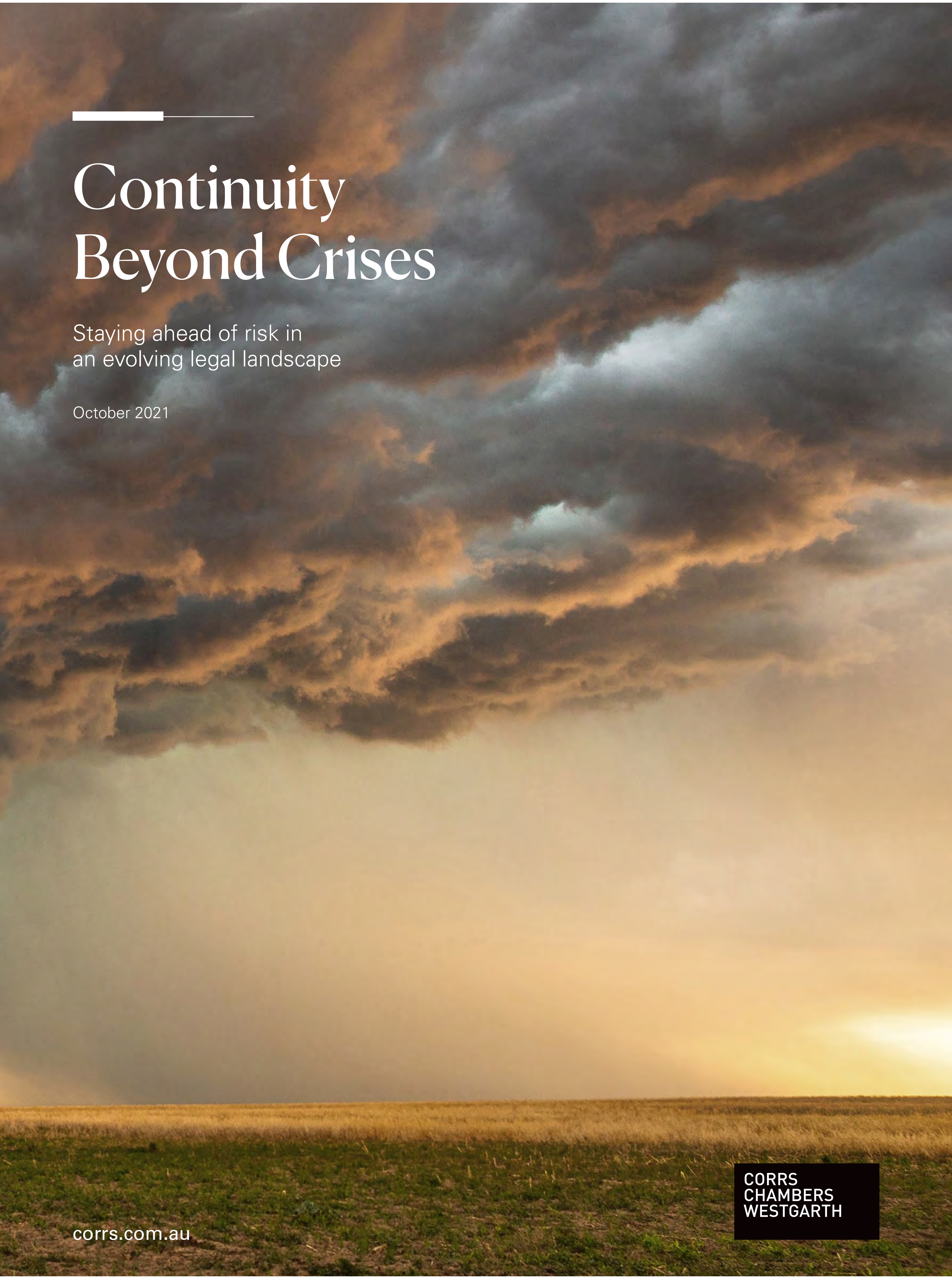
# Continuity Beyond Crises

Staying ahead of risk in
an evolving legal landscape

October 2021



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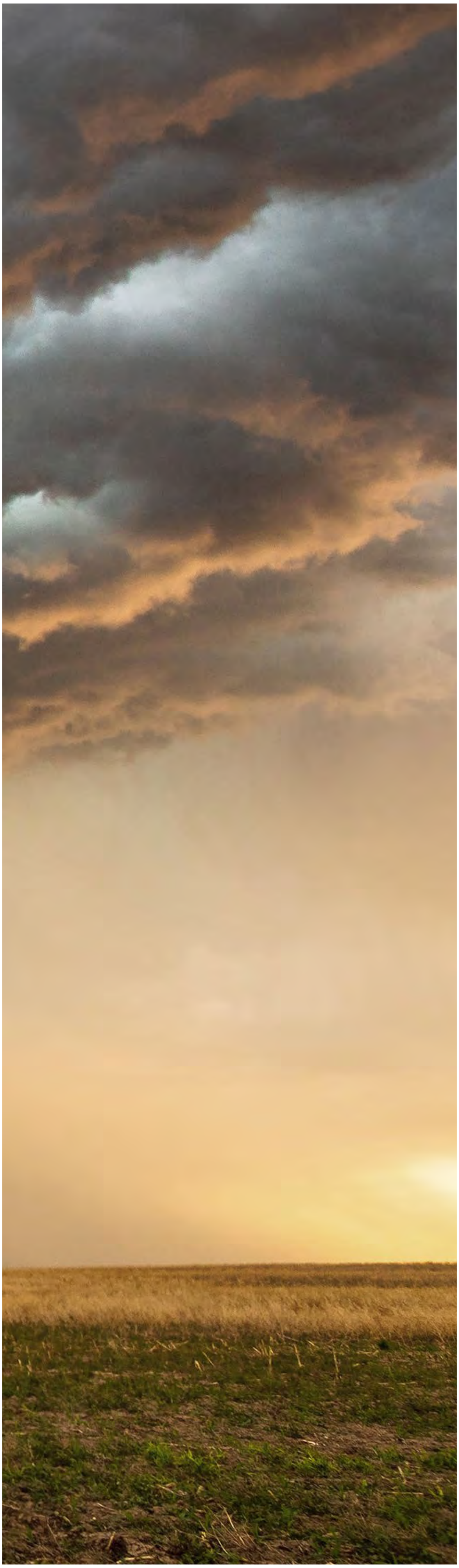

# Contents


# From the courtroom to the boardroom: climate change risks and remedies

By **Dr Louise Camenzuli**, Head of Environment and Planning, **Sandy Mak**, Head of Corporate, **Julia Green**, Special Counsel, **Valerie Manalo**, Lawyer and **Alice Johnson**, Lawyer

2021 will be seen as the year where international, environmental and market forces coalesced to bring climate change into sharp focus in Australian courtrooms and boardrooms.

With the UN Biodiversity Conference of the Parties (**COP15**) and UN Climate Change Conference of the Parties (**COP26**) both set to be held later this year, this trend is unlikely to dissipate. These conferences represent significant international events that will bring about further debate on how to tackle climate change and the associated biodiversity risks to the environment, human health and business.

Given the recent rise in shareholder activism and significant judicial decisions relating to climate change, the message is clear – if corporations do not actively take steps to meet rapidly evolving climate change benchmarks through proper due diligence, risk management, target setting and transparent reporting, it is likely that those corporations will be compelled to do so.

In Australia, regulator activity in this area has been sporadic, but numerous international developments indicate it is soon likely to come into sharp focus. While the regulators play 'catch-up', it is anticipated that shareholder activism and climate change litigation will emerge as one of the greatest threats for corporations over the next 2-3 years.

The legal, financial and reputational risks associated with failing to robustly engage with climate change are significant. Apart from the imposition of penalties, the resulting reputational damage could be debilitating, and impact the ability to secure financing or result in the withdrawal of capital. For company directors, individual liability under the *Corporations Act 2001* (Cth) for breach of fiduciary duty is also a very real risk.

However, the shifting public sentiment also presents opportunity. The Edelman Trust Barometer 2021 indicates that public trust in companies is currently higher than trust in the government – 66% of respondents voted that CEOs should take the lead on change rather than waiting for the government to impose change, while 68% endorsed the notion that CEOs should step in when the government does not fix societal problems.

The community is looking to company directors and industry to create change where government regulation may be lagging, with significant market rewards to follow for those who adapt early.

# The courtroom

## Climate change litigation trends and developments

> ...each reduction of greenhouse gas emissions has a positive effect on countering dangerous climate change... RDS cannot solve this global problem on its own. However, this does not absolve RDS of its individual partial responsibility to do its part regarding the emissions [which] it can control and influence.
>
> Hague District Court in *Milieudefensie et al v Royal Dutch Shell Plc* (2021)

A number of significant international and domestic court proceedings in 2021 illustrate the increasing willingness of the courts to adopt the science-based evidence of climate change, link human rights to climate change and hold both corporations and governments to account against greenhouse gas emission (**GHG**) targets.

Two high profile examples include:

- The recent *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* (***Sharma***) judgment, in which the Federal Court of Australia held that the Commonwealth Minister for the Environment owes a duty of care to Australian children to consider the longitudinal human health risks associated with climate change when granting environmental approvals for activities which will produce significant volumes of greenhouse gases. The Commonwealth is appealing this decision. Notwithstanding the outcome of the appeal, legal challenges are likely to arise in other States and Territories, particularly given the recent announcement that the WA Conservation Council and Environmental Defenders Office are presently considering launching a test case to establish that a similar climate change duty of care exists for consent authorities under the *Environmental Protection Act 1986* (WA).
- The *Milieudefensie et al. v Royal Dutch Shell plc* (***Shell***) judgment in the Netherlands with The Hague District Court ordering Shell to bring its corporate policy into alignment with the Paris Agreement and to reduce its net GHG emissions by 45% of 2019 levels by 2030.

### Emerging trends

Following the *Sharma* judgment and having regard to the principles in the *Shell* decision, it is not inconceivable that Australian courts could soon find that corporations owe a duty of care to Australian children to adopt appropriate frameworks and align their conduct to adopted international climate change goals, such as the Paris Agreement.

Climate change activism is also likely to manifest itself in a number of ways in the future, including:

- **Actions against major GHG emitters** – for example, if the development of a project does not align with a Net Zero 2050 target, then action may be taken against that corporation to restrain it from developing that project.
- **Actions against specific project approvals or extensions** – for example, a legal challenge against a decision of an authority to grant an environmental approval for the expansion of a new resource project that conflicts with any adopted international obligations to reduce GHG emissions. There is also an increasing pattern of rights-based claims where the litigation is founded upon human rights or a duty of care.

- **Actions against corporations and directors** – generally for failures to align corporate policy to climate change benchmarks and/or disclose material climate-related financial risks.
- **Actions against governments, including in respect of their climate change policies, or lack thereof** – for example, an action was commenced against the French Government alleging failure to implement appropriate measures to effectively address climate change. The Paris Administrative Court ruled that France's failure to meet its climate and carbon budget goals under national and European Law had caused ecological damage for which it was responsible.[1] More recently, judicial review proceedings have been brought in respect of the Climate Change Commission's advice to the New Zealand Minister for climate change.[2] The primary allegation is that the emissions budgets recommended are inconsistent with the steps required to limit warming to 1.5 degrees, as set out in the Paris Agreement.
- **Actions brought against government funding and grants decisions which have impacts on the operations of corporations and funding of projects** – for example, the recent Beetaloo NT Basin challenge, which is a Federal Court administrative law challenge to a decision of the Commonwealth Resources and Water Minister to provide a $21 million grant to an oil and gas company for a gas exploration project in Beetaloo Basin, NT. The grounds of challenge are that the Minister failed to make reasonable enquiries about the increased risks of climate change if gas resources in the Beetaloo Basin are developed, and the economic risks of expenditure on gas exploration projects in the context of decarbonisation and Australia's movement towards renewable energy. The matter is yet to be heard by the Court.

