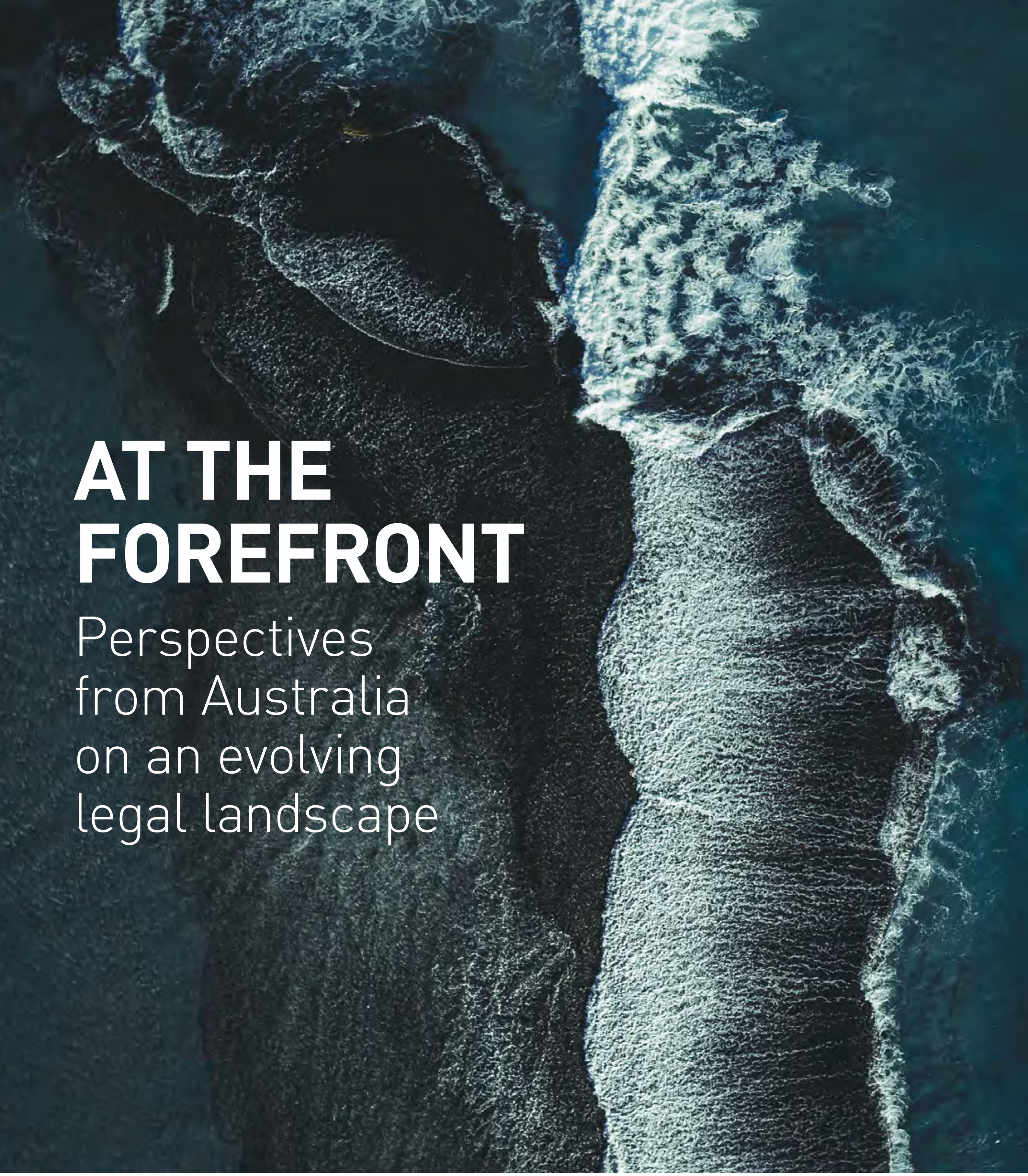

AT THE FOREFRONT

Perspectives from Australia on an evolving legal landscape

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Published September 2019

Foreword

The Australian market is undergoing a period of significant change.

This collection of insights from the team at Corrs covers many of the international trends as they impact on Australia, or in which Australia appears to be taking a first mover position.

Whether it is developments in distressed M&A and restructuring, reform resulting from the competition regulator's Digital Platforms Inquiry or the rise of regulatory intervention, understanding the issues at play is important for anyone with an interest in this market.

In 1963, JFK said "in a time of turbulence and change, it is more true than ever that knowledge is power."

This is undoubtedly still the case today.

We hope you enjoy reading this selection of articles which provide an Australian perspective on an evolving legal landscape.

Gavin MacLaren
Senior Partner and CEO

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When worlds collide: navigating M&A and restructuring in volatile global markets

Sandy Mak, Head of Corporate

Cameron Cheetham, Head of Restructuring, Insolvency and Special Situations

> *"Whenever there is change, and whenever there is uncertainty, there is opportunity."*
>
> *Mark Cuban, American businessman and investor*

In the current global market, very few things are clear other than that volatility and change are ever-present.

The economic tensions between the United States and China and the uncertainty regarding Brexit are but two of the factors that are currently casting a shadow over the global economy and impacting global growth forecasts far beyond the principal protagonists' borders.

There are few monetary policies that the central banking institutions of the developed economies have yet to deploy. Regardless, their collective economies continue to feel the strain, and there are no clear signs that these measures will ultimately have the desired effect within the required timeframe.

Australia is no exception. Record low interest rates are pushing investors to search for yield in non-interest bearing investments, and offering business the opportunity to refinance what is now considered to be expensive debt. Much to the dismay of the Federal Treasurer, Australian businesses have, generally speaking, failed to take advantage of current market conditions to fund investment.[1]

But while global and domestic market uncertainty presents risks, it also presents opportunities – particularly in the world where M&A and restructuring collide.

- **Positioning now for growth through acquisitions**

  In businesses where organic revenue growth is challenging, growth through acquisition is a sound alternative and, if done right, a fast way to grow revenue and reduce costs.

1 See the Hon Josh Frydenberg MP address to the Business Council of Australia, *Making our own luck – Australia's productivity challenge*, 26 August 2019.

Historically, a stagnant economy tended to reduce competition for assets, with the bulk of opportunities falling to buyers with stronger balance sheets and those who were confident in their ability to generate sustained profits. However, with the availability of cheap debt, all that should be set to change. Those that act with vision and anticipation of opportunities to come and position themselves to act quickly on opportunities with ready access to debt (or equity) funding will be in the driving seat. Now is the time for businesses with challenging revenue forecasts to act.

- **Take advantage of a buyer's market**

  The advantage of reduced competition is the additional comfort buyers are likely to be able to negotiate in transaction documentation. An increase in buyer bargaining power lends itself to more acquirer-friendly contractual provisions, such as earn-outs, escrows and robust non-compete provisions.

- **Consider 'loan to own' alternatives**

  In a distressed economy, debt can be an effective tool through which companies can continue to expand by alternative means, including the 'loan to own' market. The traditional mechanism of acquiring equity to take control of a business should be considered alongside lateral structures such as debt recapitalisations (including debt for equity swaps) and smaller equity stakes to facilitate subsequent exits.

  There are a number of examples in recent times where debt has been used as a Trojan horse. Corrs acted for CBS in its acquisition of the secured debt of Network Ten and the ensuing debt for equity swap through a deed of company arrangement that ultimately resulted in equity control of Network Ten vesting in CBS.

- **Risks and opportunities in public M&A**

  In Australia, a curious dichotomy appears to be emerging amongst listed entities. As a result of the hunt for yield by investors, the share price for listed entities with stable businesses, strong cash flows and generous dividend policies continues to steadily increase – irrespective of the business' fundamentals.

  By contrast, businesses with less stable balance sheets have been buffeted by the global market uncertainty, thus creating both difficulties and opportunities in public M&A transactions. Potential acquirers of solidly performing listed entities need to act quickly and decisively to avoid the ever-shrinking premium in a takeover price, while companies with struggling share prices should be reinvigorating defence strategies to protect themselves from opportunistic acquirers.

- **Opportunities to refinance**

  With interest rates currently at record low levels in Australia, buyers with a healthy balance sheet (or those that have the foresight to anticipate potential debt funding) have a window of opportunity to improve their competitive position before credit markets invariably tighten.

  Anticipating the need for debt finance and taking action in advance of an impending downturn could give acquirers an edge to build up a source of capital before that opportunity is lost. Similarly, now is the time to raise equity in an environment where investors are hungry for returns – pre-emptive capital raisings for acquisitions (or simply to improve a company's capital position) should be on every business' radar.

> “While global and domestic market uncertainty presents risks, it also presents opportunities – particularly in the world where M&A and restructuring collide.”

New directions in Australian antitrust enforcement in digital markets

Mark McCowan, Head of Competition

The final report of the Australian Competition and Consumer Commission (ACCC) Digital Platforms Inquiry (DPI) foreshadows a sustained escalation in ACCC scrutiny of digital platforms.

There are strong indications, however, that the ACCC's attention is going to be focused not on market power (dominance) cases, but on consumer law enforcement and less conventional causes of action. For the global platforms and other digital businesses operating in Australia, the threats will be no less significant, and the ACCC's approach will present some unique challenges.

In some respects, the final report of the DPI was anti-climactic. After an 18-month inquiry, the report was lacking in substance in some areas – no doubt reflecting the huge breadth of its Terms of Reference which traversed competition, consumer, media and privacy laws across platform, traditional media and digital advertising markets. The ACCC uncovered no new anti-competitive conduct justifying either prosecution or further investigation. Instead, it referenced European Commission investigations as the basis for both concerns about potential discrimination against rivals in adjacent markets and seeking to replicate in Australia interim remedies (related to mobile search app and browser choice) offered by Google in Europe. The final report also defers much of the difficult policy-making by recommending no fewer than six separate protocols or codes of conduct still to be developed.

