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AI and the Board Monitoring Function: Overcoming Institutional Failures

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OUTLINE

01 Board's Monitoring Function
and Challenges

02 The Arrival of AI and its
Impact on Board Monitoring

03 The Future of Board Monitoring and
the Proposed Governance Framework

Human-Centric Approach to Corporate Governance

CONTEMPORARY CORPORATIONS LAW AND GOVERNANCE

KEY THEME

Address Institutional
Failures and
Accountability
Challenges

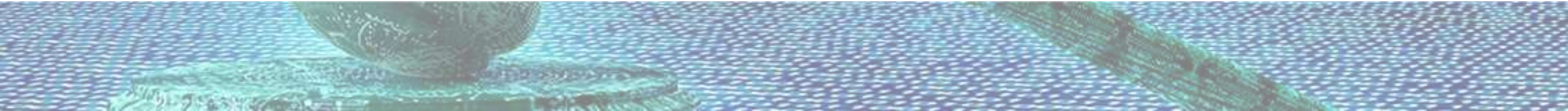
MAIN OBJECTIVE

Sound Corporate
Governance

PRIMARY TASK

of the Corporate Monitors

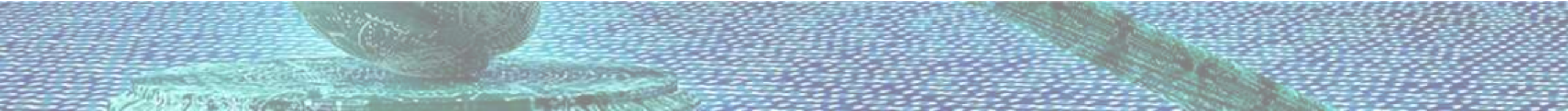
Supervision and
Management



A Difficult Task...

Together with guiding corporate strategy, **the Board is chiefly responsible for monitoring managerial performance and achieving an adequate return for shareholders, while preventing conflicts of interest and balancing competing demands on the corporation.** In order for boards to effectively fulfil their responsibilities, they must be able to exercise objective and independent judgement. Another important board responsibility is to oversee the risk management system and mechanisms designed to ensure that the corporation obeys applicable laws, including relating to tax, competition, labour, human rights, environmental, equal opportunity, digital security, data privacy and personal data protection, and health and safety.

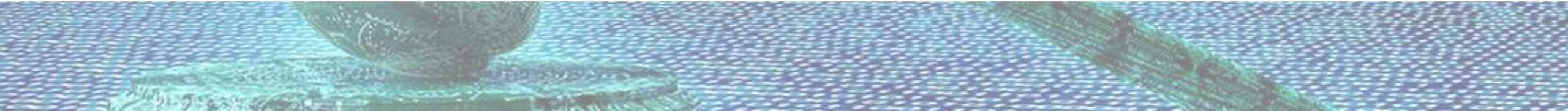
— G20/OECD Principles of Corporate Governance (2023) 34.



‘Monitoring’ Function

- Board – sets the overall strategy of the company; determining the company’s policies assessing and guiding performance; and overseeing the company’s financial operations.
- Must operate on a ‘fully informed’ basis. Board members should be satisfied that key corporate information and compliance systems are fundamentally sound and underpin the key monitoring role of the board.
- Monitoring includes continuous review of internal company structure to ensure that there are clear lines of accountability for management throughout the organisation. This should also include whether governance framework remains appropriate in light of material changes to size, complexity, business strategy, markets, and regulatory requirements.

Source: G20/OECD Principles of Corporate Governance (2023) 34-36



Potential Institutional Failures

Constraints in Time

Boards act through board meetings - 5 to 10 days a year is not enough to operate a large publicly listed company!
Phenomenon of 'overboarding'



Constraints in Information

Board reliant on executives for information and rarely has staff to assist it to get information directly. Directors may not know what information to request, making it difficult for them to monitor the corporation.



Constraints in Board Composition

Board of directors, whether consisting of executive or non-executive directors, tends to be highly reliant on remaining in the good graces of corporate executives.



Source: Melvin A. Eisenber, *The Structure of the Corporation: Legal Analysis* (Little Brown and Company, 1976)

Technology and the Human-Centric Approach

- The use of technology in assisting with monitoring functions is not new
- Question of mitigating human self-interestedness and inherent bias and shifting away from human-centric approach?
- What role for 'monitoring' facilitators/agents through technological means?
- How do we align monitoring functions and governance goals?