The significance of these developments is heightened by the release of the Intergovernmental Panel on Climate Change 6th Assessment Report in August 2021 (**2021 IPCC Report**), which provides a comprehensive global assessment of the current status and projections as to the future trajectory of climate change on the basis of the best available physical science. Significantly, the 2021 IPCC Report found that even if Net Zero is achieved globally by 2050, with negative emissions thereafter, the chance of limiting global warming to 1.5 degrees is less than 50%.

The 2021 IPCC Report is likely to be used in evidence given by experts in any litigation where climate change grounds form part of the legal challenge. It is also likely unavoidable that consent authorities, regulators and government agencies will need to consider this report when exercising their executive powers where they are linked to climate change issues.

## How can corporations shield themselves from climate change litigation?

There are various actions that can be taken to minimise the risks of legal challenge. For example, challenges to project approvals and government funding are likely to be minimised if the corporation involved has:

- made significant commitments to reducing GHG emissions;
- thoroughly considered climate change related impacts from GHG emissions in project specific environmental assessments and opportunities for reductions in emissions in an operational context, including potential offsets;
- aligned its targets with the Paris Agreement (or any new targets set); and
- put in place robust and transparent disclosure frameworks.

Further, corporate climate change risk and disclosure frameworks, where relevant, should include climate change considerations in alignment with UN recommendations. For example, any such frameworks should align with the Task Force on Climate-related Financial Disclosures (**TCFD**) global framework for the identification, assessment and financial disclosure of material climate change risks.

Collectively, the above law and policy developments underscore the need for companies to proactively and robustly engage with climate change related risks and dependencies, both within their primary operations and across their supply chain. This will involve elements of horizon scanning and adapting to climate change benchmarks as they develop. The more a corporation can be seen to be taking action, the less likely it is to be the target of any potential legal challenges.

1 See *Notre Affaire a Tous and Others v France*, No. 1904967, 1904972, 1904976/4-1, Paris Administrative Court (3 February 2021).
2 See *Lawyers for Climate Action NZ v The Climate Change Commission* (1 July 2021).

# The boardroom

## Shareholder activism and impact investing: ESG challenges and strategies for boards

> **Shareholders have the right and obligation to set the parameters of corporate behaviour within which management pursues profit.**
>
> Eliot Spitzer

Shareholder activism and impact investing are on the rise in Australia. Recent trends in the US and Europe, coupled with an increased focus on climate change issues, suggest that this is a growing area of risk for boards, and targeted strategies are required to respond adequately.

Shareholder activism typically takes the form of:

- **economic activism** – where shareholders seek to change the corporate strategy of a firm or influence specific business decisions to increase the value of a company for near- to medium-term economic gain; or
- **social activism** – where shareholders seek to influence a company's operations and strategy on environmental, sustainability and governance (**ESG**) matters. This sort of activism typically takes a medium to long term view.

Impact investing, on the other hand, is a hybrid of both forms of shareholder activism – it can be characterised as investing with the purpose or intention to generate positive, measurable social and environmental impact alongside a financial return.

Shareholder activism and impact investing are effectively two sides of the same coin, each presenting risks and opportunities for boards across Australia.

### The challenging landscape and risks

While climate change is only one plank of ESG considerations for boards, sustainability issues from a climate perspective necessarily form a key part of scenario planning, given:

- the increased focus from Australian regulators on climate risk disclosures;
- decisions on allocation of capital from institutional investors; and
- the push towards advisory resolutions on climate issues by industry associations and shareholder groups.

The consequences of failing to take into account the demands of investor stakeholders in this area can range from reputational damage to a failure to secure finance or the withdrawal of capital.

In Australia, managed investment schemes and superannuation funds are frequently able to take into account sustainability factors alongside financial returns in determining how best to allocate their capital. Additionally, a high proportion of activists are increasingly prepared to exercise their voting rights to drive change, for example, by removing directors from the board and proposing advisory resolutions or constitutional changes.

This is compounded by a growing body of commentary that suggests asset owners and investment managers could be held legally liable for breaching their duty to act with care and skill, or their duty to act in the best interest of a company, if they fail to consider financially material ESG factors.

Shareholders are undoubtedly becoming more proactive and demanding, questioning whether they can do more than manage their assets than for financial performance alone.


## How to 'de-risk' your organisation

The idea of engaging with activist investors remains a daunting one for many directors, especially those in industries where sustainability issues are likely to put them in conflict with their stakeholders.

Set out below are six practical suggestions or 'rules of engagement' for boards on how to de-risk their organisations and engage effectively with activists and impact investors.

1. Scenario planning is key. Ideally, companies should arm themselves with a team that has expertise in identifying different shareholder activist agendas, the opportunities and value of impact investing, managing communications and preparing appropriate response strategies. Make investor engagement a regular agenda item at board meetings.
2. Understand your strategy and longer term value. Having a clear understanding of the strategy of your company and the ability to maximise value for all stakeholders in the medium to long term is critical. A board that is unable to articulate a clear vision for its company's future strategy and direction will inevitably struggle to argue against alternative propositions put forward by shareholder activists and attract impact investors.
3. Adopt a constructive mindset and culture. Maintaining an open dialogue to better understand an activist or impact investor's interests and goals can lead to surprising perspectives and results. If nothing else, a board will learn more about their motivations to enable it to better craft a response strategy.
4. Engage respectfully, not combatively. As tempting as it might be to dismiss a shareholder activist or impact investor's approach or proposition, respectful engagement often leads to more effective outcomes.
5. If you don't like it, change it. If a shareholder activist proposes a blunt advisory resolution, rather than resisting the resolution, an alternative for boards is to craft and tailor a more nuanced alternative resolution. This demonstrates a more considered approach to addressing shareholder concerns which can consequently attract impact investor approval.
6. When in doubt, refer to your director's duties. The aims and objectives of the company, shareholder activists and impact investors can sometimes be diametrically opposed. In recent years, directors' duties have evolved from the concept of shareholder primacy (i.e. where directors have a duty to their immediate shareholders) to an understanding that directors also owe duties to the company as a corporate entity and, to some degree, to their creditors.

Shareholder activism and impact investing undoubtedly pose significant legal, financial and reputational risks for organisations. Careful planning and the implementation of appropriate response strategies will enable directors to engage effectively, minimise risk and deliver better outcomes for all stakeholders.


# The ever-evolving scope of legal professional privilege: key considerations for in-house counsel

By **Mark Wilks**, Head of Commercial Litigation and **Felicity Healy**, Partner

Often referred to but frequently misunderstood, the law surrounding legal professional privilege (**LPP**) can be confusing for lawyers and clients alike.

But with many regulators demanding huge volumes of documents, understanding of the scope and limits of LPP is becoming increasingly important. What are the critical considerations in-house counsel need to keep in mind when it comes to LPP, and how can the risk of waiver be reduced?

Dating back to the 16th century, the modern law of 'legal professional privilege' originated from the English common law and was at first a right that belonged to a lawyer rather than their client.

While there have been many explanations provided for the evolution and development of the doctrine, it is generally accepted that its guiding purpose is to facilitate full and frank disclosure to legal advisers to enable suitable and timely legal advice. However, there is a clear tension between the public's interest in having complete disclosure of all material relevant to a dispute and the expectation that a client can speak openly with their lawyer without fear of their communications being made public.

In Australia, legal professional privilege is both a common law and statutory right, and both may be available depending on the particular situation.[1] In its simplest form, the protection permits clients to refuse to disclose certain material that might otherwise be required to be produced in legal proceedings or regulatory investigations.

The ability of organisations to rely upon LPP to resist production of documents is regularly tested, often by regulators such as the Australian Taxation Office (**ATO**) who seek to obtain access to information for the purpose of facilitating an investigation or enforcement. Given the practice of many regulators to demand huge volumes of documents, an understanding of the scope and limits of LPP is becoming increasingly important. In particular, the ability to maintain a claim of LPP in an in-house scenario can be challenging given the need to juggle competing demands of the organisation and multiple agendas of stakeholders. This is further complicated by the prevalence of instant communication tools, often with multiple recipients and a consequent reduction in formality.

An understanding of the essential components of a valid LPP claim and how to prevent its waiver will arm in-house counsel with the ability to ensure that their organisation can continue to enjoy the benefits of confidentiality that LPP evolved to protect.

1 By way of example, see *Evidence Act 1995* (NSW), *Evidence Act 2008* (VIC), *Evidence Act 2001* (TAS), *Evidence Act 2011* (ACT) and *Evidence Act 1995* (Cth).

## What is required to make out a claim of LPP?

Claims for LPP are often only tested when something has gone wrong, making it important to have a good understanding from the outset. In its simplest form, there needs to be:

- the existence of a client and lawyer relationship;
- a **confidential** communication or **document**; and
- the communication (or document recording the communication) must have been brought into existence:
  - for the **dominant purpose** of providing **legal advice** (**advice privilege**); or alternatively
  - in respect of **litigation** or anticipated litigation (**litigation privilege**).

The key aspects and terms of this test are defined below:

- **Document**. In this context, the term 'document' includes more than simply letters and emails. The legislation gives this term a wide meaning (see s2D of the *Acts Interpretation Act*) and accordingly, is broad enough to capture drawings, sound recordings, photographs, text messages and instant messenger messages. In-house lawyers should not feel compelled to limit LPP claims to only those 'traditional' categories of documents. In the recent decision of *Asmar & Ors v Albanese & Ors ((No 2)* [2021] VSC 324), the Court was asked to make an assessment of whether text messages between two non-lawyers could be adduced into evidence. In those proceedings, Associate Justice Matthews held that the series of text messages did attract privilege on the basis that, even though the messages were not communications directly with Counsel, they were communications discussing how instructions to Counsel should be framed. Importantly, the disclosures were intended to be confidential and not disseminated outside the organisation.
- **Email chains**. There is an increasing body of case law in both Australia and the UK to the effect that Court should treat each recipient in an email chain as if they had received a separate and distinct communication for the purpose of assessing privilege.[2] While this is yet to be tested at an appellate level, where legal advice is to be circulated within an organisation it would be prudent to initiate a new email thread to ensure dissemination is consciously limited.
- **Use of labels**. While potentially helpful when conducting document reviews, simply labelling a document 'privileged' will not inform the question as to whether the communication is in fact protected from production. In each and every case there will need to be an assessment undertaken and all elements of the requisite test will need to be met. Having good record-keeping practices in place will help create an understanding across the organisation that in-house lawyers should be responsible for distributing legal advice.
- **Litigation privilege**. Where a claim for litigation privilege is asserted, it extends not just to legal proceedings within Australia but also to proceedings overseas. Section 119 of the *Evidence Act* identifies that the client in this instance can include anyone who may be, might have been, was or is a party to proceedings (even if the proceedings are only anticipated or pending but have not yet commenced). This will be important for organisations that operate in multiple jurisdictions and have their head office in Australia.
- **Dominant purpose**. The law concerning 'dominant purpose' comprises a substantial body of case law but can be distilled into an assessment of whether it is the ruling, prevailing or most influential purpose of the communication. This may be challenging in an in-house context where an email chain might cover many topics, only one of which relates legal advice. For this reason it is important to keep legal topics separate from other matters and, preferably, include them in an entirely separate email or document.
- **Non-legal context**. In an in-house role, it is common to find that lawyers are charged with undertaking a multitude of functions. However, one of the critical assessments will be whether that person was acting in a professional legal capacity when providing legal advice or receiving information in order to provide that advice. Where an officer of the company sends a communication which is not in connection with their role as a legal adviser to the company, no valid claim will be said to exist.