What is clear from the final report is that sustained scrutiny by the ACCC – including through a new dedicated digital platforms branch – is the new normal for Facebook, Google and other large digital businesses operating in Australia. It is also clear that the ACCC intends to be an important participant in both the escalating global regulatory investigation of the major digital platforms and the associated international policy debate.

Beneath the surface of the DPI final report, there are clear signs that the ACCC's continuing work in relation to digital platforms will not simply be more of the same. Rather than focus on market power or dominance cases (complex cases in which the ACCC's record has been mixed in recent years), it is likely to pursue a range of less conventional enforcement approaches as it seeks to change common practices in digital markets.

- First, while the ACCC was apparently careful to avoid any perception of a 'land grab', the Government's response to the DPI final report may well result in broader authority being delegated to the ACCC. The ACCC's recommendations propose granting a range of additional oversight and enforcement responsibilities to other regulators, including the Australian Communications and Media Authority and the Office of the Australian Information Commission, that are not natural repositories of broad enforcement obligations of that sort.

  The final report also reflects a confident and assertive ACCC that is very comfortable analysing issues outside the scope of its core competition and consumer law mandate. In that context, it is foreseeable that the Government's response to the final report may reorganise the institutional architecture, resulting in the ACCC assuming ever-broader responsibilities and powers.

- Second, irrespective of future reforms, the ACCC regards data privacy as a consumer law issue and will use existing consumer laws to prosecute matters that are fundamentally privacy concerns. A prominent theme throughout the final report is the interconnection between data privacy, competition and consumer law issues – indeed, the final report begins with a large Venn diagram to illustrate the point.

  Three of the four new ongoing investigations disclosed in the final report relate to whether representations made by digital platforms about data privacy issues contravene consumer laws. These cases are likely to involve the ACCC relying on arguments relating to consumer expectations of platforms' handling of their data, default biases, the use of bundled consents and click-wraps, and the extent to which consumers read and engage with online terms and policies – all issues discussed at length in the draft report. All indications are that the ACCC will continue to test the limits of its consumer law authority to drive change in standards of online communication, disclosure and consent.

- Third, a new prohibition on 'unfair practices' is being sought aggressively by the ACCC and is likely to expose a range of practices to ACCC action. There are various subtle forms of conduct by global platforms to which the ACCC and other regulators object but that do not fit easily into existing prohibitions or conventional theories of harm. They include, for example, offering terms on a take-it-or-leave-it basis, changing terms without notice, collecting data under vague consents, requiring the provision of unnecessary information, implementing commercial practices that enhance network effects or increasing switching costs and providing distorted information to consumers making product or consent decisions.

  In Europe, there is greater potential for novel 'exploitative' abuse of dominance theories (as seen in the German competition regulator's February 2019 finding against Facebook's data collection practices). However, such conduct is difficult or impossible to fit within Australian market power laws. The broad prohibition on unfair practices sought by the ACCC would side-step any requirement to prove market power or an anti-competitive purpose or effect, and allow the ACCC (and Courts) to make subjective judgments about the fairness of particular conduct. In that context, the proposed unfair practices prohibition is much more than a modest extension of existing laws voiding unfair terms in standard form contracts, and will likely lead to a substantial escalation in ACCC enforcement action in relation to a broad range of conduct.

- Fourth, the DPI final report reveals a willingness to entertain radical solutions or remedies, and expressly identifies further work for the ACCC in relation to data portability as a way to enhance competition in digital markets. What is perhaps of most concern for digital businesses is that the ACCC already has statutory authority for a data portability regime that could be readily applied to digital platforms (with only a Ministerial designation).

  In particular, the ACCC is the lead regulator in relation to the 'Consumer Data Right' regime, which is initially intended to allow consumers to transfer their banking and then energy data to alternative providers to facilitate price comparison, switching and innovation. In the DPI final report, the ACCC states that it will consider the benefits of applying the Consumer Data Right to digital platforms in the course of its ongoing work in relation to data portability. Given the stridency of the ACCC's conclusions around platform power, and with an existing policy framework for data portability already operating, change in this area may arrive much sooner than many expect.

The thin edge of the wedge? Legal professional privilege developments in the Australian tax sector

Rhys Jewell, Head of Tax

Mark Wilks, Head of Commercial Litigation

Legal professional privilege (or client legal privilege, as it is also known) is considered a sacrosanct feature of the relationship between a lawyer and their client. It is also a fundamental tenet of the Australian legal system and its effective administration, which can only be abrogated by legislation drafted in the clearest of terms.[1]

Recent developments in the Australian tax sector relating to legal professional privilege should be monitored for their potential to impact the broader narrative regarding the privilege in Australia. The pertinent question is – are these developments the thin edge of the wedge?

In March 2019, Australia's Commissioner of Taxation announced that the Australian Taxation Office (**ATO**) would take a tougher stance on challenging claims of legal professional privilege. This was in the context of the Commissioner suggesting that some legal practitioners may be misusing the privilege by making blanket claims over large volumes of documents requested by the ATO in order to conceal contrived tax arrangements.

Naturally, Australian tax lawyers were concerned by the position articulated by the Commissioner, and questioned whether it should be interpreted as a signal that the ATO would seek to curtail the privilege. In today's business environment, where communication between lawyers and their clients is often quick and informal (e.g. via email, instant messaging and other social media platforms) and therefore voluminous, this concern is heightened.

The Commissioner's comments coincided with the hearing of proceedings in *Glencore International AG & Ors v Commissioner of Taxation* [2019] HCA 26 (14 August 2019) (***Glencore***) by the High Court of Australia. In that case, the Glencore plc group sought an injunction restraining the ATO from making any use of certain documents amongst the so-called

1 *Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

'Paradise Papers', which were said to have been stolen from Bermudan law firm Appleby in a cyber-attack and leaked to the global press.

The Court noted that whilst there was no doubt the documents in question were subject to legal professional privilege, they were already in the public domain and in the possession of the ATO. The Court unanimously held that the privilege is only an immunity from the exercise of statutory powers which would otherwise compel the disclosure of privileged communications. In other words, the privilege can only be used as a defensive 'shield' rather than as a 'sword' that could be pleaded as a cause of action.

After the Commissioner's statements and the High Court decision in *Glencore*, the ATO has stated that it fully supports the appropriate use of the privilege, but has also suggested that this needs to be balanced by the ATO being able to review transactions without having critical evidence withheld.

Interestingly, and in contrast to any suggestion that legal professional privilege should be curtailed, it was not so long ago that the Australian Government considered a proposed statutory privilege to shield certain tax advice from the information-gathering powers of the Commissioner. This proposal, which may have been extended to include communications between taxpayers and non-lawyer tax advisers such as accountants, has now been shelved.[2]

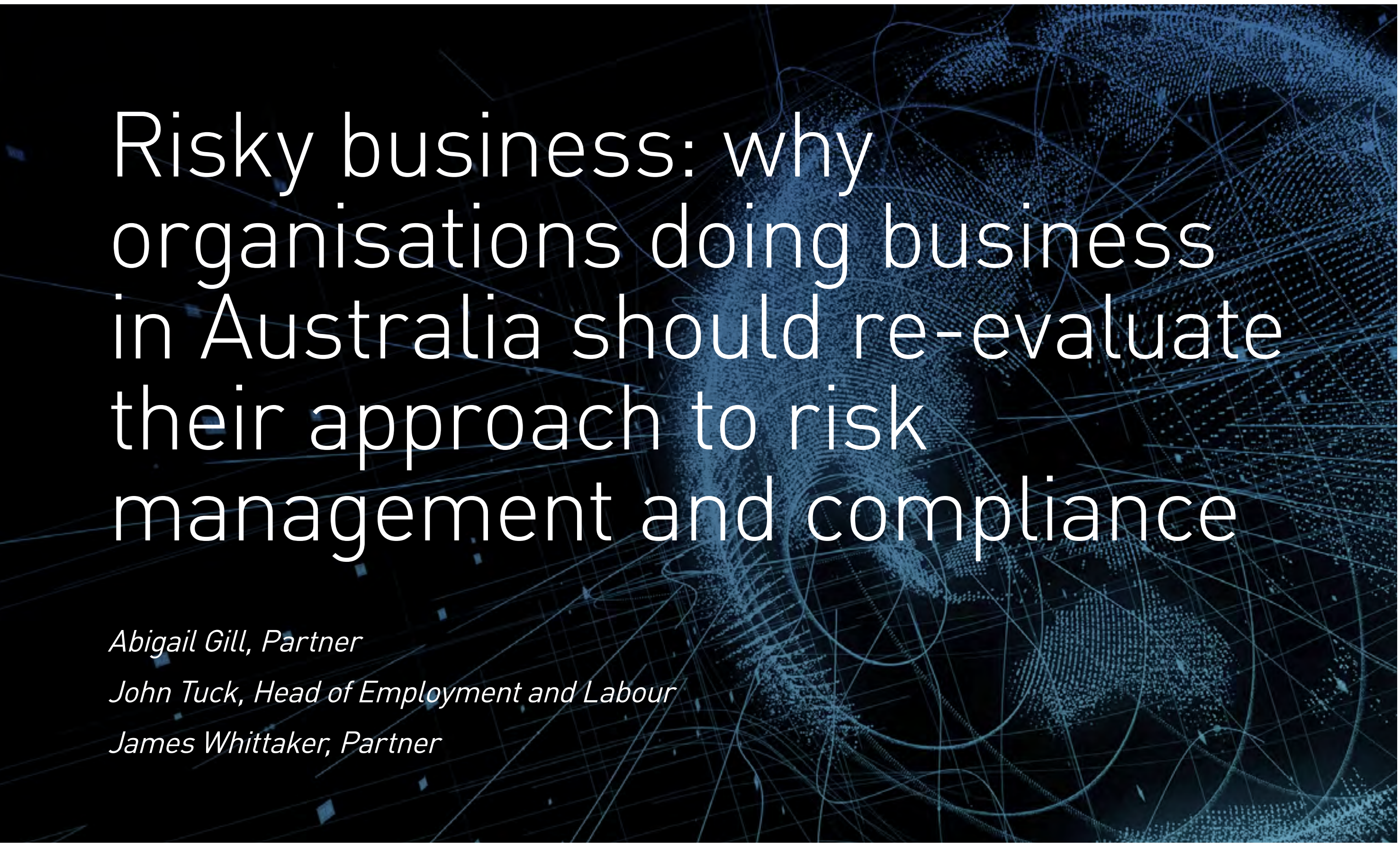
It is against this backdrop that the Law Council of Australia is currently working with the ATO to develop a new protocol to help avoid unnecessary and protracted disputes over claims of legal professional privilege. The proposed protocol will provide a set of 'best practice' guidelines and procedures for managing claims of privilege in response to information requests from the ATO, particularly where those requests potentially capture large volumes of documents and other communications. The challenge will be finding the right balance between providing the ATO with information to which it is legally entitled and preserving the confidentiality of communications between taxpayers and their lawyers.

