paper are wide-ranging and ambitious, and focus on the key areas of opportunity for Australia in its creation, adoption and use of AI. In this submission, we outline our views on a critical thread that runs through — and arguably forms the foundation necessary for — each of these for areas of focus: **how to ensure that our regulatory landscape and public policy settings are and remain able to respond and adapt to the challenges and opportunities of our digital future, including ensuring we encourage innovation, and grow, attract and retain talent that are the lifeblood for the industry**. This is critical not only for encouraging the broader adoption and use of AI in Australia, but for a range of other new and emerging technologies. We therefore encourage the Department to consider the concepts and recommendations set out in this submission in that broader context.

## Shaping the role of AI in Australia's future

As the Discussion Paper acknowledges, we are at an inflection point for AI in Australia. The acceleration of the digitisation of our economy, and the increasing ubiquity and centrality of technology to society, means that we must act now in order to ensure that all Australians realise the benefits of these technologies. The COVID-19 pandemic has only added to the urgency of this.

However, our AI Action Plan needs to identify, account for, and seek to minimise the actual or potential challenges to the realisation of these benefits. These challenges may arise as a result of a number of reasons and factors, including:

- the significant increases in the quantitative volume and variety, and accordingly in the qualitative value, of **data collected, analysed and used** by AI in order to generate its valuable outputs, and the associated privacy and surveillance considerations;
- the **performance and accuracy** of AI solutions, and their potential to generate biased outcomes or otherwise lead to unintended consequences;
- the **growing use and complexity** of AI technologies, which operate independently of human supervision, where people impacted by outcomes decided or influenced by AI technologies are unaware that AI is even being used, or otherwise may be too complex for a lay person (or even in some cases, experts) to understand or interpret;
- the **concentration and scarcity of technical expertise** needed for the design of AI, which could lead to AI being designed by groups that do not reflect the broader diversity and composition of our society; and

- a broader breakdown of **trust in the technology sector** (the ‘techlash’) and corresponding concerns that **regulation is not keeping pace with technology**, such that specific regulatory interventions are required — which may be reactive, piecemeal or not future-proofed.

We should also be clear that the term ‘AI’ is not settled or singular, and instead acts as an umbrella term for a collection of technologies that involve the use of a variety of machine-learning, statistical, and other data-driven analytical techniques to make decisions or predictions. This is why it is useful to consider and assess AI through the lens of ‘use cases’, as each particular instance of an AI system is developed, applied and used in differing ways. Those use cases and their application can then give rise to all, some or none of the above concerns depending on the context and use case. We agree with the finding of the Australian Human Rights Commission that: *‘[i]t is important for technical, policy, legal and other relevant decision makers to consider the specific circumstances of an AI system in its context’*.<sup>1</sup>

It is critical for AI to be designed, adopted and used in ways that ensure its trustworthiness, and create social value. Without public confidence and trust in its creation, adoption and use, we risk an outcome where the benefits of AI accrue only to a sub-set of our society — or leave Australians behind entirely.

This risk also presents a corresponding opportunity. That is, were Australia to take a leading role in relation to the creation, adoption and use of responsible AI, this could represent a real competitive advantage for our local industry, while also fostering innovation and protecting individual rights.

## Recommendations: an actionable approach

The AI Action Plan presents a real opportunity to set forth an holistic, inclusive and adaptable framework within which the Australian Government can best assess and determine how to respond to the impacts and opportunities associated with AI on an ongoing basis.

We believe that the regulatory environment within which AI is developed and used has a role to play here. Regulation can, and has acted as an innovation ‘enabler’ for industry, helping to determine and maintain the clear legal parameters within which participants can establish their social licence to operate, and accordingly create an environment for industry to flourish. For this to be the case, however, regulation must be implemented in a way that advances a clear, coherent and holistic standard for responding to the challenges of new technologies.

This framework can and should be crafted as part of a collaborative, multi-disciplinary and multi-stakeholder process, guided by core principles of responsible use (that is, covering not just legal considerations but also matters of ethics, human rights, industry standards, good governance and fairness).

At the outset, this might involve:

- 1 **Understanding the use cases:** Establish a taxonomy for AI, which does not solely focus on identification of what an AI solution and its methodology *is*, but the manner and context in which it is used, and by whom, at all stages of its lifecycle. This should also take into account the intersections and inter-connectedness of AI solutions with one another, and with other emerging technologies, particularly those related to the generation, gathering or use of the types of data which are used in AI solutions.<sup>2</sup>
- 2 **Assessing the use cases against overarching principles:** Develop a framework that enables identification and assessment of the nature and extent of any actual or potential harms and benefits of AI in the relevant use case(s), and the likelihood that they will eventuate.

<sup>1</sup> Australian Human Rights Commission, ‘Using artificial intelligence to make decisions: Addressing the problem of algorithmic bias’, Technical Paper, 2020 (**AHRC Technical Paper**), available at: <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/using-artificial-intelligence-make-decisions-addressing>.

<sup>2</sup> See, for example, Australian Council of Learned Academies (ACOLA), ‘Internet of Things: Horizon Scanning Report’ (November 2020), Chapter 3.