2 See *TEC Hedland Pty Ltd v The Pilbara Infrastructure Pty Ltd* [2020] WASC 364 (21 October 2020) and *The Civil Aviation Authority v The Queen (on the Application of Jet2.com Ltd)* [2020] EWCA Civ 35.

## When can a claim for LPP be waived?

From time to time, situations will arise where it is in the best interests of the organisation to waive LPP. However, given possible contagion risk, and risks surrounding inadvertent waiver, this should only be undertaken consciously on a case-by-case basis. Some of the more common scenarios involving potential waiver of LPP include:

- Confidentiality. A critical component of any claim for LPP, confidentiality is one of the most common ways that privilege can be waived. In the event that the communication is no longer confidential or is treated in a manner that is inconsistent with an assertion that it is confidential, a waiver may be said to have occurred. Ordinarily, dissemination within an organisation will not be sufficient to waive privilege even where there is widespread disclosure of the legal advice internally. In the event that an email containing privileged material is inadvertently distributed to the wrong recipient, the best practice is to contact the recipient immediately to:
  - note that the material is confidential;
  - state that it was provided in error;
  - state that there was no intention to waive privilege in the material; and
  - ask that the email and attachments be immediately deleted.
- Third parties. Where documents containing legal advice are provided to third parties, the question of whether there has been a waiver will be influenced by the role of the third party. In *Built Environs WA Pty Ltd v Perth Airport (No. 5)* [2021] WASC 237, the Court held that APP (an independent certifier) received privileged communications from Perth Airport in its capacity as agent for Perth Airport and not in its capacity as an independent certifier. Importantly the Court found that, as agent, APP owed both contractual and equitable duties of confidentiality and as such had not acted in a way that was inconsistent with the maintenance of a claim for LPP. It is useful to remember that, when providing confidential information to third parties, there should be a written record of the need to keep the information confidential and confirmation that there is no intention to waive privilege.
- Disclosure waiver. A claim for privilege may be challenged on the basis that the substance of the advice has been openly disclosed, often in correspondence, thus losing both its confidential nature and protection from disclosure. In *ASIC v ANZ (No 2)* [2020] FCA 1013, ASIC argued that ANZ had waived LPP by referring to the existence of legal advice in open correspondence. In that case, the Court found that the letter, the subject of the proceedings, merely touched on but did not reveal the substance of the advice. Accordingly, the claim for LPP was upheld. Simple phrases referring to the existence of legal advice will be insufficient to waive privilege but care should be taken to ensure that nothing more is revealed about the content or substance of the advice.

> In-house counsel play a critical role in educating stakeholders about the manner and form of which communications containing legal advice are deployed.

- **Limited waiver**. Where it is proposed that documents be shared on the basis of a limited waiver, for example with a regulator, it is important to remember that caution must be taken to ensure that an express agreement is reached prior to disclosure (which includes an express obligation to keep the information confidential). In some cases, due to the information sharing arrangements between certain regulators, it may not be possible to gain sufficient comfort that a limited waiver will be effective. In *Cantor v Audi Australia Pty Ltd* [2016] FCA 1391, the Court held that the disclosure of privileged communication on a confidential basis to a German regulator did not amount to waiver of privilege in Australia, given that they had not been deployed in a manner inconsistent with the maintaining of privilege.
- **Inconsistent actions**. The Courts have shown a willingness to impute an intention to waive LPP where actions are clearly inconsistent with maintenance of confidentiality in a document. Where the contents of a document have been openly disclosed or put into issue in proceedings, it will much harder to refute a suggestion that there was an intention to waive LPP. In *Oztech Pty Ltd v Public Trustee of Queensland (No 8)* [2016] FCA 712, the Court rejected the suggestion that privilege was waived over advices and briefing documents that were mentioned in a transcript attached to a letter which was disclosed in the proceedings.

In-house counsel play a critical role in educating stakeholders about the manner and form of which communications containing legal advice are deployed, and ensuring that claims are not inadvertently waived.

Taking time to ensure that claims for LPP are properly set up at the outset will ensure that organisations can elect if and when they wish to maintain a claim for LPP. It is also important to be alert to the dangers posed by mixed-purpose communications.

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# A seismic shift: what the ACCC's proposed merger control reforms could mean for companies doing business in Australia

By **Mark McCowan**, Head of Competition, **Jodi Gray**, Partner and **Ian Reynolds**, Special Counsel

The Australian Competition and Consumer Commission (**ACCC**) has announced its much anticipated proposals for merger control reform, which, if adopted into law, would grant the ACCC far greater discretion to block transactions and establish Australia as having one of the most interventionist merger regimes in the world.

The proposals represent a seismic shift in approach and, if implemented, would fundamentally change the way in which merger control clearances are sought, reviewed and contested in Australia.

Although merger litigation is rare in Australia, the ACCC has lost every merger challenge that it has brought in the past 20 years, including several successive high-profile merger cases in the last decade.[1] While the courts in each case identified various failings and gaps in how the ACCC ran and supported the cases, the ACCC Chairman, Rod Sims, places the blame on deficiencies in Australia's merger laws. Mr Sims has suggested that: (i) the burden on the ACCC of proving that a transaction is likely to substantially lessen competition in court proceedings is unrealistically high; and (ii) courts have too little regard to the impact of a transaction on the structural conditions of competition and too much regard for the self-interested evidence of corporate executives.

## The ACCC's proposed changes

In his opening speech to the Law Council of Australia's Competition and Consumer Workshop on 27 August 2021, Mr Sims sought to start a debate on reforming Australian merger laws by setting out a range of proposed reforms.

### Process changes

- All transactions above certain thresholds (not yet specified) would be required to be notified to the ACCC. There is presently no mandatory requirement for parties to notify the ACCC of a transaction – rather, merger parties must conduct their own assessment as to whether to notify the ACCC.
- Transactions that are filed with the ACCC would be prohibited from closing without ACCC approval.
- The ACCC would implement a process for parties to transactions that obviously do not raise competition concerns to obtain a 'notification waiver'. This waiver would enable merger parties to proceed with the transaction without the need for a detailed review.
- The ACCC would have a 'call in' power over any transactions that do not meet the mandatory filing thresholds, but that the ACCC considers require review.
- The ACCC would be required to publish detailed reasons for its decisions.

### Substantive changes

- At present in Australia, an acquisition of shares or assets that has, or is likely to have, the effect of substantially lessening competition in a market in Australia is prohibited under section 50 of the *Competition and Consumer Act 2010* (Cth). The ACCC proposes changing the legal meaning of the word 'likely' from a 'real commercial likelihood' to a 'possibility that is not remote'.
- The ACCC proposes revising the factors that the ACCC (and any review body) must take into account in determining whether a merger is likely to have the effect of substantially lessening competition to focus on the structural conditions for competition that are changed by the transaction to the detriment of competition, including to introduce factors to address whether the transaction may result in the loss of potential competitive rivalry and/or to increase access to or control of data, technology or other significant assets.
- The ACCC proposes a provision that deems transactions by corporations with a substantial degree of market power to substantially lessen competition if they entrench, materially increase or materially extend that market power.

1 *Australian Competition and Consumer Commission v Pacific National Pty Limited* [2020] FCAFC 77; *Vodafone Hutchison Australia Pty Limited v Australian Competition and Consumer Commission* [2020] FCA 117; *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited* [2014] ACompT 1; *Applications by Tabcorp Holdings Limited* [2017] ACompT 5; *Application by Sea Swift Pty Limited* [2016] ACompT 9; *Australian Competition and Consumer Commission (ACCC) v Metcash Trading Ltd* [2011] FCAFC 151.

> If adopted into law, the proposals would grant the ACCC far greater discretion to block transactions and establish Australia as having one of the most interventionist merger regimes in the world.

## Digital platforms changes

- The ACCC proposes introducing lower notification thresholds for transactions by digital platforms.
- The ACCC proposes a different substantive test for digital platform transactions that are caught by the notification thresholds. Although no details have been provided, the test would require the ACCC to establish a lower probability of competitive harm than that which applies for transactions in the economy more broadly (presumably lower still than a 'not remote possibility'). The ACCC's focus appears to be on preventing: (i) digital platforms from being able to buy out possible competitive threats before they have a chance to develop into effective rivals; (ii) transactions that leverage existing dominance; and/or (iii) transactions that leverage the control of data into market power in adjacent markets. The ACCC intends to publish these rules together with a wider package of proposed digital platform-focused regulatory measures in early 2022.

## Review right changes

- The ACCC proposes that merger parties would only be able to seek limited merits review of ACCC decisions by the Australian Competition Tribunal. This would mean that merger parties could no longer apply to the Federal Court for a declaration that a transaction does not substantially lessen competition and the review would be 'on the papers' and limited to the material before the ACCC.

## Key insights

1. **If properly structured, a mandatory filing regime would bring greater timing and process certainty to ACCC merger review – albeit at a cost to the timeliness and efficiency of the review of many small deals**. A mandatory regime would bring Australia into line with other major jurisdictions and would provide certainty for businesses as to when to notify in Australia. Inevitably, establishing mandatory filing thresholds will result in more deals needing to be notified in Australia, but the extent to which this occurs will depend upon the notification thresholds and safe harbours, which the ACCC has not proposed.

   While the greater timing certainty provided by statutory timetables would be welcomed, given the general recent trend towards longer reviews of more complex deals, this benefit will be greatly undermined if the ACCC adopts the practice from several other jurisdictions of having long 'pre-notification' periods before a filing is formally accepted and the statutory clock started.

   The proposal for a bar on closing transactions pending ACCC approval would mean that the ACCC would no longer have to resort to seeking a court injunction to prevent closing, or threatening such an injunction application as a means to obtain an undertaking not to close. It would also allow the ACCC to delay closing of global deals, including those that have been scrutinised and cleared by agencies in other jurisdictions that often represent the vast bulk of merging business' revenues.

   A 'call in' power would be an unwelcome addition to any mandatory regime, as it would undermine the main benefit of a mandatory regime for companies doing business in Australia – i.e. certainty as to when a transaction requires notification. Also, if the ACCC is able to call-in transactions at any time before completion, some parties may still elect to make voluntary notifications to obtain certainty and de-risk an ACCC intervention shortly before completion.

   Publication of detailed reasons would bring the ACCC in line with its international peers and would be a welcome development. At present, the ACCC's reasoning for, and analysis in relation to, its merger decisions is often opaque – both for parties and non-parties. Publication of detailed reasons would allow interested parties and practitioners to better understand the ACCC's analysis and allow a more useful body of decision precedents to develop.