The ATO is only one of the regulators in Australia with wide-ranging statutory information-gathering powers. The Australian Securities and Investments Commission (**ASIC**) and the Australian Competition and Consumer Commission (**ACCC**) are also currently conducting a large number of very significant investigations. ASIC has made it clear in some of those investigations that it requires claims of privilege to be established to a very high degree of particularity. In the post-*Glencore* environment, it seems that at least the ATO (and likely other regulators) are ready to vigorously test claims of privilege, particularly if the provenance or confidentiality of the underlying communication is in doubt.

Moving forward, it is likely that the ATO and other regulators will not be satisfied with simple blanket claims of privilege that rely on general descriptions of how the documents meet the relevant test for establishing privilege. As lawyers charged with asserting, and then establishing, claims for privilege on behalf of our clients, we have a responsibility to ensure that our clients are able to meet the relevant evidentiary burden when the privilege is claimed – rather than if and when those claims are challenged.

> “Recent developments in the Australian tax sector relating to legal professional privilege should be monitored for their potential to impact the broader narrative regarding the privilege in Australia.”

2 See Department of Treasury, *Privilege in relation to tax advice* (Discussion Paper, April 2011).



Risky business: why organisations doing business in Australia should re-evaluate their approach to risk management and compliance

Abigail Gill, Partner

John Tuck, Head of Employment and Labour

James Whittaker, Partner

Corporate governance, risk management and compliance have attracted considerable attention in Australia over recent months.

Following a number of developments – including increased external scrutiny of corporate practices and new laws enhancing private sector whistle-blower protections – organisations with corporate activities in Australia cannot afford to sit back, rely on past practices and hope that it will all blow over: the time for re-evaluation is now.

Recent developments that are driving many organisations to reassess their culture and the robustness of their internal policies and processes include:

- external scrutiny of corporate practices following the Financial Services Royal Commission and an escalating emphasis on the management of non-financial risks;
- the adoption of a 'why not litigate' stance from the corporate regulator, the Australian Securities and Investments Commission (**ASIC**);
- increasing accountability under vulnerable worker, labour hire licensing and modern slavery laws, with a name and shame approach from the regulators;
- the appetite of litigation funders in class actions; and
- new laws enhancing private sector whistle-blower protections and a growing appetite for law reform targeting corporate conduct.

The heightened focus on corporate governance, risk management and compliance has been driven partly by the findings of the recent Financial Services Royal Commission, which observed that 'effective leadership, good governance and appropriate culture' are 'fundamentally important'. The Commissioner, the Hon Kenneth Hayne QC, recommended that regulators closely scrutinise the risk management policies of financial service providers.

In the wake of the Commission, Prime Minister the Hon Scott Morrison MP (who was Treasurer at the time) indicated that the Government would take action to reduce the perceived 'lack of accountability' in large corporations. It is likely that legislative change in the near future will place a greater emphasis on the adequacy of an organisation's internal compliance procedures in identifying and mitigating risks that arise under its operating model.

ASIC is proactively pursuing high deterrence enforcement action via the newly established Office of Enforcement and a war chest to pursue its mandate to accelerate court-based enforcement matters. Historically, vicarious liability and Part 2.5 of the *Criminal Code* (Cth) (which extends liability for Criminal Code offences to corporations, equating the intentions of a corporation with its 'corporate culture') have been the predominant methods of determining whether a corporation can be held criminally responsible in Australia. However, there is a growing consensus that these models of liability are insufficient and a company's criminal responsibility should be tied to the effectiveness of its internal policies.

A similar trend has been observed in other Western democracies. Given the success of the United Kingdom 'failure to prevent' model for bribery and tax evasion offences, the UK Serious Fraud Office has argued that it should be extended to all corporate economic offences. The UK Treasury Committee has echoed this submission and is currently pushing for legislative reform.

In Australia, the recent Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 sought to introduce a 'failure to prevent' bribery offence, modelled on the approach under the UK *Bribery Act*. If enacted, this offence will impose strict liability on corporations for bribery offences committed by an organisation's 'associates', unless the corporation is able to show it had 'adequate procedures' in place to prevent the crime. The Bill would also introduce a Deferred Prosecution Agreement scheme. The Commonwealth Attorney-General considered these reforms necessary to 'encourage corporations to adopt adequate compliance measures'. Though the Bill lapsed in the Senate because of the 2019 Australian federal election, it seems likely the re-elected Government will seek to re-introduce it.

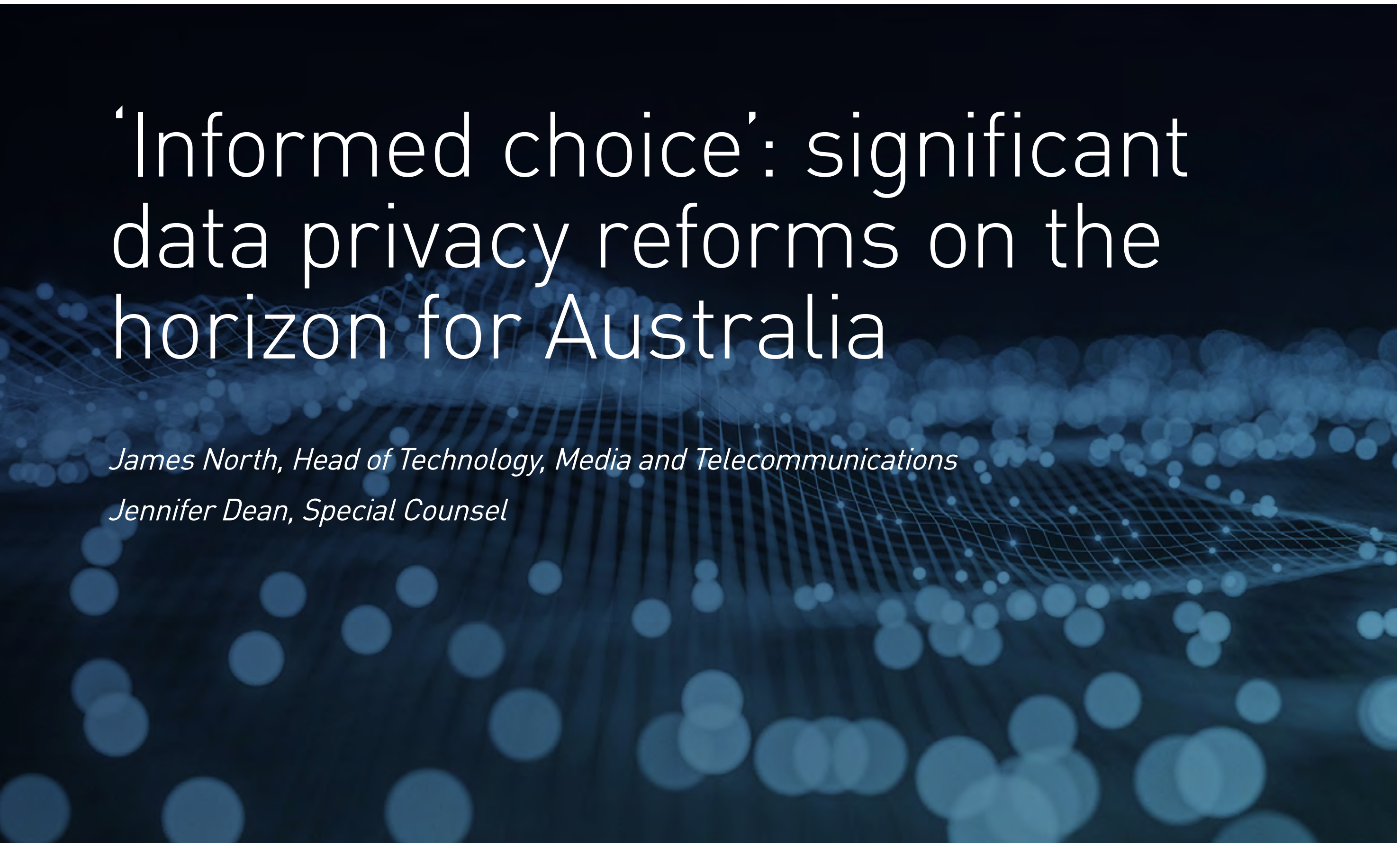
The Federal Government has also asked the Australian Law Reform Commission to review the nation's corporate criminal responsibility laws, with the goal of creating 'a simpler, stronger and more cohesive regime'. Australia's enforcement track record for corporate criminal offences has been very low to date. This review raises a real prospect that Australia will pursue a similar legislative framework to the UK for a much broader range of corporate economic offences.