- 3 **Prioritising and evaluating potential responses:** Based on this assessment, determine a clear matrix of factors by which to prioritise and determine what actions to take (if any) to ensure that the benefits are maximised, or the harms are minimised. This matrix and any consequential determinations will require a careful analysis of the given context and use case, and should take into account:
- how the existing legal framework (domestic and international) applies to the use case, including how it is and should be enforced;
  - what approaches are or might be available to maximise benefits and minimise harms;
  - the technical and commercial feasibility and effectiveness of available approaches (including the capacity of Australian industry participants to implement or respond to the proposed action which may be time-consuming, costly or require special skill-sets, and the ability of the Australian Government to support industry participants where this is needed);
  - how the available approaches align to global norms and standards, and the extent to which other national or international regimes may impact, or be impacted by, Australia’s determinations;
  - the risk of available approaches themselves giving rise to unintended consequences; and
  - a broad range of other factors including ethics, diversity and inclusion, and societal sentiments or norms.

Importantly, this final step should not assume that existing laws are or will be inadequate in the circumstances (in particular, as many AI use cases will take place in industries or domains that already contain regulation that can be applied to AI as for any other innovative process), or that a regulatory approach should be the first (or only) resort. For example, the risks of the benefits of AI leaving some Australians behind can be addressed through broader investment in skills development and retention in a manner that reflects the diversity of our society, as well as investment in ensuring equal access to technology and minimising the impact of the ‘digital divide’.

There are numerous measures that can and should be put in place to support this framework and enable it to be more easily implemented. The AI Action Plan should incorporate:

- consideration of existing or proposed AI and data-related regulations, frameworks or strategies put forward in other jurisdictions, and how those may inform, interact with or impact any measures taken in the Australian jurisdiction, particularly where those measures apply to actors or AI systems that are cross-border in nature;<sup>3</sup>
- mechanisms to enable holistic review of the existing regulatory landscape, in order to ensure that laws are and can remain fit for purpose and able to respond to the challenges raised by new technologies into the future;
- the establishment of an expert body, as recommended by the Australian Human Rights Commission, to *‘provide proactive policy and legal guidance on rapidly evolving technologies’*.<sup>4</sup> The composition of this expert body should be carefully considered and formulated, in order to ensure that it is able to provide advice that spans across disciplines, across sectors and across the wide range of Australian society; and
- strategies to build industry confidence and capability in responsible AI across our economy (with consideration for smaller and/or local industry participants that may have fewer resources to do so independently), for example by:

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<sup>3</sup> See, for example: European Commission, ‘White Paper on Artificial Intelligence: a European approach to excellence and trust’ (19 February 2020), which proposes that requirements applied to high-risk AI applications be imposed to all relevant economic operators providing AI-enabled products or services in the EU, regardless of whether they are established in the EU or not.

<sup>4</sup> Australian Human Rights Commission, ‘Human Rights and Technology: Discussion Paper’ (17 December 2019), 131.

- promoting the development and adoption of relevant certifications and standards with respect to responsible AI, including audit standards, with an eye towards international standardisation;
- investing in rigorous testing protocols and mitigation strategies for algorithmic bias;<sup>5</sup> and
- providing corresponding incentives and support systems for industry participants who are implementing or innovating solutions for responsible AI.

## Moving forward

AI and other emerging technologies have brought, and will continue to bring about, genuine change in the way in which we act, work, communicate, and make decisions. This means that it is an inherently difficult task to identify and implement appropriate governance frameworks for changes so profound. It is also a critical reason why this process should not occur in a narrow or isolated manner, but must involve cooperative and comprehensive efforts. We believe that the AI Action Plan presents a real opportunity to drive towards those goals.

We are pleased to provide this submission to the Department and would welcome the opportunity to discuss our comments further.

Yours sincerely



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<sup>5</sup> The AHRC Technical Paper not only explains the potential impacts of algorithmic bias, but the need for pragmatic and rigorous methodologies to identify, assess and deal with cases of algorithmic bias at all stages of development and implementation of an AI solution. These methodologies in turn require scarce expertise and investment to implement.



## About Herbert Smith Freehills

Herbert Smith Freehills is one of the world's leading commercial law firms, bringing the best people together across our 26 offices globally.

At Herbert Smith Freehills, we believe there is an important role for the private sector, and law firms in particular, to play in considering and implementing frameworks to address the legal, ethical and human rights concerns arising from new and emerging digital technologies.

In our capacity as a trusted professional advisor to a large number and variety of clients, across a wide range of industries and sectors, we have experience supporting our clients to thrive in the digital age and navigate novel technological changes. We are also pleased to be a major project partner of the Human Rights and Technology Project of the Australian Human Rights Commission.

Herbert Smith Freehills has a number of specialist practice areas that consider the legal and regulatory issues arising in connection with technology and data. These specialists work closely with our business and human rights specialists. This submission was prepared by our cross-practice group, multidisciplinary Digital Law Group who are providing bespoke advice and practical solutions to the opportunities, risks and ethical and regulatory requirements brought on by digital transformation.

These experiences mean that we have a multi-dimensional perspective on the issues raised by new and emerging digital technologies and their impact.

## Key contacts



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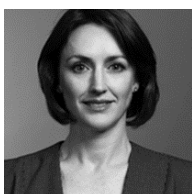
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