2. **Proposals to reform the legal test(s) could lead to more deals being blocked on the basis of speculative theories of harm and weak evidence**. The change to the legal meaning of 'likely' would set a very low standard for opposing a transaction, reject decades of Australian Court precedents that are based on sound legal and economic principles,[2] and make Australia's merger laws inconsistent with comparable international regimes that require agencies to show anticompetitive effects on the balance of probabilities standard (e.g. the UK[3]) or higher (e.g. the EU[4]). It seems the ACCC wants to be able to more easily block mergers where it is concerned about a mere possibility of competitive harm, even if that possibility is improbable. The ACCC also appears to intend to take a more precautionary approach to transactions by larger firms on the basis that the transactions risk greater potential harm – so the larger the acquirer, the more tenuous the potential concern can be. If implemented, the proposal will inevitably result in an increase in blocked transactions on the basis of speculative theories of harm, including in circumstances where the same transaction is approved by overseas authorities.

   The proposals to include new merger factors to examine potential competition and data aggregation appear redundant, as the ACCC and review bodies are already able to, and do, take these factors into account when assessing the likely effect of a proposed transaction.

3. **New deeming provision unnecessary and unclear in application**. The deeming of any transaction that entrenches, materially increases or materially extends the existing market power of a merger party to substantially lessen competition is extreme. The proposal goes further than even a rebuttable presumption that places the burden on the acquirer to demonstrate that competition would not be lessened. If implemented, this proposal would greatly enhance the ACCC's ability to block transactions involving large companies on the basis of speculative theories of harm because the ACCC will not be required to demonstrate the likelihood of anticompetitive effects.

   It is also unclear how this would work in practice. Would merger parties have to make submissions that they do not have substantial market power in any relevant market; but if they do, it is not 'entrenched' (at all) or 'enhanced' or 'extended' (to a 'material' degree) by the transaction; and that the acquisition does not substantially lessen competition on its merits (to the 'not remote possibility' standard)?

2 *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited* [2014] ACompT 1; *Australian Competition and Consumer Commission (ACCC) v Metcash Trading Ltd* [2011] FCAFC 151.

3 Competition and Markets Authority, *Merger Assessment Guidelines*, 18 March 2021, paragraph 2.36.

4 Case T-399/16, *CK Telecoms UK Investments Ltd v European Commission*, judgment of 28 May 2020.

4. **A lower probability test for digital platforms is an unprincipled approach to merger assessment**. Lowering the probability of competitive harm that needs to be established for a specific industry is an unprincipled approach to economic regulation. Australia has never had a more stringent or restrictive merger regime for particular industries or companies, and no proper case has been made for why one is necessary in relation to certain digital platforms.

   Although unclear, it seems the ACCC wants the power to deem some types of transactions by digital platforms (e.g. transactions that involve an increase in data held by the digital platform or an acquisition of a nascent but potential competitor) as likely to substantially lessen competition without being required to analyse or show why such transactions are in fact likely to have this effect. As with the deeming proposal in respect of merger parties that may have substantial market power, any use of a deeming provision applied to particular industries or companies would be an extreme and unjustified mechanism.

5. **Proposal to remove full merits review erodes important safeguards**. The ACCC's proposed removal of the right to apply directly to the Federal Court would remove important safeguards against over-enforcement and poor decision-making.

   In a limited merits review, merger parties would be placed at a disadvantage to the ACCC because they would be unable to properly test third parties' submissions and evidence. The limited merits review proposed would occur 'on the papers' and there would be no oral hearing or cross-examination and no ability to submit new evidence that was not before the ACCC.

   Because the ACCC can examine merger party executives on oath during the clearance process using its compulsory powers and receive full access to all of the evidence, but the merger parties never obtain access to complainant witnesses and may obtain only limited access to their submissions and data, it is likely that the merger parties' evidence and arguments will be tested far more robustly than opposing parties.

   In an environment in which merger parties' appeal rights are limited to the material before the ACCC, there will be a strong incentive to front-load the ACCC process with factual and economic evidence – potentially increasing review costs dramatically.

The ACCC flagged that it was opening debate on these proposals and seems to recognise that changes are unlikely in the near term. Given the political landscape in Australia and the impending federal election, it is likely to be some time before concrete proposals are considered or developed by legislators and the prospects of these (or any) changes becoming law are currently unclear.


# Technology and human rights: emerging risks for companies and boards

By **James North**, Head of Technology, Media and Telecommunications, **Dr Phoebe Wynn-Pope**, Head of Business and Human Rights and **Thomas Milner**, Law Graduate

As Australia treads a rapid path towards becoming a leading digital economy, corporates are increasingly adopting emerging technologies, including artificial intelligence (**AI**), to assist with various business operations and functions.

But while novel technologies offer exciting commercial opportunities, they can also create new legal, reputational and human rights risks that companies and boards should be taking proactive steps to mitigate.

Directors and managers should understand the technology they are deploying in the business, in order to be able to assess and mitigate any risks arising from its use. These risks can be varied and in some cases extremely complex, requiring subject matter expert consideration of the technology and its impacts from the design stage through to end use.

## Liability risks for AI-informed decision-making

Companies may incur liability for unlawful decisions made using AI-informed technology. AI systems make decisions based on analysis of large databases, which may include data relating to historical human-made decisions. If that data indicates a trend of bias (for example, due to historically prevalent prejudices), that bias may be replicated in the decisions made by the AI system.

Similarly, AI systems use algorithms that may reflect the prejudices of the engineers that developed them. If a company makes an AI-informed decision which is discriminatory due to underlying bias in the data set or algorithms – such as a hiring decision which factors in protected attributes such as race or gender – it may be liable for breach of anti-discrimination law.

Liability risks are likely to increase as regulation of AI use expands. For example, the Australian Human Rights Commission has recommended a moratorium on the use of biometric technology due to the high risk of human rights impacts. Companies should ensure that their deployment of AI does not conflict with expanding regulation.

### How can liability risks be mitigated?

There are a number of measures and processes that companies and general counsel can put in place to verify appropriate AI-informed decision-making, including:

- **Obtaining contractual protections from the provider of the AI system**. These may include warranties that the AI system is fit for purpose and has been trained on appropriate data, or indemnities against the liability resulting from discrimination in the AI system.
- **Taking operational steps to minimise the risk of harm resulting from its use of AI**. These may include ensuring that the AI system is rigorously tested in a safe environment prior to commercial use, that the data used to train the AI system is fit for purpose and free from biases, that the operation and decisions made by the AI is subject to appropriate human oversight, and that appropriate procedures are put in place to handle complaints and redress any unintended harm.
- **Ensuring that an audit is conducted to determine what AI systems are already in use at the company or are proposed for future use**. This will help general counsel understand the relevant risks that might arise from the company's use of AI systems, and what mitigation measures would be appropriate to address those risks.

## Directors' duties and personal liability

As the use of technology expands, it is expected that directors will increasingly seek to use machine learning and AI to assist them in their own decision-making. At a minimum, directors will likely rely on AI-informed decisions taken elsewhere within the organisation. Where the AI is wrong, or has been built on flawed data-sets, wrong decisions or even decisions that breach the law may result.

The question for directors is whether they may be exposed to a breach of their statutory duty to exercise reasonable care and diligence. For example, directors are obligated to inform themselves about the subject matter of business decisions to the extent that they reasonably believe to be appropriate. It may be difficult for directors to comply with this obligation if they rely upon the conclusions drawn by an AI system when they do not fully understand the operation of that system.

### How can directors' risks be mitigated?

Steps that directors can take to mitigate their risks of breach of statutory duties and personal liability for AI-informed decision-making include:

- **Ensuring that an audit is conducted to determine what AI systems are already in use at the company or are proposed for future use**. An AI audit helps directors understand what information and decisions they are making has been influenced or informed by AI, and empower them to further interrogate aspects and operation of the AI where necessary.
- **Requiring management to implement human rights safeguards**. These may include conducting human rights impact assessments for each system and ensuring human oversight over the operation of the system to minimise the risks of unexpected bias in decisions.
- **Increasing the technology capabilities of the board through targeted training**. This will enable the board to provide appropriate oversight of the company's use of AI. A recent study by the Australian Institute of Company Directors and the University of Sydney showed that only 3% of surveyed company directors brought technological expertise to the board.

## Reputational and human rights risks of AI use

Even if companies do not incur liability for technology-assisted decisions, they may still suffer reputational damage and associated loss of public trust if those decisions impact upon human rights. Even if a company's AI systems do not make harmful decisions, non-transparent AI-informed decisions may contribute to public distrust of the company.

The risk of reputational damage associated with AI is particularly high in a social context of low public trust in AI – a recent report by the University of Queensland and KPMG indicated that only one in three Australians currently trust AI technology.

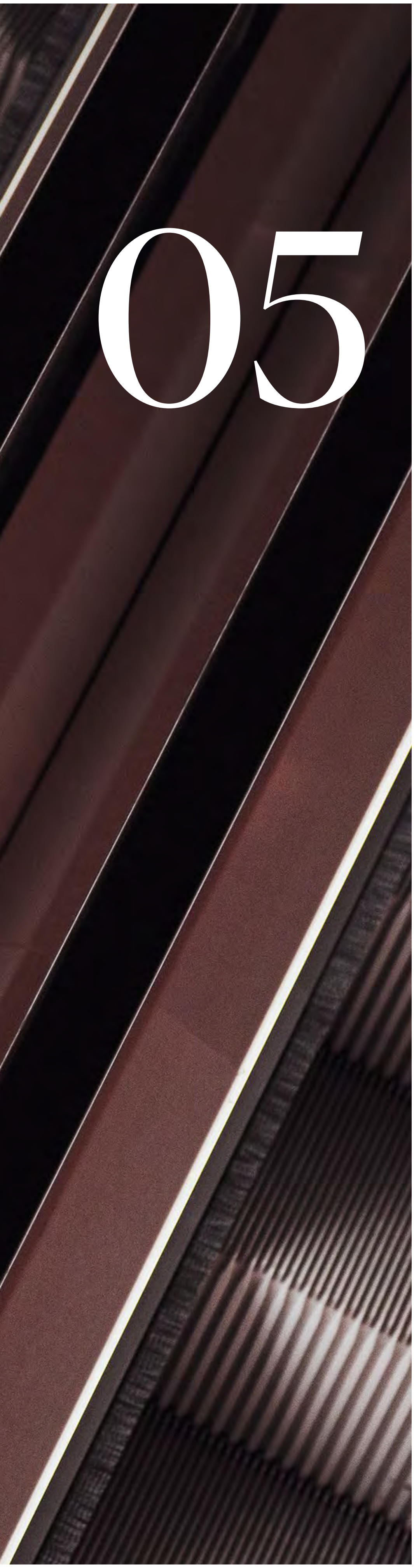
### How can human rights and reputational risks be mitigated?

There are several voluntary tools that companies may use to reduce their reputational and liability risk and ensure that their AI systems are safe, secure and reliable. For example, the Australian Government has introduced voluntary AI Ethics Principles, which encourage companies deploying AI to ensure that:

- they respect human rights;
- they protect diversity and the autonomy of individuals;
- the outcomes of their decisions are fair and remain inclusive and accessible;
- there is a measure of transparency and explainability on any decisions made using AI;
- consumers are able to contest those decisions; and, ultimately
- those responsible for the deployment of the technology are accountable for the decisions that result.