There is also a heightened environment of identifying and informing on wrongdoing. After several years of consultations, committee hearings and draft proposals, long foreshadowed reforms to Australia's private sector whistle-blower regime were passed on 19 February 2019.[1] The range of matters which may be the subject of a protected disclosure under the Act is very broad, triggering obligations to protect confidentiality and rights to seek compensation for retaliation. Organisations are finding it challenging when scoping the detail which will be required to satisfy the legislative requirement for a whistle-blower policy. ASIC has published very detailed draft guidance, which is currently the subject of consultation.

These reforms impose a significant compliance burden, and we think there is an insufficient appreciation of the challenges affected organisations have to address. Organisations will face penalties if they get this aspect wrong in practice. As importantly, an entity's ability to maintain stakeholder confidence is enhanced considerably by pinpointing and resolving internal weaknesses before this information becomes public.

Now is also an opportune time for organisations with activities in Australia to consider holistically how they encourage people to speak up, how they respond when issues are raised and how they maintain confidence in these processes after an allegation is substantiated.

1 *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth).



‘Informed choice’: significant data privacy reforms on the horizon for Australia

James North, Head of Technology, Media and Telecommunications

Jennifer Dean, Special Counsel

Following its recent detailed examination of the functioning of Australia’s digital economy, the Australian Competition and Consumer Commission (ACCC) has released its Digital Platforms Inquiry (DPI) Final Report.

The ACCC’s recommendations are wide ranging, and include a series of proposals relating to data privacy which, if implemented, would have broad impacts across the entire economy and significant implications for global businesses that deal with Australian consumers.

We also see the potential for some unintended adverse outcomes for consumers.

The case for reform

The primary focus of the DPI was digital platforms and the media. Digital platforms typically operate under a distinct business model providing services to consumers for zero monetary cost in exchange for their attention and use of their data. The platforms then ‘monetise’ that data by selling targeted advertising, from which they earn the majority of their revenue.

This business model poses some specific challenges in terms of data privacy, but the ACCC makes a case for ‘economy-wide’ reforms, citing a number of other sectors with data practices it considers to be similar, including financial institutions, telecommunications service providers, retailers offering rewards schemes, airlines and media businesses.

Concerns regarding current practices

It is fair to say that Australian data privacy regulation has not kept pace with the multiple ways in which businesses collect, use, share and deal in data as part of the digital economy. For the ACCC, however, this is not only about privacy, but also consumer protection.

In its analysis of consumer welfare, the ACCC places significant weight on consumer survey data which indicates a strong consumer preference for having control over the data collected about them (especially location data and internet browsing data) and how it is used and disclosed. While these results are hardly surprising, what the surveys do not appear to address is whether consumers value this control more than some of the benefits that access to data drives (e.g. improvements to the quality of services or the ability to offer services for free).

The ACCC is highly focused on the importance of consumers being able to make 'informed choices' about the handling of their data. Some of its key findings in this context include:

- Bargaining power imbalances and information asymmetries between digital platforms and consumers create inherent difficulties for consumers in accurately assessing the current and future consequences of providing their user data.
- Consumer consents using click-wrap agreements with take-it-or-leave-it terms that 'bundle' a wide range of consents mean that consent is not truly informed or voluntary.
- Many privacy policies are long, complex, vague and difficult to navigate.

Key recommendations

Most of the ACCC's recommendations would bring Australian privacy law into closer alignment with the European Union General Data Protection Regulation (**GDPR**). However, the ACCC's recommendations regarding consumer consent appear to be stricter than the GDPR in some respects. The ACCC's key recommendations are:

- **Strengthened protections in the Privacy Act (in line with the GDPR)**. A range of amendments are intended to broaden the definition of 'personal information' to encompass technical data (such as location data and IP addresses) and impose more prescriptive notification requirements at the time of collection.
- **Strengthened consent requirements in the Privacy Act.** These would require consumer consent for any collection, use or disclosure that is not necessary for the performance of a contract to which the consumer is a party (with some limited exceptions). Significantly, the ACCC does not recommend adoption of the GDPR exception for use or disclosure for the 'legitimate interests' of the collector. Separately, it has recommended that valid consent must be clear, affirmative (i.e. default settings should not allow collection and processing), specific (i.e. consents should not be bundled), unambiguous and informed.
- **A prohibition against unfair contract terms.** The ACCC has recommended that unfair contract terms be prohibited and not just voidable, meaning that civil pecuniary penalties would apply to their use. This could add significantly to the compliance burden for businesses contracting with Australian consumers and small businesses.
- **A direct individual right of action for an interference with privacy and increased penalties.**
- **A new Privacy Code specifically for digital platforms.**
- **A statutory tort for serious invasions of privacy.**
- **A prohibition against certain unfair trading practices (beyond unfair contracting).**

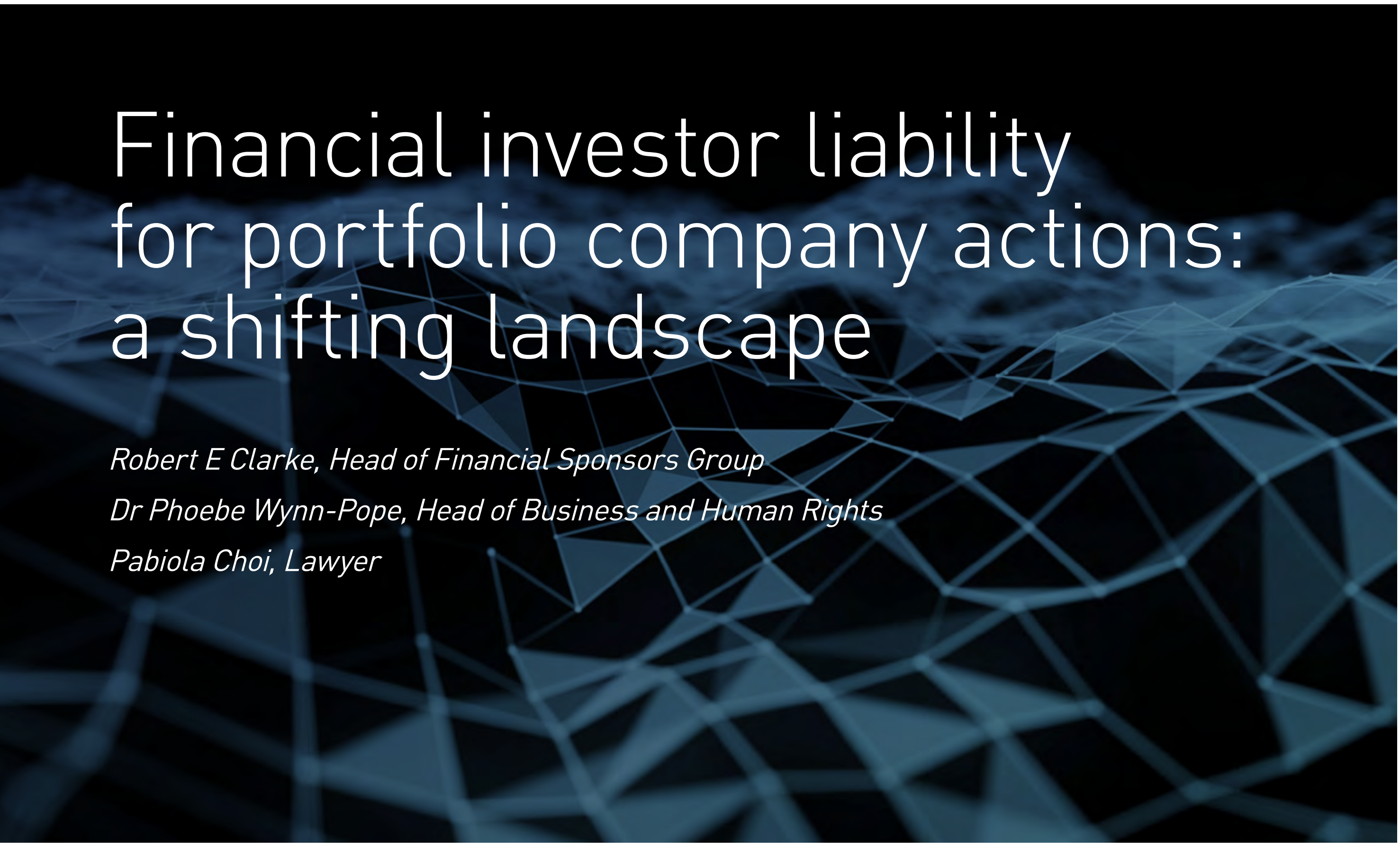
What's ahead?

Global convergence towards GDPR standards means that the ACCC recommendations that align with the European privacy regime are unlikely to impose significant additional regulatory burdens on the majority of businesses operating in Australia. However, the recommendations relating to consent, which are stricter than the GDPR protection standard, are likely to present a greater compliance challenge. In particular, when coupled with unbundling consents, more stringent consent requirements could present real IT system challenges, with systems needing to be able to record and implement diverse consent patterns on an individual consumer level based on the particular services acquired.

Further, both the consent recommendations and the proposed digital platforms privacy code arguably raise some fundamental issues in relation to the way digital platforms operate. The ACCC has acknowledged that data collection drives the ability to offer valuable services without charge and to improve those services over time. In an individual case, much of the data collected may not be necessary for the provision of the particular digital service a consumer is receiving. However, the potential cumulative impact of successive decisions by consumers to refuse consent for such data collection (or a simple failure to adjust mandated default settings which would prevent the collection) has not been addressed by the ACCC, either in terms of quality of service or the ability to offer services at no charge.