A conceptual image showing a human hand in a grey sweater sleeve holding a glowing blue wireframe mesh of a hand. The mesh is composed of many interconnected lines, giving it a digital, AI-like appearance. The background is a blurred office setting with a laptop and papers on a wooden desk.

The Arrival of AI and its Impact on Board Monitoring

Augmented and Automated Board Decision-Making

New Opportunities (*Board-Enhancing*)

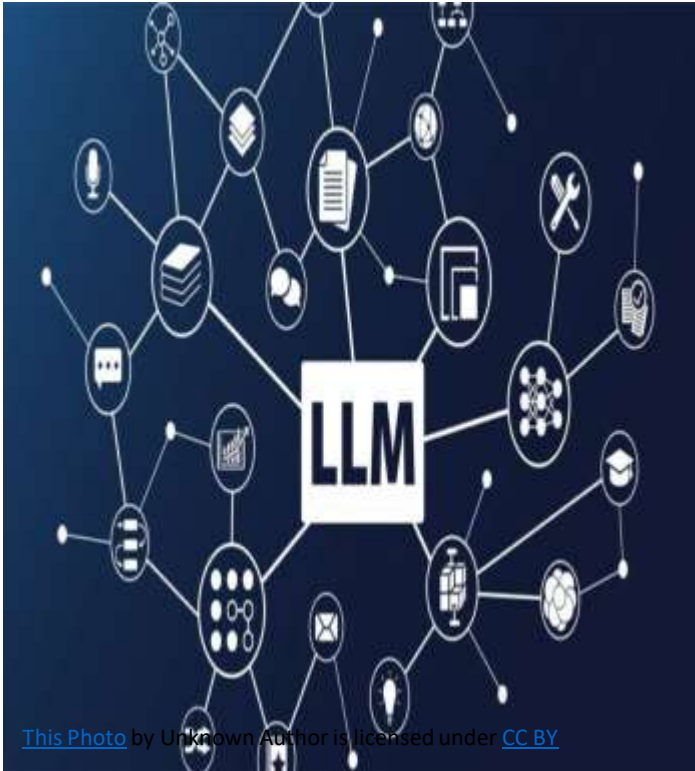
- Increasing efficiencies (addressing constraints on time - automating routine tasks;)
- Promoting more effective information coordination (addressing constraints on information – predictive and descriptive insights)
- Enhancing the expertise of members of the Board (addressing, to some extent, board composition constraints – in addition to time and information saving, development of Agentic AI)

AI as a Decision-Making Enhancement Tool

When applied to the Board of directors, so-called **‘human-in-the-loop’ AI**, raises questions about which humans should be assigned to monitor decisions augmented through AI and whether any particular skill or experience should be required (what we refer to as putting the **‘right-human-in-the-loop’**) and how we can ensure the humans monitor AI-based decisions effectively (what we refer to as putting the **‘human-in-the-loop-right’**).