Further, the Australian Human Rights Commission has recommended private sector adoption of human rights impact assessments to determine how their use of AI systems engages human rights, and the compliance measures that can be taken to ensure that human rights are not violated.

As we look ahead to a future in which emerging technologies will play an increasingly important role, it is vitally important that companies and boards take proactive steps to mitigate the associated legal, reputational and human rights risks.



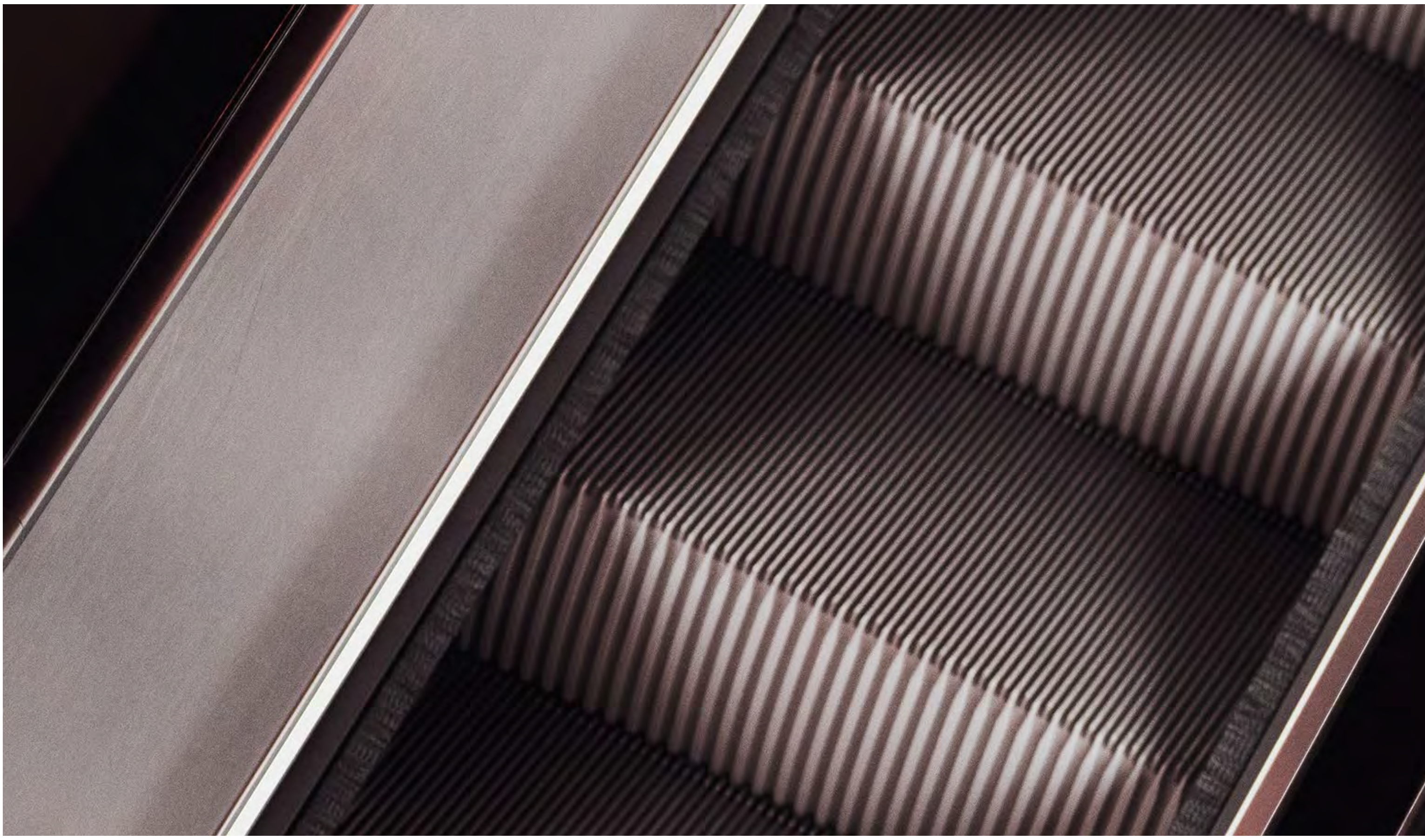
05

# De-risking in response to permanent changes to Australia's continuous disclosure laws

By **Andrew Lumsden**, Partner, **Chris Pagent**, Head of Class Actions, **Daniel Marquet**, Partner, **Joshua Levy**, Senior Associate and **Kate Mani**, Law Graduate

Recent significant reforms to Australia's continuous disclosure laws designed to address the increasing cost of obtaining directors and officers (D&O) liability insurance and deter unmeritorious class actions have now been made permanent.

But despite this, concerns about the availability and affordability of D&O insurance continue to linger, and the economic fallout from COVID-19 has materially heightened the risk of securities class actions based on alleged inadequate disclosure. How can listed entities and their officers manage the risks associated with Australia's continuous disclosure and misleading conduct regime?



From 14 August 2021, listed entities and their officers will only be liable for penalty proceedings where they are knowingly involved in a failure to comply with the continuous disclosure obligation (*Treasury Laws Amendment (2021 Measures No. 1) Bill amends the Corporations Act 2001).* The changes also import the fault element into misleading or deceptive conduct claims where those provisions are relied on to support continuous disclosure claims.

This means that if a listed entity took the view that the matter did reach a threshold of certainty where it can be reasonably expected to be relied on by a reasonable retail investor and decided not to make a disclosure, they should not be liable for penalty proceedings.

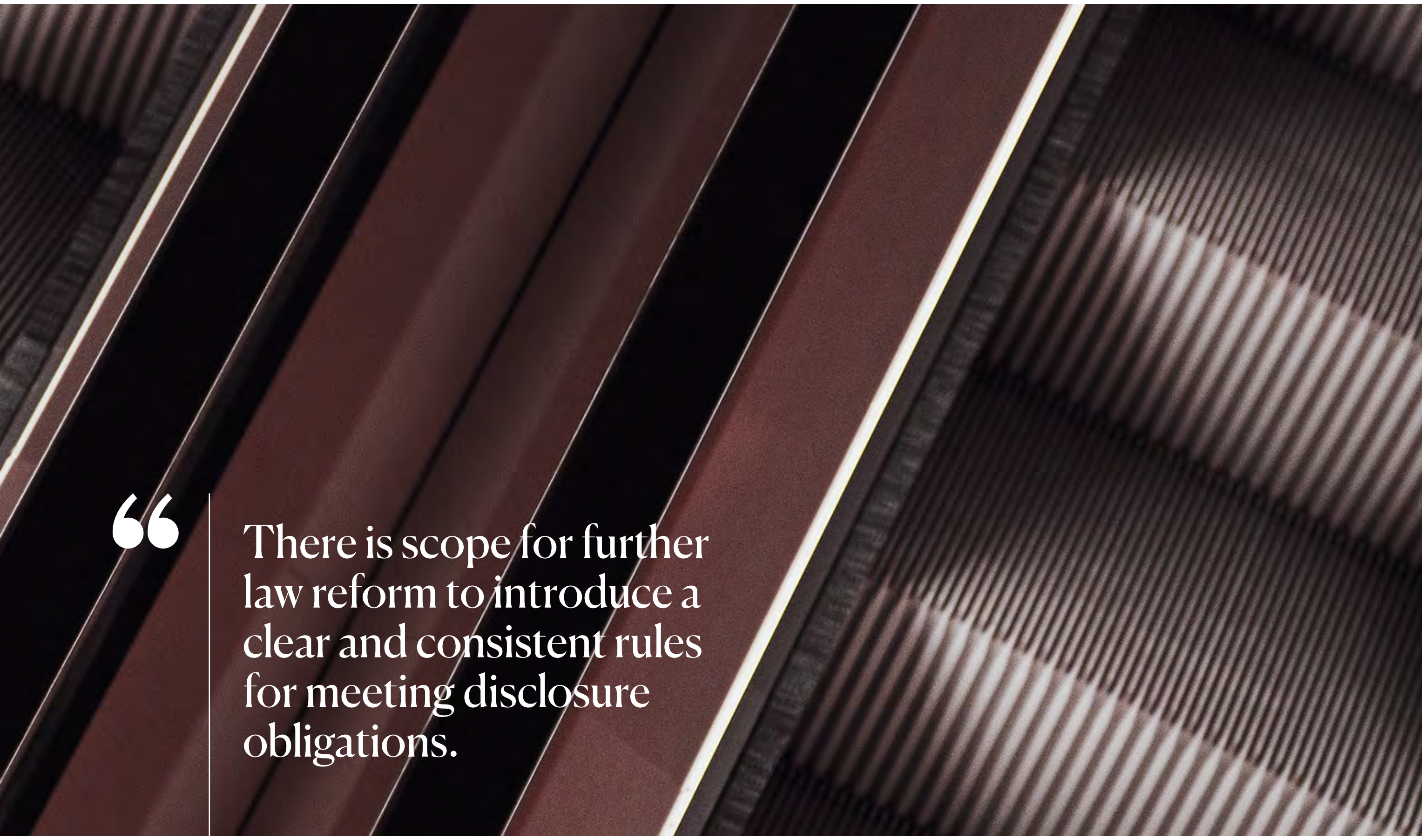
The disclosure rules require listed entities to immediately disclose to the ASX any information of which it is aware that a reasonable person would expect to have a material effect on the price or value of its securities. Breaches of the obligations can give rise to both civil and criminal penalties for the entity and its directors. The entity will be treated as being aware of information if an officer has, or ought reasonably to have, come into the possession of the relevant information in the course of performing their duties.

## Implications and effects of the changes

The changes had their genesis in the [Parliamentary Joint Committee on Corporations and Financial Services] as part of its inquiry into litigation funding and the regulation of the class action industry. Treasurer Josh Frydenberg said, *"these changes will mitigate the risk of companies and their officers being subject to opportunistic class actions under our continuous disclosure laws"*, and that the changes *"strike the right balance between ensuring shareholders and the market are appropriately informed while also allowing companies to more confidently make forecasts of future earnings or provide guidance updates."*

But while the changes align Australia's continuous disclosure regime more closely with similar regimes in the United States and the United Kingdom, given the issues in the global professional indemnity insurance market, it remains to be seen if we will see reductions in the increasing cost of obtaining D&O insurance.

While there may be a connection between an increased number of class actions / resultant insurance claims paid and premiums, retentions and availability of D&O insurance, this does not necessarily mean that these changes will have that effect.