Perhaps the key takeaway from the data privacy sections of the DPI Final Report is that the ACCC does not view data privacy as an issue solely for privacy regulation – instead, it is thinking about it as a consumer issue that may equally be addressed under the Australian Consumer Law.

Australian privacy law reform is perhaps inevitable. In line with other jurisdictions, such as the US and Germany, we also expect to see the ACCC pursue enforcement action under competition or consumer protection legislation to address data privacy issues.



Financial investor liability for portfolio company actions: a shifting landscape

Robert E Clarke, Head of Financial Sponsors Group

Dr Phoebe Wynn-Pope, Head of Business and Human Rights

Pabiola Choi, Lawyer

The legal, political and societal assessment of parent responsibility for the actions of affiliated organisations is changing in many parts of the world, including Australia.

Liability is no longer restricted to the typical corporate/parent-subsidiary relationship – it can now extend to financial sponsors and the portfolio companies they invest in (and often control). As the landscape continues to shift, financial investors must come to terms with the risks of controlling entity liability.

For many years, Australian courts have steadfastly upheld the sanctity of the *Salomon* principle,[1] whereby a corporation is considered to have a separate legal personality, rights and obligations to its shareholders.

As a result, 'piercing the corporate veil' (or in other words, when a corporation's shareholders are held personally liable for that corporation's actions or debts) continues to require something akin to a sham group holding structure. There are, however, two ways in which the consequences of the *Salomon* principle have been altered **without** piercing the corporate veil – liability in the tort of negligence pursuant to a duty of care owed by a controlling entity to third parties dealing with affiliated entities, and legislative intervention.

Parent company duty of care

Australian courts have previously held that a parent company owes a duty of care to an employee or third party affected by the activities of the parent's subsidiary (and is liable if that duty is breached).[2] Albeit few in number, these decisions have turned broadly on the questions of whether the parent exerted a sufficient degree of control or influence over its subsidiary and whether the harm to the claimant was reasonably foreseeable.

Interestingly, control was also a key factor in a recent UK Supreme Court case determining the scope of parent company liability.[3] In April 2019, the UK Supreme Court unanimously held in *Vedanta* that

1 See *Salomon v Salomon* [1896] UKHL 1.

2 See *Barrow v CSR Ltd* (Unreported, 4 August 1988, Supreme Court of Western Australia, Rowland J); *CSR Ltd v Wren* (1997) 44 NSWLR 463; *CSR v Young* (1998) Aust Tort Reports 81-468.

3 See *Vedanta Resources plc and another v Lungowe and others* [2019] UKSC 20.

there was an arguable case that a UK-domiciled parent company had a duty of care to third parties harmed by its foreign subsidiary's activities. A key consideration for the Court was the parent's adoption and communication of group-wide policies on environmental, social and corporate governance (**ESG**) – by advocating and promoting adherence to high standards, the parent created a duty of care to those impacted by affiliate operations.

A survey of the relevant case law across a number of Commonwealth jurisdictions also suggests that the category of situations where a controlling entity has a duty of care for affiliate operations is not closed. Driven by a combination of 'deep pockets' and the ability to seek legal remedy in the controlling entity's home jurisdiction, it seems novel situations will continue to be presented to the courts.

Considerations for financial investors

As the impact of ESG matters on financial investments continues to grow, it is becoming increasingly necessary for financial investors to re-examine the nature of controlling entity and affiliate liability.

Financial investors should carefully consider the following:

1. Promotion of ESG policies and standards. The promotion of ESG policies and standards by financial investors can contribute to establishing a special relationship with those impacted by its portfolio company operations, which helps found a duty of care. By promoting ESG considerations, the investor moves closer to suggesting responsibility for adherence to those standards. This conundrum should not cause investors to resile from promoting ESG as an investment virtue or parameter – rather, investors should ensure that they are genuine about their ESG commitments and that promoting those commitments is not simply a 'tick-the-box' exercise.

2. The 'control' question. This goes to the heart of financial investor liability, and three aspects are worthy of particular consideration:

- First, where a financial investor backs a management or executive team and establishes an incentive scheme, the incentive criteria specified should appropriately incorporate the portfolio company's performance on ESG matters and impact on third parties – again in a substantive, not tick-the-box, manner. In the right circumstances, we can foresee the adoption of solely financial incentive criteria being used against a financial investor where third parties are impacted by portfolio company operations. In the Australian context, the issue of performance incentive criteria and corporate conduct has become a focus of regulators following the recent Financial Services Royal Commission. Again, where claims are made, we can foresee controlling entities being asked how their incentive mechanisms aligned with (and supported attainment of) their stated ESG goals.
- Second, the concept of 'superior knowledge' is one element of control. In both Australia and the UK, where controlling entity liability has been established (or in the case of *Vedanta*, allowed to be argued on its merits), a common characteristic was the superior operational capacity of the controlling entity in relation to the relevant impugned conduct. The superior knowledge thesis lies at the heart of many financial investments – financial investors acquire and take control of portfolio investments because, for example, they have global expertise in 'turning around' the investment based on similar portfolio investments (often on a global scale), and the value proposition they bring to a portfolio investment sits naturally with the idea that they have some form of superior knowledge or capacity. We can readily see this argument being made in future litigation scenarios.
- Third, the absence of control in relation to a portfolio investment (e.g. a minority interest) does not mean the above issues are not relevant. For example, financial investors who are signatories to the *United Nations Guiding Principles on Business and Human Rights* commit to using and building leverage in their investments to prevent and mitigate harm.

Financial investors must come to terms with the risks of controlling entity liability and grasp the changing landscape – just as holding companies that operate globally in extractive or environmentally sensitive industries (who have been exposed to most litigation to date) have had to.

In the years to come, tick-the-box compliance for portfolio companies will no longer be enough to provide an appropriate level of protection from legal risk.

A catalytic effect: inbound investment in PNG set to rise following embrace of international arbitration

Joshua Paffey, Head of Arbitration

Vaughan Mills, Head of PNG Practice

Papua New Guinea is the latest nation state to accede to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

In so doing, and by heeding the guidance of international financiers and investors, the country markedly has improved its inbound investment profile and enhanced its attractiveness as an investment destination. This move by PNG also is a timely reminder of the value of international arbitration in providing a stable, efficient and 'bankable' method of resolving investment and project-related disputes.

An update to PNG's arbitration legislation is overdue. The existing 1951 Arbitration Act (**Act**) pre-dated the huge growth in foreign investment in the resource-rich nation, best illustrated by the US$19 billion ExxonMobil operated PNG LNG Project, which commenced production in 2014.

Due to its many limitations, parties (both domestic and foreign), rarely arbitrated under the Act. Instead, disputes were resolved through the courts or, in the case of disputes between foreign investors and the State, by relying on international arbitration rules such as those established under the United Nations Commission on International Trade Law (**UNCITRAL**).

Further to the perceived deficiencies of the Act itself, there are no arbitral institutions to support arbitrations seated in PNG, requiring them to be conducted on an ad hoc basis or by foreign arbitral institutions. Accordingly, while it has been common for investors in PNG (particularly those contracting with the State) to select arbitration as their preferred dispute resolution mechanism, such arbitrations typically were seated in other Asian centres such as Singapore.

Perhaps the greatest concern regarding PNG-related disputes, however, has been the difficulty associated with enforcing arbitral awards in the country. Now that PNG has become a signatory to the New York Convention, this is set to change. Once the now outdated Act is replaced in order to introduce a mechanism that recognises international arbitral awards, the ability to enforce arbitral awards in PNG is set to become more certain and efficient. This will give comfort to foreign investors, and be a fillip for the many large-scale oil and gas and resources projects mooted for the country.

Foreign investment linked to international arbitration

A strong commercial arbitration framework improves foreign investment. One only has to review the decisions of the multitude of global financiers, equity investors, development banks and export credit agencies to understand the criticality of a reliable and stable dispute resolution framework.

Being able to enforce an arbitral award in the country in which an investment is made is an essential factor in many final investment decisions, and if the country in question is not a signatory to the New York Convention, any such investment decision is fraught.

Once seen as revolutionary, the New York Convention has proved to be one of the most successful international treaties, with 160 signatories to date. It creates a familiar and trusted regime which offers substantial additional comfort to business.

At the South Pacific International Arbitration Conference held in Port Moresby in March 2019, international economists expressed their support for PNG's accession to the New York Convention, noting the increases in foreign investment that have been shown to flow to a country once it ratifies the New York Convention.

But international, cross-border investment decisions are not limited to issues concerning enforcement. When making investment decisions, international investors often consider whether a country is supportive of commercial arbitration, including whether the local courts will intervene in the interests of local parties, whether State or private.

PNG has recognised the need to create the right climate to attract inbound investment. Despite its exports of gold, copper and LNG, it has been ranked 108th out of 190 countries by the World Bank in its 2019 '*Ease of Doing Business*' global ranking. Significantly, this places PNG behind many of its regional counterparts, including Fiji (101), Vanuatu (94), Tonga (91) and Samoa (90).

ADB project for the South Pacific

PNG's accession to the New York Convention has been widely and positively reported in the global community. In this regard, the Asian Development Bank (**ADB**) took something of a lead on behalf of the international investment community.

In November 2016, the ADB released a Technical Assistance Report, which outlined its project of promoting international arbitration reform in the South Pacific to promote a better investment climate in the region.[1] The ADB framework identifies three project outputs aimed to achieve increased foreign investor confidence, in turn leading to greater economic development of nations.