Types of AI

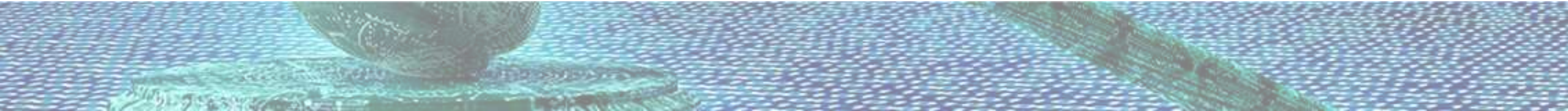
Large Language Models



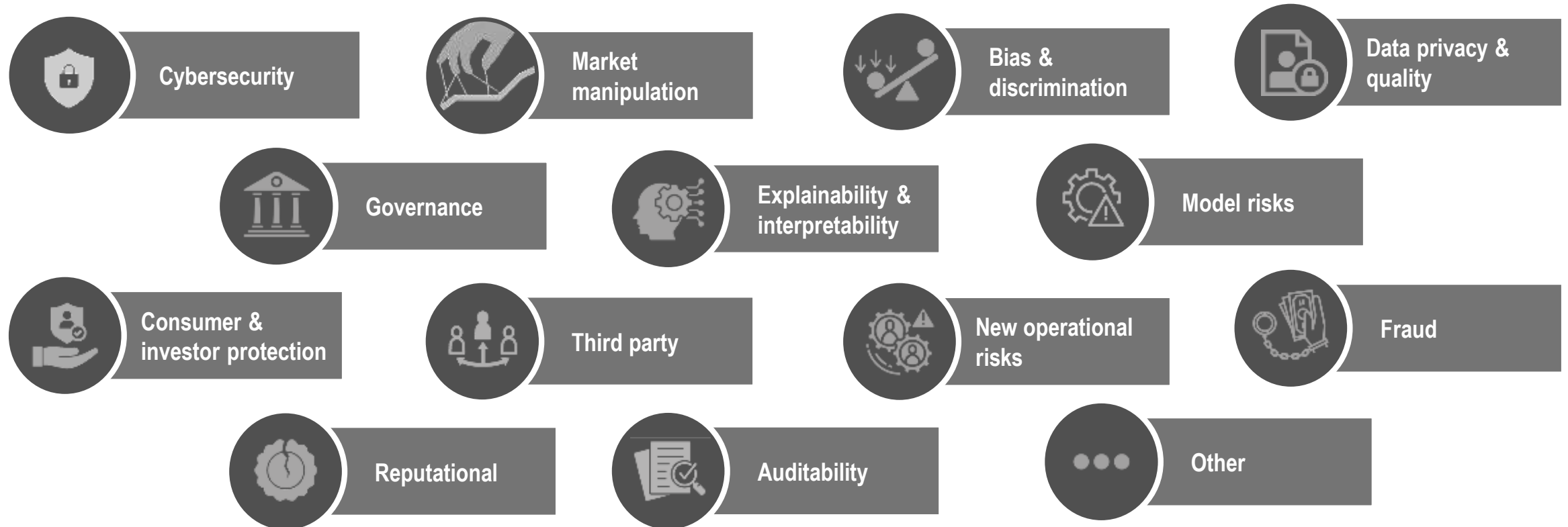
Generative AI



Agentic AI



AI Risks

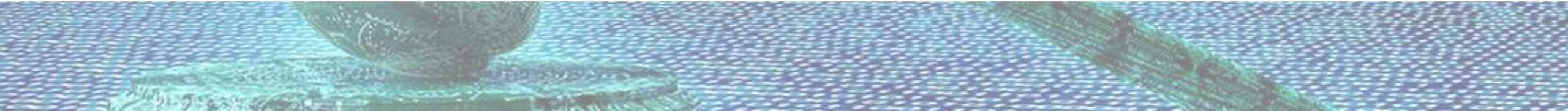


Source: OECD, REGULATORY APPROACHES TO ARTIFICIAL INTELLIGENCE IN FINANCE (September 2024), p. 17, Figure 1.6

Policy Approaches to AI

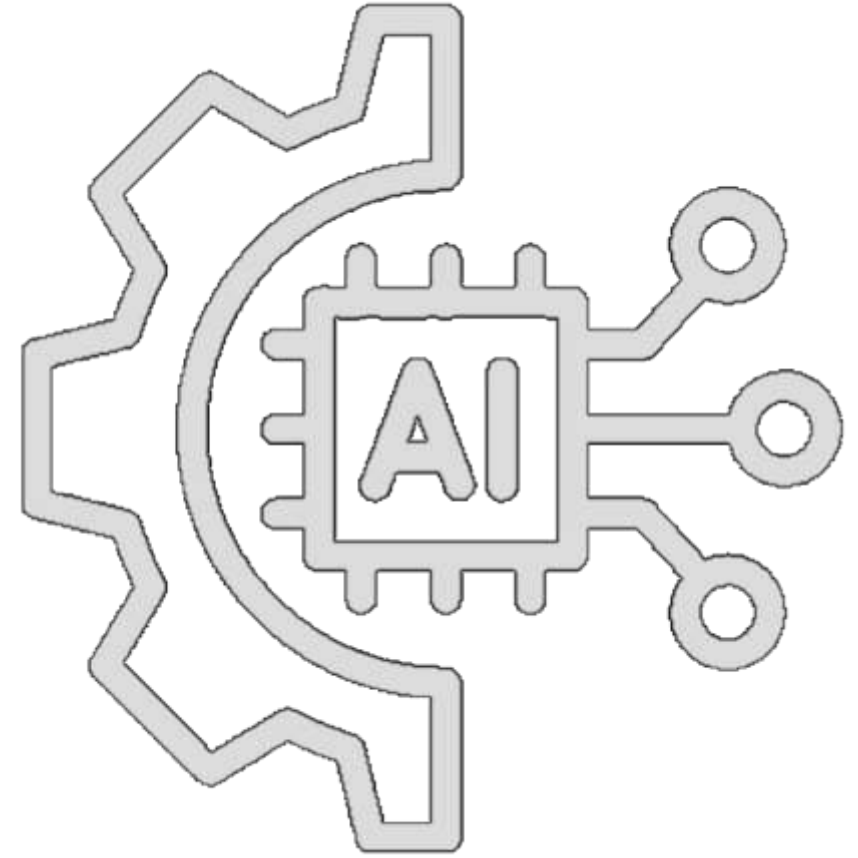
- Cross-sectoral AI legislation
- Binding and Proposed Rules that aim at sectors or certain types of activities
- Non-binding policy guidance that targets cross-sectorial activities
- Supervisory expectations released by regulators
- AI governance principles