## How can listed entities manage the risks?

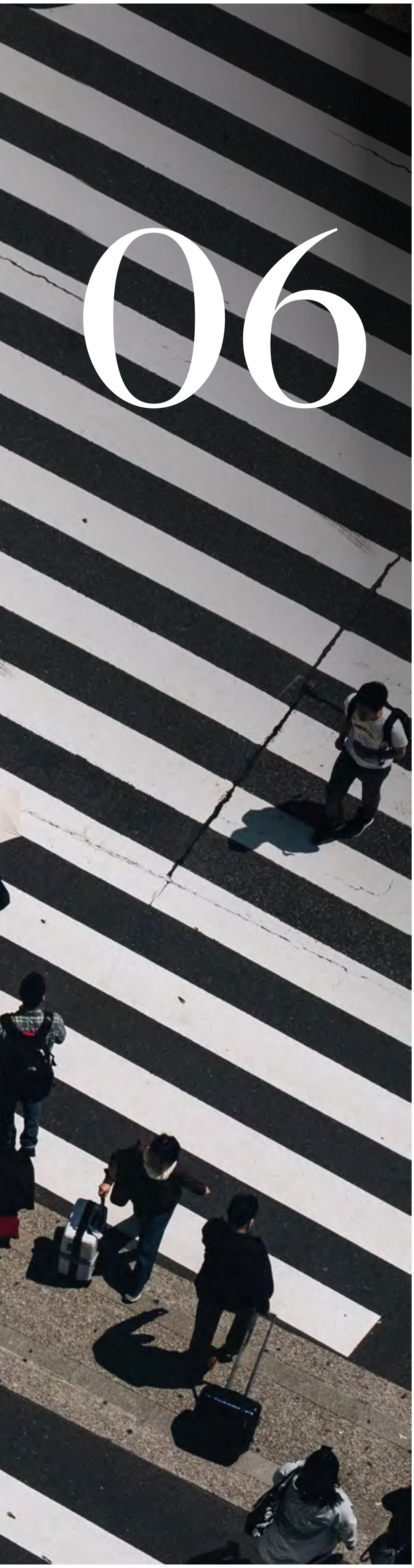
Listed entities and their officers need to understand that these reforms will not change the content of continuous disclosure obligations, nor do they affect ASIC's ability to issue infringement notices and undertake non-penalty proceedings for continuous disclosure breaches where there has been no fault element. The amendments also do not affect the application of ASX Listing Rules 3.1 and 3.1A, which continue to apply.

In order to get the benefit of the provisions, listed entities should ensure that:

- they are documenting their processes around disclosure and non-disclosure of matters; and
- there is an evidence trail that demonstrates that their decision is based on an analysis of whether the information would have a material effect on the price or value of its securities and how it decided that the information would not, or would not be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the securities.

Disclosure committees need to review their continuous disclosure policies and think about how their processes demonstrate that their decisions did not involve knowledge, recklessness or negligence, and that they reasonably formed a view that the material was not 'information such that a reasonable person would expect it to have a material effect' on price. Listed entities need to establish a counter factual to the hindsight bias that all too often sits behind continuous disclosure or misleading and deceptive conduct claims.

It remains to be seen if the initial objective of improving the cost and quality of D&O insurance will eventuate. However, the liability regime in relation to disclosure and directors' and officers' obligations remains sub-optimal and we think there is scope for further law reform to introduce a clear and consistent rules for meeting disclosure obligations.




# Mandatory COVID-19 vaccination policies in the workplace: the new norm?

By **John Tuck**, Head of Employment and Labour and **The Hon Graeme Watson**, Partner

With the spread of the Delta COVID-19 variant across Australia's eastern seaboard showing no signs of abating, there is a pressing need for organisations to make clear choices to aid their return to work efforts – and accelerate the path to broader societal and economic recovery – by supporting COVID-19 vaccination.

Encouraging, rather than coercing, employees to get vaccinated will likely be favoured by most employers. But if this is insufficient, what options do employers have open to them? What are the objections to mandatory vaccination policies in the workplace? And, more importantly, can these issues be addressed both from a legal and an ethical perspective?

In late July 2021, the Australian Federal and state governments agreed to a four-stage National Plan to open up the economy and the broader community, and to live with COVID-19 for the foreseeable future. The final stage will be reached when more than 80% of the population aged 16 and over is fully vaccinated. Encouragingly, the take up rates – particularly in New South Wales – suggest we will reach these targets in 2021.

Over recent weeks, we have observed that community sentiment has noticeably shifted to an acceptance that Australia needs to move from an 'aggressive suppression' strategy to one where it will be necessary to live with the virus circulating, managing this risk in part by high levels of vaccination and ongoing non-pharmaceutical interventions (**NPI**). Vaccines provide a way out from the deleterious impacts of ongoing lockdowns, and, importantly, they offer individuals protection from hospitalisation and death from COVID-19. Expert opinion also suggests it is likely that vaccines offer some collective protection by significantly reducing transmission.

With the Federal and state governments either unwilling or unable to mandate wide-ranging vaccination requirements, many employers are addressing the question of what their organisations should be doing to support this critical community effort, and how they can manage the risk the Delta COVID-19 variant presents not only to their employees but to their business, customers, clients, suppliers and the public at large.

Fortunately, most adults now have access to an approved vaccine. It also seems likely that the virus will still be circulating throughout some parts of Australia for the foreseeable future. These factors impel a consideration of the need to strike a balance between individual freedoms and the common good.

What are the principal issues that need to be addressed in the context of mandating vaccination of employees?[1]

## Would it be a lawful and reasonable direction to require employees to receive a vaccine as a condition of employment?

In simple terms, all employees are under a contractual obligation to observe the lawful, reasonable directions of their employer. For a direction to be lawful, it must be consistent with any employment contract, award or industrial agreement, and any Commonwealth, state or territory law that applies (e.g. an anti-discrimination law). This is well established law in Australia. Importantly, a direction need not be required by law in order to be lawful. The test is that the employer's direction not involve any contravention of a law, industrial instrument or employment contract. By the same token, the direction may well be necessary in order to enable the employer to discharge its legal obligations.

It follows from the foregoing that an employer does not need to establish that mandatory vaccination is required by health and safety laws. It does, however, need to be confident that giving such a direction is not contrary to such laws. This is an important and often misunderstood distinction.

We consider that in all but highly exceptional circumstances, implementation of a mandatory vaccination policy would not be contrary to occupational health and safety laws. What constitutes a 'reasonable' direction is less well-established than what constitutes a lawful direction. It is clearly not a matter that is to be determined in a vacuum. The nature of work and relationship are informative. Frequently, the reasonableness of directions has been considered in the context of implementation of health and safety policies.

Recent decisions of the Fair Work Commission (**FWC**) have confirmed that a direction to be immunised (against influenza) may constitute a lawful direction. In doing so, the FWC has found that such a direction is neither inherently discriminatory[2] nor an assault or battery.[3] It seems reasonable to assume that the FWC would adopt a similar position in relation to a direction to take a COVID-19 vaccine. Employers can, therefore, have confidence that a direction to require a vaccination as a condition of work will normally be both lawful and reasonable.

1 In this context, 'mandatory vaccination' refers to compelling vaccination by direct or indirect consequences, and the imposition of restrictions in cases of non-compliance. Despite the terminology, 'mandatory vaccination' is not truly compulsory in the sense that there is no force or threat of criminal sanction in cases of non-compliance. Each individual would retain agency over whether to receive a vaccine or not, but their choice may have implications for their ongoing employment on a temporary or continuing basis. It is also important to recognise that typically, mandatory vaccination policies permit a limited number of legitimate exceptions – such as, for example, medical contraindications (a specific situation in which a drug, procedure, or surgery should not be used because it may be harmful to the person).

2 *Ms Maria Corazon Glover v Ozcare* [2021] FWC 2989 (26 May 2021) (**Ozcare**); *Jennifer Kimber v Sapphire Coast Community Aged Care Ltd* [2021] FWCFB 6015

3 *Ms Bou-Jamie Barber v Goodstart Early Learning* [2021] FWC 2156 (20 April 2021) (**Goodstart**);

On the other hand, it is important to bear in mind that although a direction to take a COVID-19 vaccination is likely to be regarded as lawful and reasonable, and as such to constitute a 'valid reason' for termination for purposes of unfair dismissal claims, employers are still required to accord employees an appropriate level of procedural fairness before treating a valid reason as a ground for termination of employment.

It is also important to bear in mind that disciplinary action short of dismissal can constitute 'constructive' dismissal if it is adjudged not to be reasonable in the circumstances. This is not to suggest that refusal to observe a mandatory vaccine direction cannot lawfully lead to termination of employment or other disciplinary action, but it is to emphasise the importance of observing appropriate standards of procedural, as well as substantive, fairness in such contexts.

## Can the risk profile of a workplace objectively justify a reasonable and lawful direction to receive a vaccination?

Although safety and welfare considerations for all workers and workplace participants need to be balanced against the rights of individuals, the nature of the balancing process has changed dramatically in New South Wales and Victoria in particular. Initially, the focus was on high-risk environments, where the medical and safety advice has been that vaccines are necessary. Employers in these sectors including health and aged care had a clear path to mandate vaccinations. Employers not in a medical or aged care environment now need carefully to consider whether the risk profile of their workplaces can objectively justify a reasonable and lawful direction to take a vaccination. All employers have both statutory and common law workplace health and safety obligations. Compliance with these obligations is of course mandatory. But whether a mandatory policy for vaccinations is necessary to manage a workplace risk does not fully resolve the question of whether a direction is reasonable. A direction may still be reasonable without being necessary.

In this context, even though vaccination does not guarantee that the individual concerned will not contract the virus, or infect another person, the capacity to declare that all staff are vaccinated is likely to provide an employer with reliable comfort in the face of potential litigation, as well as a level of assurance to its clients as to its commitment to safety.[4]

It seems obvious, but necessary, to point out that when the virus is circulating in the community and there is full and ready access to a vaccine, then a fully vaccinated workplace will have a higher level of safety than a workplace with lesser rates of vaccination. If the health advice is that in such an environment, a workplace with 90% vaccination will be safer than a workplace with 50% vaccination, does this suggest an employer should mandate vaccinations?

4 Ozcare at [249].

This may seem trite, but it must be recognised that this is the more likely scenario for Australia, given that the virus is likely to continue to circulate for some considerable time. Surely, this is a scenario that needs serious, and informed, consideration by employers, especially if the data suggests that vaccinated people are on balance less a risk to others than unvaccinated people.

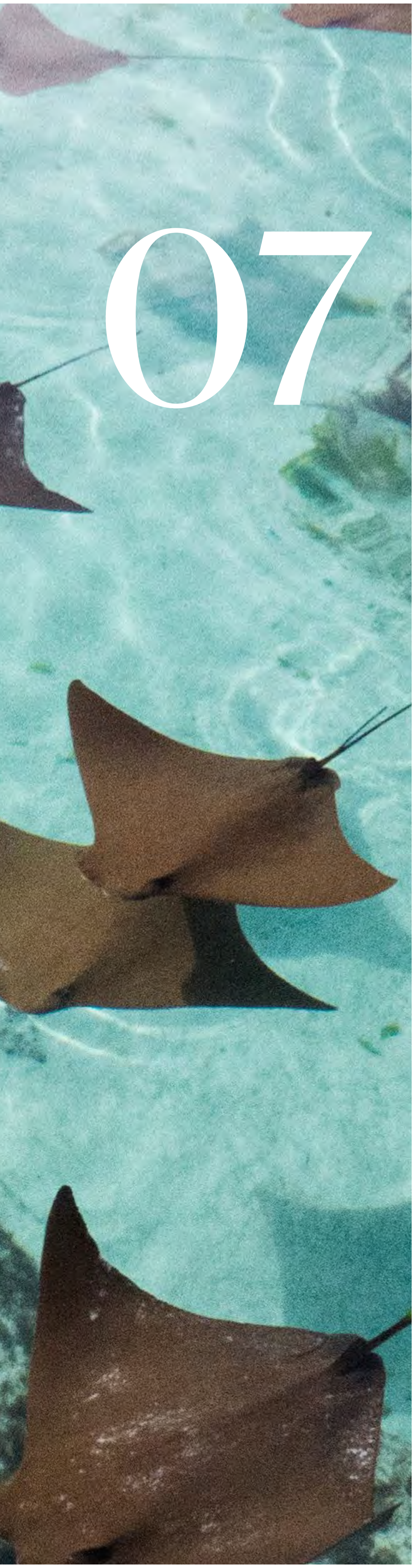
The counter-position is that other control measures (**NPIs**) could instead be used to manage COVID-19 risks in the workplace (e.g. the wearing of PPE, rapid antigen testing, varied work patterns or locations etc.) But this would not in itself render a managerial decision to mandate vaccination unreasonable or unlawful. For starters, work health and safety laws require the risk of exposure to COVID-19 to be eliminated or minimised so far as is reasonably practicable. Applying this standard requires taking account of a range of factors, including the likelihood of exposure to COVID-19 occurring, the degree of harm that might result from that exposure and the availability and suitability of ways to eliminate, or otherwise minimise, that exposure.