PNG achieved the first project output in July 2019 when it deposited its binding instrument of accession to the New York Convention with the UN Secretary-General, and currently is working towards the second, which requires domestic legislative reform to give effect to the New York Convention and to reflect modern international commercial arbitration standards. Its focus will then turn to the third project output, being the strengthened capacity for international arbitration reforms, achieved by:

- regional awareness building and dissemination workshops; and
- tailored trainings of arbitrators, lawyers and judges in international commercial arbitration and recognition of enforcement proceedings under the New York Convention.

The path to legislative reform

With support from ADB, PNG is developing a new Arbitration Act. At present, it remains unclear whether the current legislation will be repealed in full or in part, or whether it will remain in force for domestic arbitrations.

1 See https://www.adb.org/projects/50114-001/main

While a draft of the proposed new Arbitration Act has yet to be released publically, a period of consultation is expected. It is anticipated that the new Arbitration Act will primarily be based on the UNCITRAL Model Law on Arbitration with additional features specific to PNG's legal framework, such as the acknowledgement of customary law.

Legislative reform, however, is not the end of the road. Programs to enrich the current expertise of local practitioners and the judiciary will be of immense value in ensuring a smooth transition. The Papua New Guinea Centre for Judicial Excellence provides an ideal platform for such activities.

While investors will continue to consider a multitude of factors when assessing opportunities in PNG, the country's accession to the New York Convention and proposed modernisation of its arbitration regime significantly enhances its attractiveness as an investment destination.

As can be tracked through many developing economies, it will not be a surprise to see the stabilisation of investment-related disputes via international arbitration having a strong, catalytic effect on inbound investment in PNG.

> “It will not be a surprise to see the stabilisation of investment-related disputes via international arbitration having a strong, catalytic effect on inbound investment in PNG.”

Intellectual property in the boardroom: risks and opportunities

Kate Hay, Head of Intellectual Property

Sandy Mak, Head of Corporate

Frances Wheelahan, Partner

For many companies, intellectual property (IP) only makes an appearance in board papers when expenditure on research and development is being reviewed, or when an allegation of IP infringement hits the risk register.

However, as brand, technology and innovation become ever-more important to companies' financial fortunes, intangible assets like IP are becoming significantly more prominent in boardroom deliberations.

In this context, the board has a vital strategic role to play in relation to IP – one aligned to its fundamental responsibility to ensure the proper structures are in place to maximise the financial success and mitigate the risk of the company it oversees.

To maximise its return on investment in IP, a board should set the following three IP-specific priorities:

1. Know what IP is in the business and how integral it is to the company's market position.
2. Understand the value of the IP.
3. Minimise risks to key IP.

Some key considerations that underpin these priorities are set out below.

1. Devise and embed your IP strategy

IP can be the result of years of intensive research and development or it can arise from an unexpected technological breakthrough. The thrill of innovation can lead to a precipitous jump to commercialisation.

An embedded IP strategy, endorsed by the board, is crucial to ensuring that key safeguards are in place to identify and protect a company's IP. Any IP strategy should cover the company's approach to:

- logging what material IP has been developed and by whom;
- assessing what rights might be available to protect the IP (patents, copyright, designs);
- checking branding and trade mark availability;
- ensuring ownership of IP; and
- confidentiality arrangements.

Key metrics from the strategy should be reported to the board. A well devised strategy not only identifies IP at an early stage, but also fosters a discipline of avoiding investment in IP that might not be viable and protecting IP that is.

The board should also seek to understand the monetary value of the company's IP assets. There have been instances of shareholder activists in the US seeking to remove board members who they believe have failed to recognise the company's IP and pursuing alternative approaches to value creation for the company (e.g. by licensing or selling the company's IP).

2. Think globally

The board enjoys a perfect vantage point from which to test an organisation's growth strategy from an IP perspective and lay the groundwork necessary to realise the full potential of an international IP strategy. The following questions should be considered:

- What is the manufacturing and supply chain, and does the company have its IP rights registered in key jurisdictions? IP squatters remain rife in certain jurisdictions and pose a significant risk if not pre-emptively managed.
- What third party rights might be infringed if the products or processes are taken offshore?
- What are the biggest growth markets, and what are the costs / barriers of any regulatory compliance? This is particularly relevant to pharma, medical device and med-tech innovation.
- Who might be interested in buying the company's IP, and do you have IP protection in the key growth markets?
- What are the adjacent opportunities?

3. Don't inadvertently spoil your rights

Although not all innovation is patentable, it is important to test patentability early to ensure there is not disclosure that spoils that opportunity or gives your competitors a chance to beat you to it.

In order to secure patent protection for an invention, the invention must not have been disclosed to the public before a patent application is filed. There are limited grace periods in some countries (including Australia), but not all. A patent-destroying disclosure can inadvertently occur on your website, at a conference or to potential investors or customers not bound by a non-disclosure agreement (**NDA**).

There is a balance to be struck between talking early to the marketplace about technology breakthroughs and ensuring protection for that technology. A communications plan that includes IP considerations minimises the risk and also facilitates optimum IP capture. At a minimum, boards should ensure:

- there is an internal communications process that reviews (and where necessary restricts) what goes into the public domain;
- patent applications are filed ahead of public disclosure; and
- discussions with third party investors, customers or collaborators are covered by confidentiality terms (a simple NDA can generally do the job).

If patent protection is not sought, consider an offensive strategy of disclosure to prevent others seeking patent protection that could shut you out of a business-essential development. The company can hold back whatever it may still seek to protect as trade secrets.

4. Take care of ownership

A heightened awareness of what IP resides in a business is not enough – an understanding of the necessary chain of title that underpins its ownership is essential.

This is particularly crucial in the context of IP infringement and M&A activity. A register of IP rights and their corresponding chain of title (e.g. details on the inventors and their terms of engagement and written IP assignments) should ensure that infringement actions and IP commercialisation activities are not stymied by lack of ownership and that due diligences do not throw up nasty surprises.

The board should also review and request updates to the register regularly to ensure IP ownership is kept front of mind and in good order. IP is often assumed to be owned but this belies the complexity that can arise. Complicating factors include:

- IP developed by contractors or employees which is not necessarily owned by a company;
- the transfer of IP rights giving rise to unexpected tax consequences; and
- managing joint ownership of IP (which should be avoided where possible).

A well prepared board should have a good grasp of these issues and systems in place to address them.

5. Data as an asset

Many companies are identifying the value that can be unlocked from the data they hold about their operations, tangible assets and customers. For some companies, data may be one of its most valuable assets. However, this value depends on the company fully understanding its data holding, the data sources and pathways within the company and having confidence in the quality and integrity of that data. Data governance arrangements to appropriately control and protect valuable data within the company should be in place, and the board ought to treat data as part of the potentially high value IP assets of the company.

Because the board is responsible for the overall governance, management and strategic direction of an organisation as well as its financial success, it has an integral role to play in ensuring that the company properly manages its IP assets.

Increasingly, the financial fortunes of a company are becoming intimately tied to key IP. A failure by the board to fully understand these intangible assets can compromise a company's ability to capitalise on opportunities and manage risk.

> “Intangible assets like IP are becoming significantly more prominent in boardroom deliberations.”

Is the ASX becoming the new NASDAQ? How growth-stage tech companies are finding a warm welcome down under

James North, Head of Technology, Media and Telecommunications

Gaynor Tracey, Partner

Madeleine Kulakauskas, Senior Associate

With a market heavily weighted towards financial services and mining companies, the Australian Securities Exchange (ASX) has traditionally been light on technology stock, meaning that investors wanting tech exposure have had to look to other markets or exchange traded funds.

Now, however, as the benefits of an Australian platform are becoming increasingly understood across the world, the ASX's mission to actively target overseas technology companies looking to raise capital is starting to come to fruition.

With numerous growth-stage tech companies from Australia, the Asia-Pacific, the US, Europe and Israel successfully listing on the ASX with good valuations and traction for scale, a clear trend has emerged – the ASX is increasingly being used by tech companies as either a stepping stone to a future dual listing on other exchanges or as a long-term listing venue.

In August 2019, WiseTech (one of the top five ASX tech companies) was the first to cross over the A$10 billion market cap threshold. Other recent high profile raisings include those by Silicon Valley growth story Life360, which launched its IPO in May 2019 and raised A$145 million, and Minneapolis-based payment platform Sezzle, which launched its IPO in July 2019 and raised A$43 million. Most recently, Irish insurance software company Fineos launched the largest 2019 initial public offering on the ASX with an A$211 million dollar listing.

Over the last five years, the ASX-listed tech sector has triumphed as the fastest-growing sector in respect of new listings, with its growth rate more than doubling. So why is it that the ASX is increasingly being seen as the new NASDAQ?

- **A super pool of capital**

  A listing on the ASX exposes tech companies outside the US or UK to a much broader network of investors, both in Australia and around the globe. Australia's funds management industry is the largest in the Asia-Pacific region, in part due to Australia's compulsory superannuation system. By 2035, its pool of superannuation assets is expected to reach A$9.5 trillion. While resources and financial stocks will continue to draw the lion's share of that cash, tech is undoubtedly the fastest growing sector on the ASX.

- **Valuation requirements ideal for start-ups**

  Starting a technology company has never been easier. The digital revolution has allowed technology entrepreneurs and their investors to go from an idea to reaching millions of customers at a speed never seen before.

  While Silicon Valley is largely considered the home of tech start-ups, listing in the US is onerous to the point that it is not accessible to growth stage companies. In particular, companies trying to go public in the US are prone to litigation and enormous expense. Floats are fewer but larger, because by the time the company reaches a stage where it can afford to list, it is mature. For a tech company to list on NASDAQ, it needs to be circa-US$1 billion to get any traction. For a tech company to get a float worth less than US$3 billiion or US$4 billion underway is almost impossible.