Reference: OECD, REGULATORY APPROACHES TO ARTIFICIAL INTELLIGENCE IN FINANCE (September 2024), p. 21

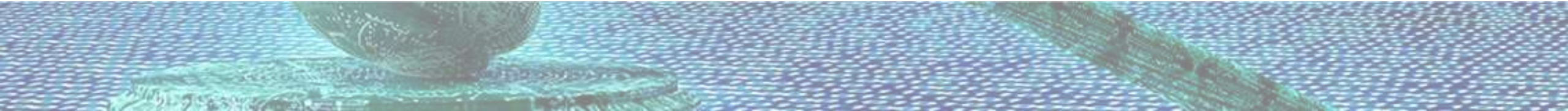


AI Governance

- AI governance refers to the norms, policies, laws, and institutions that shape and guide how AI is/should be built and deployed to promote good social goals.
- Binding or non-binding?



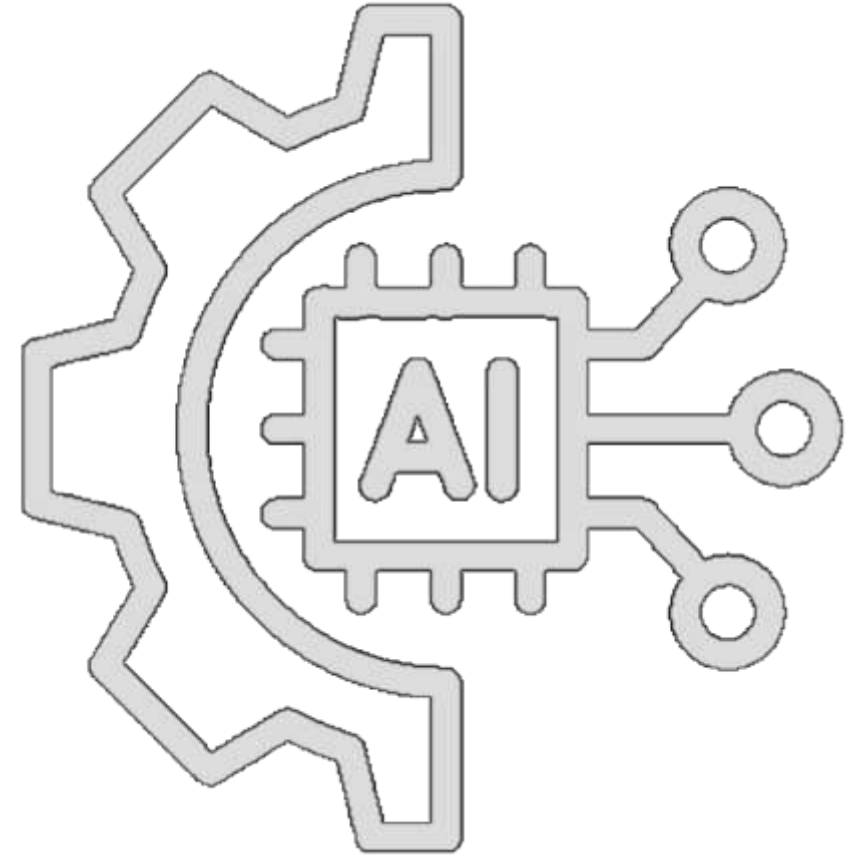
Reference: Allan Dafoe, *AI Governance: Overview and Theoretical Lenses* in THE OXFORD HANDBOOK OF AI GOVERNANCE, p, 21, 39 (2022)