Further, business considerations are relevant to reasonableness in this context. If the business is likely to be a more attractive place for customers to visit if its workforce is fully vaccinated, or less prone to interruptions or forced shut downs, it is legitimate to take this consideration into account. The personal circumstances of employees are also relevant.

To date, the focus has been on workplaces where employees interact with people with an elevated risk of being infected with COVID-19 (e.g. employees working in hotel quarantine or border control), or employees who have close contact with people who are most vulnerable to the health impacts of COVID-19 (e.g. employees working in health care or aged care). However, overseas experience suggests that when restrictions are eased and the virus is still circulating in the community, albeit at a socially acceptable level, most, if not all, workplaces will be susceptible to infection. This year has shown that people have contracted the virus attending sporting events, at shopping centres, in offices and on construction sites.

These considerations suggest that it is likely that risk assessments will confirm the imposition of vaccinations to be reasonably practicable in the near future for many workplaces. In this context, the medical advice that people who are vaccinated can still contract COVID-19 and therefore transmit the virus to others is an important consideration. Even when an individual is fully vaccinated, they still have an interest in whether others are vaccinated.

An earlier, more detailed version of this article can be accessed here.



07

# Sting in the tail: the importance of proper brand governance

By **Grant Fisher**, Partner, **Jürgen Bebber**, Partner, **Gaynor Tracey**, Partner and **Melissa Chuong**, Lawyer

The ever-expanding role of intellectual property (**IP**) rights in safeguarding and enhancing the value of a modern business necessitates that IP-dependent corporates invest in proper IP governance.

Increasingly, it is becoming essential that corporates have specific protocols in place for the governance of their IP rights (including their brands), and ensure they are used, monitored, measured for risks and concerns, valued and reported to management and the board of directors.


Brands are often the lifeblood of an organisation and underpin its value to customers. Proper protection and vigilant monitoring of any use by competitors is key to ensuring that a brand's value is maintained and enhanced. Without proper governance – which refers to the entirety of structures, rules and processes by which an entity is controlled and managed, including corporate, environmental and social governance as well as IP management – a company risks losing significant value in its brand assets.

Good brand governance includes having proper systems in place to ensure that existing brands are protected (for example, by seeking trade mark registration in key jurisdictions where possible), ensuring that new brands will not infringe competitors' rights and ensuring that competitors are not infringing your rights. (In the latter case, enforcement processes must also be in place to inform decision-making on what action should be adopted).

It also includes having systems in place for 'dealing' with marks, such as:

- **licensing** – which might occur when a brand is to be used in another jurisdiction by a third party;
- **assignment – which might occur when part of a business** is being sold; and
- co-**existence arrangements** – which might occur where your brand co-exists in the market with another similar brand but in respect of very different good and/or services.

In the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry final report, Commissioner Hayne reminded us that: *"It is rightly said that the 'tone' of an entity is and must be set at the top but that tone must be echoed from the bottom and reinforced at every level of the entity's management and supervision."*

While proper board governance is essential to protecting the value of a brand, it is also important that the whole of an organisation has systems – at both the executive and ground level – and a general appreciation of the factors which contribute to the value of and proper treatment of a brand. Accordingly, when 'dealing' with a brand, proper checks and balances need to be negotiated and included in agreements to take account of various potential scenarios. These agreements will often be negotiated by managers within a company's organisation who in turn then report to senior management who then report to the board. Like all good practices, good brand risk management and governance should exist at these three points as well. Regular monitoring ensures any concerns or risks are promptly reported to management and, if necessary, elevated to the board so they may be attended to as soon as possible and dangers averted in that process.

When licensing a brand, it is important that a company's key negotiating personnel ensure proper terms are in place that enable it to oversee and manage the way in which the mark is being used and the quality of the goods and/or services being supplied by a third party. It is also essential that arrangements are negotiated that anticipate a breach of a term of the agreement or for when the agreement comes to an end or is terminated. In such circumstances, there will often need, for example, to be a 'phase out' period. If agreements are not negotiated with an eye to when they may go wrong, there can be unanticipated and costly consequences.

One of the many recent cases to illustrate some of the issues that may arise when licensing a brand is the Federal Court of Australia's decision in *Chevron Global Energy Inc v Ampol Australia Petroleum Pty Ltd* [2021] FCA 617. The applicant (**Chevron**) and the respondent (**Ampol**) were competing businesses, each operating retail service stations before they merged in 1995. From then onwards, Ampol rebranded all but ten of its service stations to the Caltex brand under which Chevron had been operating. As a consequence of a divestment in 2015, Chevron and Ampol entered into a Trade Mark Licence Agreement (**TMLA**), which licensed Ampol to use the CALTEX mark and other related marks (**licensed marks**). The dispute arose after Chevron terminated the TMLA and took issue with Ampol's conduct during the 30-month 'work-out' (**phase out**) period for the transition of its service stations from the Caltex brand to Ampol brand.

Chevron's claims against Ampol for breaches of the TMLA, trade mark infringement and contraventions of the Australian Consumer Law were mostly unsuccessful. The TMLA required Ampol to remove 'signage and/or [any] element bearing [or displaying]' any of the licensed marks, however, the Court found that this did not apply to Ampol's use of red coloured canopy fascia as part of its re-branded Ampol service stations. The wording of the agreement was silent on the issue of colour schemes (or other trade indicia). Accordingly, reading into the TMLA, a license to use of the 'Caltex Red' colour was 'at odds with commercial sense' and, more importantly, 'if such an uncommercial and unlikely outcome had been intended, it would surely have been made clear'.

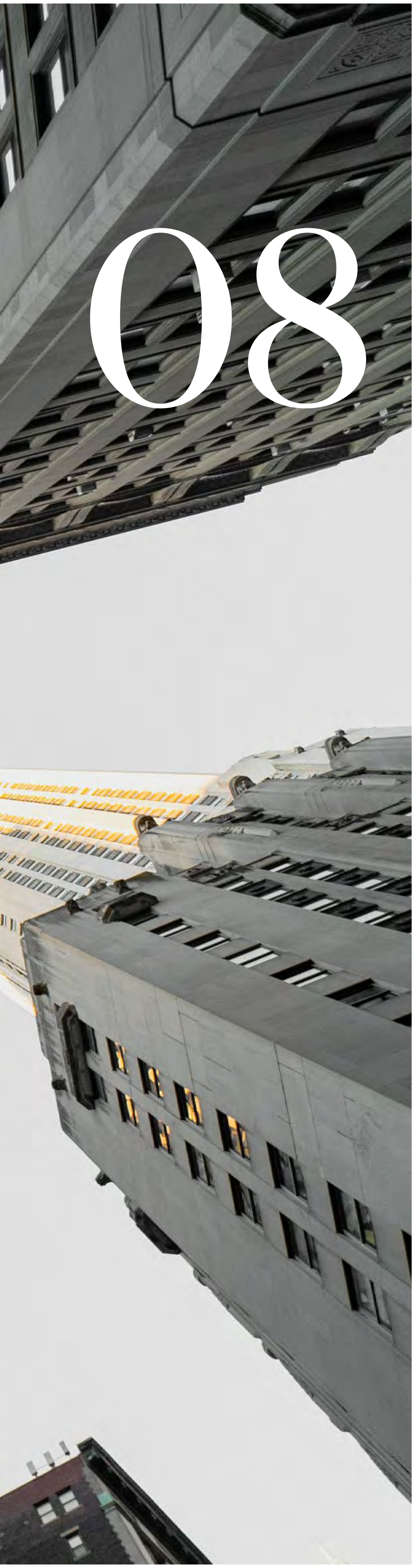
In addition, the Court did not consider Ampol's use of the licensed marks (CALTEX and STARCARD) in conjunction with the AMPOL and AMPOL CARD marks during the phase out period to be in breach of the TMLA. The exceptions were a banner that said 'StarCard accepted here' and advertising which said 'StarCard will be accepted at Ampol branded sites', as such use was commercial, not educative. Again, the wording of the TMLA was the decisive factor and, in that case, the only permitted conjunctive use contemplated by the parties was 'for the sole purpose of educating customers that [Ampol] is transitioning away from [the licensed marks]'.

For publicly listed IP licencing companies, including companies that deal with innovative technologies or companies that are IP-dependent, the stakes may be even higher, with mismanagement of IP assets potentially resulting in shareholder activism as seen in the US. Examples include:

- **Tessera Technologies, Inc.** – In 2013, one of the major shareholders of Tessera (an IP licensing company) wrote to fellow shareholders pushing for the election of a new board and CEO as the firm had failed to contain costs and successfully license its extensive patent and technology holdings. According to Forbes, 'the result in only one year was a dramatic turnaround that saw Tessera's stock double in value and its earnings grow from a $151 million loss in 2013 to a $175 million gain in 2014.'
- **AOL** – In 2012, one of the major shareholders of web portal / online service provider AOL pushed for the replacement of five board members because, among other reasons, AOL 'owns a robust portfolio of extremely valuable and foundational intellectual property that has gone unrecognized and underutilized.'

In order to avoid unnecessary financial consequences, companies should adopt a forward-thinking approach to protecting IP rights (including their brands) and take steps to exercise good brand governance – that is:

- consider **all** brand assets – a common pitfall is to consider a name or logo as the primary brand element and overlook other relevant aspects of the brand (such as any slogans, product shape, trade dress or colours);
- envisage the brand across all channels, including online and offline (e.g. store signage, packaging, advertisements and third-party websites); and
- ensure that all necessary perspectives are considered by involving the internal marketing, legal and managerial teams in any brand strategy.




# Mitigating cross-border investment risk through investment treaty protections

By **Joshua Paffey**, Head of Arbitration and **Nastasja Suhadolnik**, Partner

With almost unprecedented levels of undeployed capital presently sitting as dry powder within companies and financiers across the world, international cross-border investment will form an almost inevitable component of the near to mid-term investment strategy for many investors.

But with a confluence of geopolitical trade tensions and the extraordinary use of pandemic-driven sovereign power, international investment – particularly in long-term capex-intensive projects – has never been riskier.

The risks of cross-border investment to investors are manifesting globally in a variety of ways. Authorities of the host country may assert their sovereignty against the investor's contractual rights or adopt measures that otherwise impact the economic viability of the investment. Unlawful expropriation is an extreme example of that but there may be less overt ways in which government action can deprive a company of the economic use of its rights or the value of its assets – from withdrawals of industry subsidies, to discriminatory denials of permits required to conduct operations or arbitrary criminal proceedings against the company's personnel, to name but a few examples.