  Conversely, the ASX presents itself as the ideal market for tech companies valued under US$1 billion. Provided they have a minimum number of 300 non-affiliated investors (totalling $2,000), a free float of 20% and can satisfy either the profit test (having A$1 million) or the asset test (having A$4 million net tangible assets or A$15 million market capitalisation), companies can list on the ASX.

- **High ranking in the world's top equity markets**

  The ASX is consistently ranked in the world's top ten global securities exchanges by value, and is a world leader in capital raising, ranked within the top five exchanges globally. In 2018, Australia found itself within the global top five for IPOs, coming in at A$8.5 billion with 132 new listings. In particular, the ASX recorded A$4 billion in tech-focused IPO capital raised between 2013 and 2018. This figure provides clear incentive for growth-stage companies who are looking to raise capital to fund future growth.

- **Well-regulated with a stable economy**

  A listing on a well-regulated exchange helps to build a company's reputation and profile as it shows they are focused on strict business and accounting procedures and professional management. It can also bring additional credibility when dealing with large multinational customers, which is important for a tech company in the growth stage.

  Another great attraction of Australia is its resilient economy and impressive growth record. Over the past 28 years, Australia's economy has grown by an average rate of 3.2% in real terms. This is well above that of all other major developed economies, including the US (2.5%). Further, Australia's tech industries specifically have grown at a yearly average rate of approximately 5.0% over the past 28 years. This high and steady economic growth gives foreign companies confidence and incentive to list.

- **Access to a global market**

  Australia's local market is global, which brings global exposure – each day, approximately 45% of the ASX's trading volume and capital comes from outside Australia. For tech companies who don't want to be limited to investors from a single market, this is a great attraction. With a market cap of A$1.9 trillion, the ASX has a significant capacity to fund local and global companies, meaning it can be used by tech companies at growth stage as either a stepping stone to a future dual listing on the NASDAQ or as a long-term listing venue.

  Following the downturn of the Australian mining boom and recent regulatory scrutiny of the financial services industry, the ASX has looked to redress the majority of the value of its market being tied up in the mining and financial services industries. It has done this by courting US, European and Israeli tech companies and industry bodies and actively encouraging a less concentrated spread with a focus on the tech companies of the future.

- **An epicentre of technological innovation**

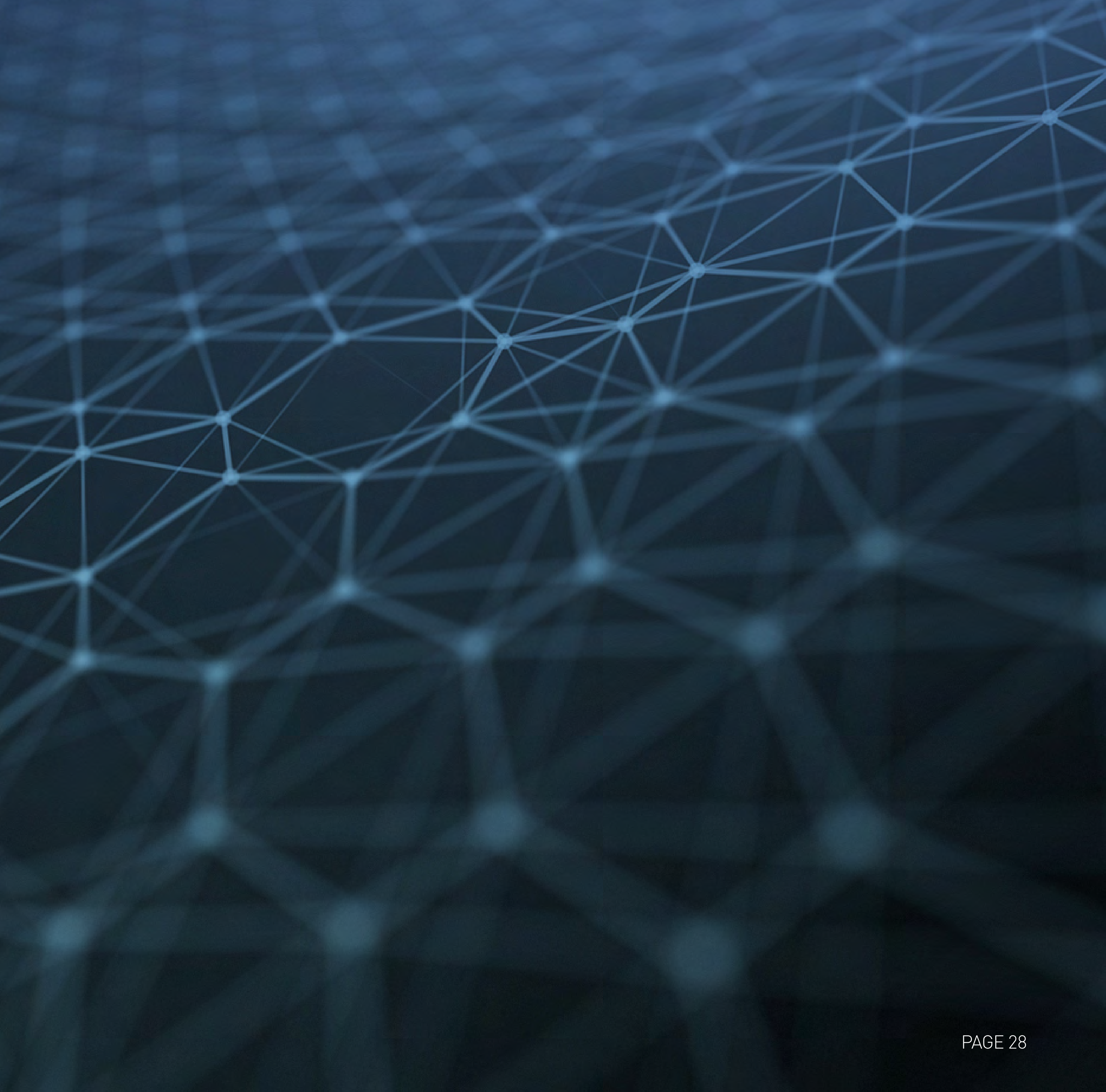
  Australia has always prized innovation and punched above its weight for technological advancement – this is the country that brought the world WiFi, ultrasound, the pacemaker, the bionic ear, the underwater torpedo and, most importantly, Vegemite! With Australian technology companies such as Atlassian, Xero and Canva having global success and a supportive ecosystem, the ASX is open for business to ambitious tech companies, regardless of jurisdiction.

While technology stocks currently only make up 2.4%, or approximately A$50 billion, of the A$1.9 trillion worth of companies listed on the ASX, the exchange wants that to grow.

ASX executive general manager of listings and issuer services Max Cunningham has recently commented "ASX is trying to position ourselves as a late-stage VC [venture capital] funding market with companies that have de-risked their model, have proven their revenue and are looking to scale their businesses and potentially go public to provide liquidity for their shareholders and acquisition currency."

The ASX's clear appetite for these stocks means that tech companies desperate for much needed capital to scale will find a warm welcome down under.

> "The ASX is consistently ranked in the world's top ten global securities exchanges by value, and is a world leader in capital raising, ranked within the top five exchanges globally."



Preparing for a world without LIBOR: key considerations for loan market participants

Rommel Harding-Farrenberg, Head of Banking and Finance

Clare Corke, Partner

It has been two years since the Financial Conduct Authority (UK) (FCA) announced that the London Interbank Offered Rate (LIBOR) will cease in 2021.

As this deadline nears, and the FCA continues to stress the assumption that there will be no LIBOR publication after end-2021, regulators and industry bodies around the world are urging market participants to prepare for the transition with increasing intensity.

FCA's Chief Executive, Andrew Bailey, recently commented that firms delaying transition are making a mistake. The CEO of the Asia Pacific Loan Market Association (**APLMA**) has also stressed that "time is now of the essence" and that members need to be informed of the upcoming "seismic changes".

In Australia, the Australian Securities and Investments Commission (**ASIC**) has written to major financial institutions imploring them to undertake a comprehensive risk assessment in respect of their exposure to LIBOR.

What will replace LIBORs?

Working groups in different jurisdictions have now each identified an overnight risk-free rate (**RFR**) for their currency.

Each RFR is at different stage of development, as highlighted in the table overleaf. Unlike LIBOR, the RFR is only an overnight rate, which is available in various term lengths. The RFR, anchored in active and liquid market transactions, is inherently risk-free and so lower than LIBOR (which accommodates credit and term risks).

How can loan market participants prepare for the transition to RFRs?

Due to the difficulty in reconciling the differences between RFRs and LIBOR, the loan market lags behind other financial markets in its transition to RFRs.

As RFR is only an overnight rate, interest amounts are determined at the end of any given interest period. This is troubling for both lenders and borrowers for cash flow management purposes.

There is a push for development of forward-looking term interest rates based on the RFR, using derivative transactions that reference RFR, provided that there is sufficient liquidity. SONIA is the most advanced in developing the Term Sonia Reference Rate.