AI Governance

OECD sets out a series of high-level principles to guide the design and implementation of AI systems consistent with current trends in corporate governance, including:

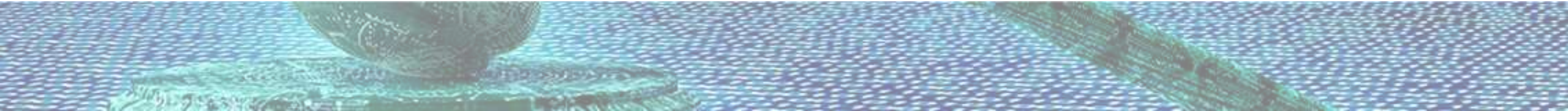
- inclusive growth, sustainable development and well-being;
- human rights and democratic values, including fairness and privacy;
- transparency and explainability;
- robustness, security and safety; and
- accountability.



Used as template for the development of AI governance. In Australia, the Department of Industry, Science, and Resources together with other research institutions proposed the adoption of *The Voluntary AI Safety Standard* (“AI Safety Standard”) in August 2024. Australia is also proposing mandatory AI guardrails for high-risk settings.

Lessons learned

- Require corporations to maintain accountability mechanisms and risk management systems.
- **Data governance, human oversight, model transparency, operational robustness** and **outcome fairness** are at the heart of the board's function as a corporate monitor.
- Ensure corporations are cognizant of climate change and sustainability and, in particular, the role of directors in monitoring a corporation's obligations on such matters.





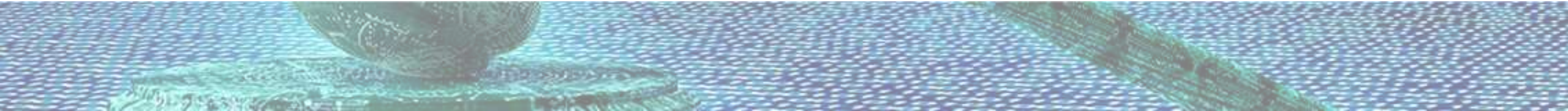
The Future of Board Monitoring?

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AI in the Boardroom and Accountability

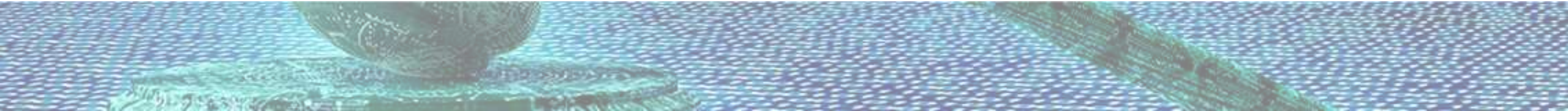
The use of AI itself as part of the systems adopted within a corporation may contribute to the attribution of fault directly to a corporation. Further, the reliance on AI, even if only taken as part of a broader group decision, can contribute to direct liability being imposed on the corporation. '[T]he concept of intention should be applied to a system as though the system, as a construct, were a natural person.'

— Productivity Partners Pty Ltd v Australian Competition and Consumer Commission; Wills v Australian Competition and Consumer Commission [2024] HCA 27, para 241.



Potential Considerations

- Depending on the legal framework of a particular jurisdiction, it may be possible for a non-human to be held directly liable for misconduct in a corporate setting. Depending on the status of the particular AI (or its controller), it may be found directly liable as may its controllers.
- Directors and officers may be liable as 'accessory' or in breach of their duties to the company if they permit a corporation to engage in conduct that contravenes the law and AI was a part of the corporate system that resulted in the violating conduct.
- Ensuring that corporate governance codes reflect what may be considered 'good corporate governance' is, therefore, increasingly important where AI may be part of a corporate system that contributes to decisions resulting in misconduct.
- Questions:
 - How do you balance need for accountability with non-human decisions?
 - If the legal framework establishes human oversight for accountability, can AI respond to institutional failures or will it create further failures?



