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4 October 2024

Department of Industry, Science and Resources
Industry House
10 Binara Street
Canberra

Via online form.

Re: Proposals Paper for introducing mandatory guardrails for AI in high-risk settings

To Whom It May Concern:

The Association of Digital Service Providers Australia New Zealand (DSPANZ) welcomes the opportunity to provide this submission on behalf of our members and the business software industry.

About DSPANZ
Digital Service Providers Australia New Zealand is the gateway for the government into the dynamic, world-class business software sector in Australia and Aotearoa New Zealand. Our members range from large, well-established companies to new and nimble innovators working at the cutting edge of business software and app development on both sides of the Tasman.

DSPANZ supports the government in introducing mandatory guardrails for developing and deploying artificial intelligence (AI) in high-risk settings.

Many of our members agree that the government should take a more robust regulatory approach towards AI but that this approach should allow for international interoperability and innovation. Following our previous submission on safe and responsible AI, it is important to recognise the challenges that Digital Service Providers (DSPs) currently face when looking to leverage and invest in AI technologies.

With the proposals paper indicating that AI in employment processes can be considered high-risk, this submission provides feedback on AI in employment software, recognising that our members offer software products and services to support employers and employees, such as:

- Payroll
- Rostering, time and attendance
- Human resources
- Employee engagement

- Employee training
- Employee onboarding.

In summary, our feedback on the mandatory AI guardrails includes:

- We support the government following approaches taken by Canada and the European Union (EU) for defining high-risk AI systems to allow for global interoperability;
- DSPANZ prefers the principles-based approach to defining high-risk, acknowledging that a list-based approach may not keep pace with technological change and each of the underlying AI use cases;
- The mandatory guardrails must balance the need for transparency with enabling organisations to innovate and protect their intellectual property;
- DSPANZ supports options 2 or 3 for mandating the guardrails, but we recognise that the legislative approach could introduce conflicting requirements for DSPs who operationalise legislation driven by different government agencies.

DSPANZ welcomes the opportunity to provide further feedback on our submission. Please contact Maggie Leese for more information.

Yours faithfully,

Matthew Prouse,
President & Director
DSPANZ.

1. Do the proposed principles adequately capture high-risk AI? Are there any principles we should add or remove?
Please identify any:

- **Low-risk use cases that are unintentionally captured**
- **Categories of uses that should be treated separately, such as uses for defence or national security purposes.**

DSPANZ supports the government following the approaches taken by Canada and the European Union (EU) to develop the proposed principles for defining high-risk AI systems. Interoperability with these jurisdictions and others, such as the United Kingdom and the United States, will help to reduce the burden for Digital Service Providers (DSPs) and other organisations that must comply with differing approaches to regulating high-risk AI.

Recognising that the proposals paper highlights employment use cases as potentially high-risk, we suggest that high-risk within the employment space would result from uses that could cause non-compliance with industrial relations legislation. High-risk may include AI used in the following employment processes:

- Hiring
- Onboarding
- Rostering
- Human resources
- Dismissal.

Other uses, such as AI in employee engagement, may be considered lower-risk and unintentionally caught by the proposed definition of high-risk.

3. Do the proposed principles, supported by examples, give enough clarity and certainty on high-risk AI settings and high-risk AI models? Is a more defined approach, with a list of illustrative uses, needed?

- **If you prefer a list-based approach (similar to the EU and Canada), what use cases should we include? How can this list capture emerging uses of AI?**
- **If you prefer a principles-based approach, what should we address in guidance to give the greatest clarity?**

DSPANZ prefers the principles-based approach to defining high-risk as it could better adapt to emerging technologies and uses. We support the government drawing upon use cases, such as those we have identified above, to inform the supporting guidance they provide.

A list-based approach to defining high-risk would likely not keep pace with technological change. If a list is developed with the different high-risk use cases, it may not capture all of the underlying AI uses in those settings.

If a list-based approach is taken, we would support the inclusion of carve-outs, similar to those included in the EU, to provide additional considerations for whether AI use cases could be considered high-risk.

8. Do the proposed mandatory guardrails appropriately mitigate the risks of AI used in high-risk settings? Are there any guardrails that we should add or remove?
DSPANZ broadly supports the intent of the proposed mandatory guardrails. However, the need for transparency across AI systems raised in the guardrails must be balanced, enabling organisations to innovate and protect their intellectual property. For employment-related processes, ensuring that this balance will allow DSPs to continue providing seamless employment experiences in software will be critical.