	USD	GBP	EURO	JPY	CHF
RFR	Secured Overnight Financing Rate (**SOFR**)	Sterling Overnight Index Average (**SONIA**)	Euro Short Term Rate (**ESTER**)	Tokyo Overnight Average Rate (**TONA**)	Swiss Average Rate Overnight (**SARON**)
National Working Group	Alternative Reference Rates Committee (**ARRC**)	Working Group on Sterling Risk-Free Reference Rates	Working Group on Risk-Free Reference Rates for the Euro Area	Study Group on Risk-Free Reference Rates	National Working Group on Swiss Franc Reference Rates
Administrator	Federal Reserve Bank of New York	Bank of England	European Central Bank	Bank of Japan	SIX Exchange
Features	Secured rate covering multiple overnight repo market segments	Unsecured rate covering overnight wholesale deposit transactions	Unsecured rate capturing overnight wholesale deposit transactions	Unsecured rate capturing overnight call rate market	Secured rate reflecting interest paid on interbank overnight repo
Available?	Yes	Yes	Anticipated October 2019	Yes	Yes
Development of term rate	Anticipated in 2021	Anticipated in second half of 2019	Under consideration	Under consideration	Unlikely to be feasible

There is substantial uncertainty regarding the viability and timeline for RFR term rates. Transition is not just about new business, but also about converting legacy LIBOR contracts. Regulators are stressing that RFR term rates will not be the primary avenue for transition, and are urging market participants to proceed with their transition plans to RFR without waiting for RFR term rates to become available.

What else do loan market participants need to consider?

1. **Existing loan documents**. Although many documents include a fallback mechanism if LIBOR is not available, this fallback was designed with temporary unavailability in mind, not a permanent cessation, meaning existing loan documents are not equipped to deal with the transition.

2. **LMA proposed amendments.** In Europe, the Loan Market Association (**LMA**) updated its *Recommended Revised Form of Replacement Screen Rate Clause and User Guide* in May last year, expanding the application of the 'Replacement of Screen Rate' clause to broader circumstances, including the benchmark administrator announcing that it will cease to provide the benchmark interest rate. The update also introduced a concept of 'Replacement Benchmark' to which the parties will transition.

3. **ARRC proposed provisions for new documents.** In the USA, the ARRC has published two sets of contractual provisions called the 'amendment' approach and the 'hardwired' approach to prepare for a transition to SOFR. The 'amendment' approach does not prescribe a successor rate but offers a process for the parties to agree a replacement benchmark. In contrast, the 'hardwired' approach prescribes the replacement options to apply in a waterfall fashion. The adoption of the LMA or ARRC proposed clauses are not automatic and must be voluntarily entered into by the parties. For existing loan documents, amendments are required.

Next steps

Loan documents often do not exist in isolation, and simultaneously with amending the rate applicable to the loan, any hedging transaction must also be amended or alternatively terminated (which may trigger break costs) and fresh hedges entered into.

As LIBOR is used in a broad range of commercial (i.e. non-financial) contracts, those contracts must be amended. Market participants are well advised to consider referencing RFRs for new contracts, identify any contracts that include LIBOR clauses, evaluate their position and prepare for negotiating amendments to documents. For complex cross-border transactions, negotiations may be more protracted than expected, and the clock is ticking.

Contacts

Gavin MacLaren
Senior Partner and CEO

Tel: +61 3 9672 3068
gavin.maclaren@corrs.com.au

Sandy Mak
Head of Corporate

Tel: +61 2 9210 6171
sandy.mak@corrs.com.au

Rhys Jewell
Head of Tax

Tel: +61 3 9672 3455
rhys.jewell@corrs.com.au

Mark Wilks
Head of Commercial Litigation

Tel: +61 2 9210 6159
mark.wilks@corrs.com.au

James Whittaker
Partner

Tel: +61 2 9210 6667
james.whittaker@corrs.com.au

James North
Head of Technology, Media and Telecommunications

Tel: +61 2 9210 6734
james.north@corrs.com.au

Dr Phoebe Wynn-Pope
Head of Business and Human Rights

Tel: +61 3 9672 3407
phoebe.wynn-pope@corrs.com.au

Joshua Paffey
Head of Arbitration

Tel: +61 7 3228 9490
joshua.paffey@corrs.com.au

Frances Wheelahan
Partner

Tel: +61 3 9672 3380
frances.wheelahan@corrs.com.au

Gaynor Tracey
Partner

Tel: +61 2 9210 6151
gaynor.tracey@corrs.com.au

Cameron Cheetham
Head of Restructuring, Insolvency and Special Situations
Tel: +61 2 9210 6122
cameron.cheetham@corrs.com.au

Mark McCowan
Head of Competition
Tel: +61 2 9210 6533
mark.mccowan@corrs.com.au

Abigail Gill
Partner
Tel: +61 3 9672 3262
abigail.gill@corrs.com.au

John Tuck
Head of Employment and Labour
Tel: +61 3 9672 3257
john.tuck@corrs.com.au

Jennifer Dean
Special Counsel
Tel: +61 2 9210 6370
jennifer.dean@corrs.com.au

Robert E Clarke
Head of Financial Sponsors Group
Tel: +61 3 9672 3215
robert.clarke@corrs.com.au

Vaughan Mills
Head of PNG Practice
Tel: +61 7 3228 9875
vaughan.mills@corrs.com.au

Kate Hay
Head of Intellectual Property
Tel: +61 3 9672 3155
kate.hay@corrs.com.au

Rommel Harding-Farrenberg
Head of Banking and Finance
Tel: +61 2 9210 6366
rommel.harding-farrenberg@corrs.com.au

Clare Corke
Partner
Tel: +61 7 3228 9318
clare.corke@corrs.com.au

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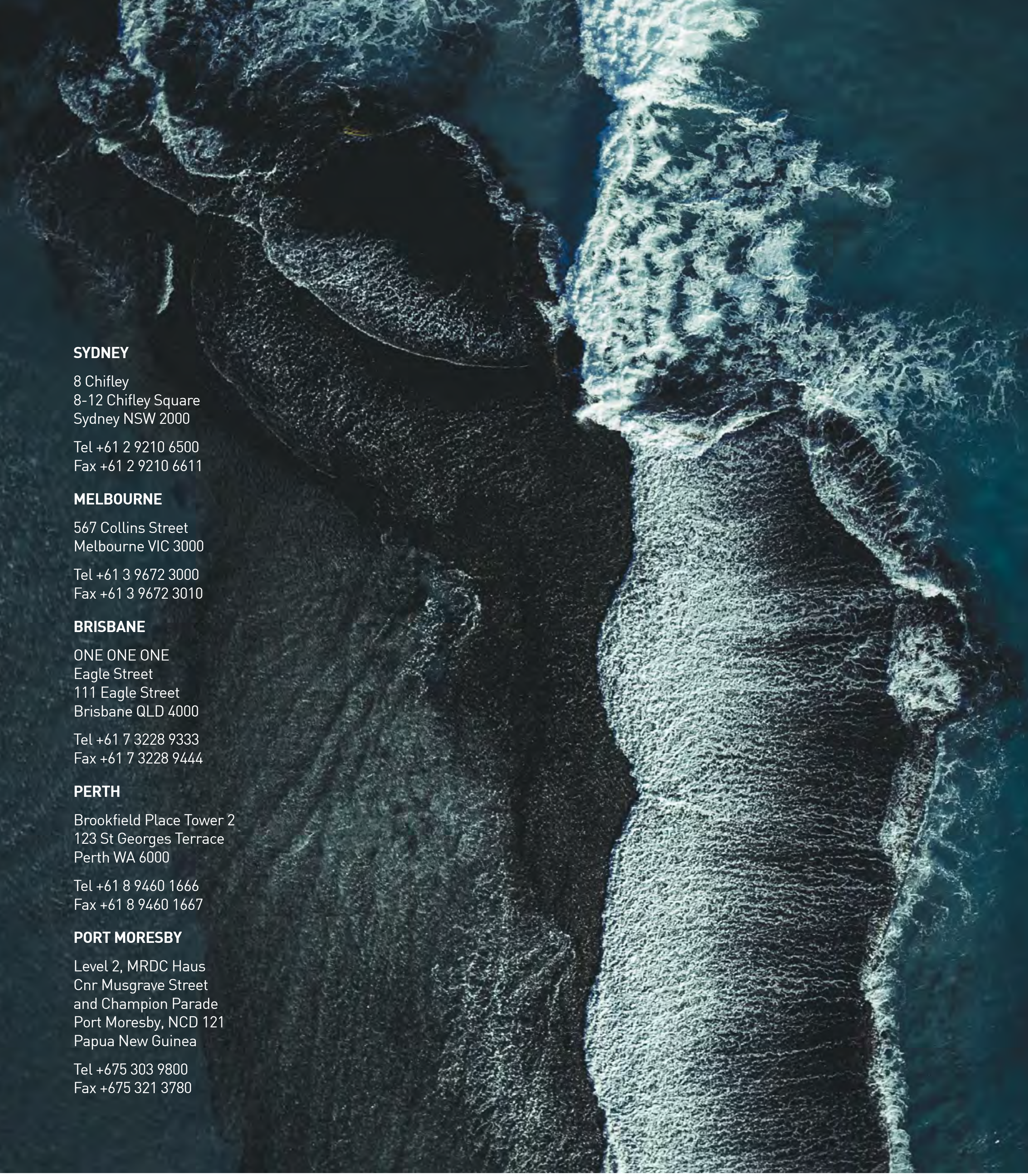

SYDNEY

8 Chifley
8-12 Chifley Square
Sydney NSW 2000

Tel +61 2 9210 6500
Fax +61 2 9210 6611

MELBOURNE

567 Collins Street
Melbourne VIC 3000

Tel +61 3 9672 3000
Fax +61 3 9672 3010

BRISBANE

ONE ONE ONE
Eagle Street
111 Eagle Street
Brisbane QLD 4000

Tel +61 7 3228 9333
Fax +61 7 3228 9444

PERTH

Brookfield Place Tower 2
123 St Georges Terrace
Perth WA 6000

Tel +61 8 9460 1666
Fax +61 8 9460 1667

PORT MORESBY

Level 2, MRDC Haus
Cnr Musgrave Street
and Champion Parade
Port Moresby, NCD 121
Papua New Guinea

Tel +675 303 9800
Fax +675 321 3780

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