Putting the Right Human in the Loop, the Right Way?

THREE INQUIRIES

1

Who is in the best position to deploy or supervise the deployment of AI solutions and what specific skill, experience or qualification do they need to effectively deploy AI in their functions?

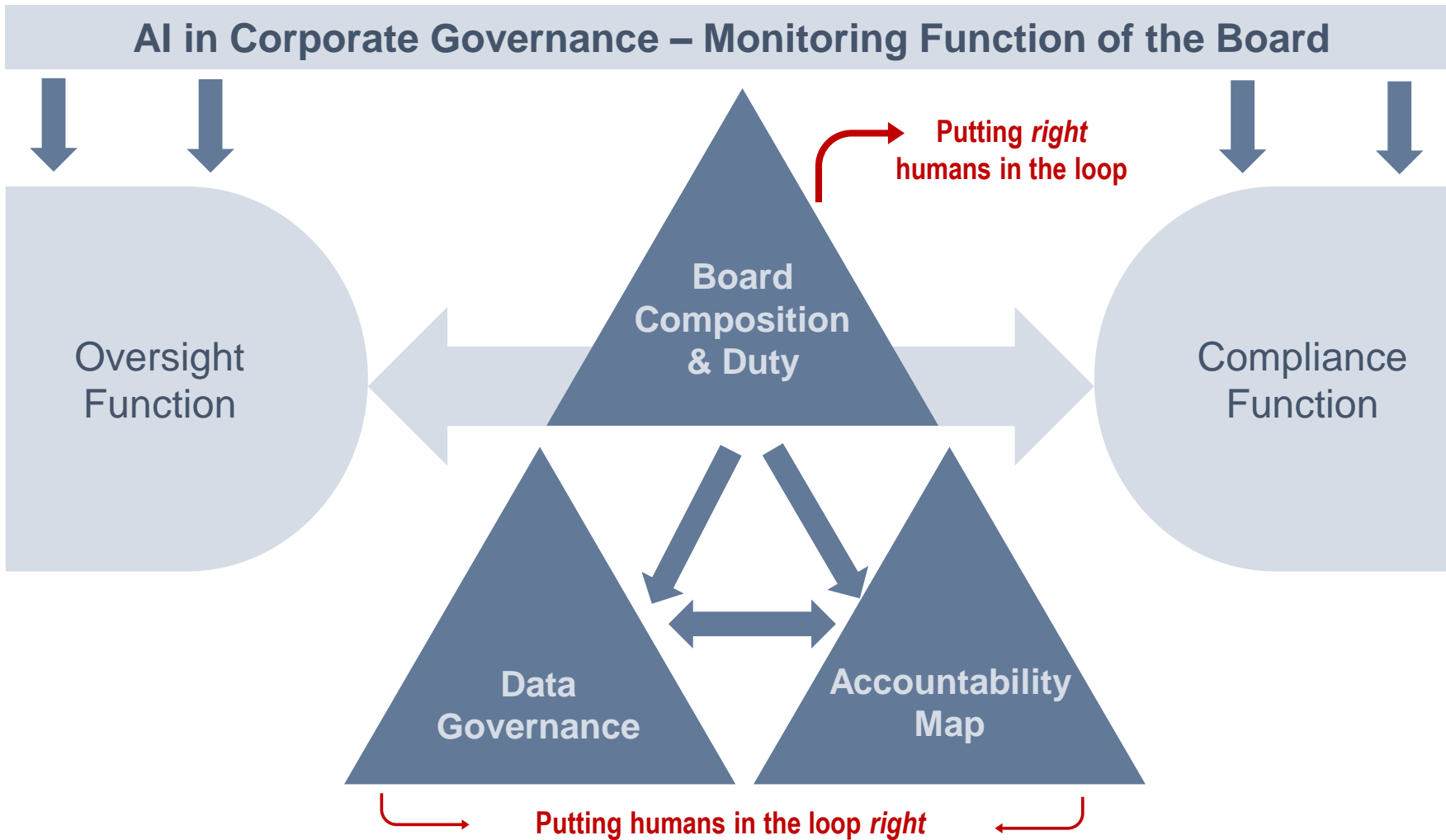
2

What rules are needed to ensure decision-making processes align with governance principles?

3

Would decision-making processes are different and would thus require different safeguards?

Proposing a Governance Framework





Thank you!

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