Guardrail 6: Inform end-users regarding AI-enabled decisions, interactions with AI and AI-generated content
The notification requirements outlined under this guardrail could result in notification fatigue and end-users ultimately ignoring this information.

This guardrail should outline options that enable developers and deployers to provide streamlined approaches to informing and notifying end users to avoid notification fatigue and disrupting user experiences.

It will be important to consider how the proposed reforms to the Privacy Act around automated decision-making will be reflected in this guardrail and whether there will be any conflicting requirements.

Guardrail 7: Establish processes for people impacted by AI systems to challenge use or outcomes
We agree that DSPs should have processes for customers to raise issues or challenge outcomes when using AI in software.

DSPANZ recognises that DSPs provide software or services to their customers (businesses) who may have individuals as end-users (such as tax practitioners, clients or employees). It would be impractical for DSPs to engage directly with individuals impacted by AI use, given that their customers are the ultimate decision-makers about AI use and its outcomes.

The government should allow organisations a level of flexibility in meeting this guardrail and demonstrating their conformance, given the different types of end-users that may interact with a high-risk AI system and the most appropriate avenues to support them.

Guardrail 8: Be transparent with other organisations across the AI supply chain about data, models and systems to help them effectively address risks
We would like to reiterate our earlier feedback about striking a balance between transparency across AI supply chains and protecting intellectual property.

Guardrail 9: Keep and maintain records to allow third parties to assess compliance with guardrails
The government must address the following in the record-keeping requirements outlined under this guardrail:

- What records must be kept
- How long records must be kept

- What format should records be provided in when they are requested from relevant authorities
- Which relevant authorities can request records.

The requirement to provide detailed information in records should be balanced with protecting intellectual property.

Guardrail 10: Undertake conformity assessments to demonstrate and certify compliance with the guardrails
The government must define how often conformity assessments will be required and the exact process of this assessment.

If conformity assessments require independent assessments and there is no established market when the mandatory guardrails come into effect, they could involve significant costs, particularly for small to medium businesses.

If organisations regularly retrain or make changes to their AI systems, the requirement to produce a new conformity assessment each time could become burdensome and at high costs.

12. Do you have suggestions for reducing the regulatory burden on small-to-medium sized businesses applying guardrails?
We recognise that the record-keeping requirements and conformity testing obligation may create a regulatory burden for small to medium sized businesses. DSPANZ suggests that the government provides additional guidance and support for these organisations.

13. Which legislative option do you feel will best address the use of AI in high-risk settings? What opportunities should the government take into account in considering each approach?
DSPANZ would support the government implementing options 2 or 3 for mandating the guardrails.

However, we recognise that taking a sector-by-sector (or regulator-by-regulator) approach to introducing the mandatory guardrails may introduce conflicting requirements for DSPs who operationalise legislation driven by different government agencies to support tax, payroll, superannuation, business registry and eInvoicing processes in software. Depending on the products and services they offer, DSPs may interact with government agencies such as the Australian Securities and Investments Commission (ASIC), Australian Taxation Office (ATO), Department of Employment and Workplace Relations (DEWR), Fair Work Commission (FWC) and Fair Work Ombudsman (FWO). We recognise that these agencies could take a different approach to regulating AI in their respective sectors, ultimately impacting the DSPs operating across these processes.

While the legislative options set out ways to address some of the potential complications we have raised, DSPANZ recommends consulting further with different sectors to understand some of these challenges.

We also recommend that the government undertakes further consultation with industry once they have decided on the legislative option to allow for additional feedback on their approach.

16. Where do you see the greatest risks of gaps or inconsistencies with Australia's existing laws for the development and deployment of AI? Which regulatory option best addresses this, and why?

As DSPANZ has raised in our previous response to the safe and responsible AI consultation, many DSPs are looking at opportunities to leverage AI technologies. However, many DSPs view the current legislative environment as an investment barrier.

DSPs looking to leverage AI in tax, accounting and payroll services to prompt users about their regulatory obligations and help them avoid mistakes are currently being prevented by the *Tax Agent Services Act 2009 (TASA)* as they could be categorised as providing tax advice. Further, there is still uncertainty about the second tranche of changes to the *Privacy Act 1988,* making it difficult to know whether current investments in AI will fall on the right side of this future regulatory change.