When this occurs, recourse before a foreign country's domestic courts may not provide a meaningful remedy for a range of reasons including a perceived lack of judicial independence and impartiality, an absence of adequate protections under the local laws and the application of sovereign immunity rules.

Australian companies and shareholders can reduce the risk of operating overseas by ensuring that their activities benefit from protections available under investment treaties.

Investment treaties are international agreements concluded between two or more countries which protect qualifying investors (from one country) against certain types of government conduct (in the other country). They include treaties that are dedicated exclusively to the protection of foreign direct investments (often called bilateral investment treaties or 'BITs'), as well as free trade and other trade liberalisation agreements that include investment protection provisions. Today, there are over 3000 investment treaties in force worldwide and Australia is a party to several dozens of them, including with countries such as Indonesia, the Philippines, Papua New Guinea and Peru where significant Australian assets are located.

Investment treaties offer substantive and procedural protections. Substantive protections typically guarantee that the investor's rights will not be nationalised or expropriated (either directly or indirectly) without just compensation, that the investor will not be treated less favourably than comparable domestic and other foreign investors or subjected to discriminatory, grossly unfair or arbitrary treatment, and that the investment will be protected from harm by government and private actors. Treaties may also contain other substantive guarantees, like the right to a free transfer of profits in and out of the host country. They may even protect the investor's legitimate expectations about future matters that may come to impact the investment. These protections can restrict arbitrary conduct by host countries in the form of new laws and regulations or the application of the existing laws in a way which affects the value of an investment.

> Apart from the substantive protections, many investment treaties offer important procedural advantages.

Apart from the substantive protections, many investment treaties offer important procedural advantages. They may enable the investor to claim damages, including lost profit, from the host country for alleged treaty breaches in front of a privately appointed, independent and depoliticised panel of arbitrators, without needing to resort to domestic courts first. Moreover, unlike under most domestic law systems, a claim for damages for losses sustained in respect of an investment may be made by the company's shareholders, sometimes several levels up the corporate chain.

In this way, investment treaties can be a powerful tool for companies and shareholders wishing to reduce risks to their foreign investments. If an investment is impacted by conduct of the host state's authorities, they can – and often do – provide leverage when negotiating with foreign governments, and if a settlement cannot be reached, recourse to an international tribunal may result in an award of damages enforceable against the host country in a range of jurisdictions where the country holds assets.

However, to benefit from investment treaty protections, investments must be structured in a way which enables access to the most favourable treaty. While a number of treaties contain similar broad guarantees, we increasingly see differences among more recent species of investment treaties. Some limit access to investor-state arbitration to claims for breaches of distinct treaty guarantees only, such as expropriation, or even exclude investor-state arbitration entirely. Others might exclude certain types of investments or investors from their scope, and some contain specific provisions that preserve the host country's right to regulate in certain areas, even if to the detriment of the investor. Some have begun to impose obligations on investors.

The foregoing underscores the need to understand the full range of investment treaties that may be available to de-risk foreign investments. Without careful corporate and transaction structuring, Australian companies and shareholders may only able to benefit from a limited number of treaties to which Australia is a party. Where there is no investment treaty between Australia and the host country of the investment, obtaining the most favourable treaty protections may require the investment to be channelled through a corporate entity of a third country with which the host country of the investment has concluded an investment treaty, offering a greater degree of protection to the investor and allowing disputes to be resolved in a binding dispute settlement process. Maximising treaty coverage may even require spreading the chain of ownership across a number of different jurisdictions so that a larger number of investment treaties can potentially be available.

It is important to bear these matters in mind early in an investment's cycle. Restructuring after a potential dispute has arisen may be treated as 'abusive' and may ultimately disallow the investor(s) from relying on a treaty's protections. To de-risk operations by reference to investment treaty, corporate, transactional and operational structuring must be considered prior to the time of making an investment.

# Minimising corporate risk through 'responsible' dispute resolution processes

The global pandemic has placed extraordinary pressures on trade across almost all industries and sectors, particularly those with exposure to cross-border transactions. These pressures have caused, or will cause, loss and disputes. The manner in which those losses are recouped and disputes managed can have a significant and potentially long-lasting effect on shareholder value and the investment profile of a company. Unwanted media attention on losses and disputes can erode market value, while not pursuing losses can impact the balance sheet and potentially spark shareholder-led claims. Confidential arbitration that is tailored to the needs of the parties and the nature of their disputes may be an effective and 'responsible' option for companies.

Arbitration has long been the dispute resolution method of choice for international transactions involving parties from different jurisdictions. In Australia, it has been commonly used for energy and resources and major infrastructure projects. More recently, its use has spread into sectors that traditionally opted for litigation, including big tech, the pharma industry, banking and finance. Why are these players increasingly choosing arbitration to resolve their disputes?

At its heart, arbitration is a private process, shaped by the parties involved in a transaction and often kept confidential and away from the media. The parties agree to resolve their disputes pursuant to a set of procedural rules of their choice and before one or more independent arbitrators instead of in court. In so doing, the process can be truncated, dispense with unnecessary steps, and be uniquely structured to suit the particular transaction or issues in dispute, including the appointment of subject-matter experts to determine the dispute. The parties can agree to replace costly discovery processes with targeted document production, avoid strict application of rules of evidence, or have their dispute determined expeditiously 'on the papers' without the expense of preparing for and attending a prolonged hearing.

While the procedure is left to the parties, the result is a final and binding award that is enforced like a judgment domestically, and often more easily than a judgment internationally due to a common enforcement regime codified in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which most countries in the world are parties. Making arbitration particularly attractive for cross-border transactions, this means that a common set of rules applies for having an award issued in one country recognised and enforced in another country.

For these reasons, arbitration can effectively and responsibly be used to manage the risk of disputation across an ever growing number of sectors beyond the traditional users in construction, engineering, infrastructure and oil and gas.

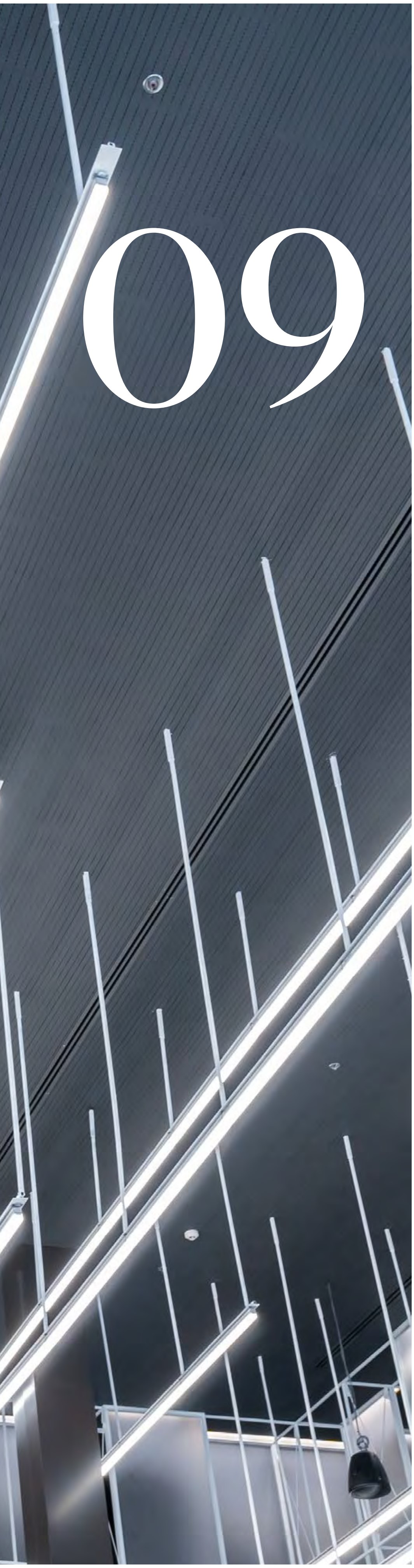
In the financial services sector, the choice of arbitration may ensure that increasingly complex claims involving financial products can be resolved by industry specialists familiar with financial instruments and models, and with the speed required to protect investments recoverability. The inclusion of optional arbitration clauses into the ISDA Master Agreement in 2013 recognised the distinct suitability of arbitration for resolving derivatives disputes. So too the suitability of arbitration increasingly is recognised for the effective and efficient determination of disputes arising out of syndicated loan investments. Likewise, arbitration reduces risks around enforceability when dealing with counterparties from emerging markets because of the relative ease of enforcement of arbitral awards compared to domestic court judgments.

Arbitration also brings advantages to resolving disputes at all stages of corporate and complex M&A transactions. Arbitral institutions are reporting increasing caseloads involving shareholders' agreements, share purchase agreements and joint venture agreements, and this trend is set to continue with the evolution of arbitral rules to meet the parties' needs. For example, arbitral rules are being revised to introduce provisions for urgent interim relief, allowing a tribunal to order interim or conservatory measures sought by parties to M&A transactions (e.g. to protect the valuation of the target).

The use of arbitration to resolve technology-related disputes has also significantly increased in recent years, as has its use for disputes involving intellectual property rights. While consumer agreements and intellectual property rights historically were linked to public policy and often considered not 'arbitrable', today many jurisdictions will enforce the choice of arbitration for disputes involving user agreements with big tech, as well as disputes involving intellectual property rights.

When considering arbitration, the negotiation of an arbitration clause should not be left to the eleventh hour. There are important choices to be made, including regarding the institutional or *ad hoc* arbitration rules that will govern the arbitration process, and the type of dispute resolution clause that will meet the parties' needs. Parties may wish to adopt a 'multi-tiered' approach, starting with settlement negotiations, a mediation or the increasingly popular expert determination, and if this step is not successful, then transition to arbitration. Apart from the ability to tailor the arbitration process, it is critical to ensure that the arbitration agreement is enforceable under the law that applies to it, which may not be the law of the main contract. To be effective, the arbitration clause must clearly designate the parties' agreement on certain key elements, such as the place of arbitration, the applicable rules, and the language of arbitration.

Litigation before domestic courts will continue to play an important role and may be preferable for some disputes. However, it is overwhelmingly recognised by users of arbitration that it can be an effective tool for de-risking disputation due to the parties' ability to keep the dispute confidential, tailor the process and shorten time for resolution, select arbitrators with specialised industry or transaction expertise, and easily enforce international awards.



09

# De-risking and future-proofing commercial leases

By **Nathaniel Popelianski**, Head of Property and Real Estate, **Jane Hider**, Partner and **Ellen Guilfoyle**, Law Graduate

As the workforce recovers from the impacts of 2020 and more people realise the productivity and lifestyle benefits of working away from traditional offices, commercial tenants are increasingly rethinking their future space requirements.

De-risking and future-proofing commercial spaces – having regard to both the physical environment and how offices can be used to drive workplace strategy – will be front of mind for many, as will making offices places to collaborate, innovate, problem-solve, connect and socialise, in line with shifting culture expectations.

The Sydney Morning Herald reported in July 2021 that 42 of Australia's 50 biggest companies have permanently adopted hybrid working arrangements for office-based employees, with a further six companies planning to implement flexible working policies where appropriate. A survey conducted by PWC in February 2021 revealed that a hybrid working environment is preferred by 60% of Australian workers.

Simple lease renewals and conventional fitouts are giving way to deals involving increased space flexibility, utilisation of versatile co-working or 'third' spaces in buildings and adaptability in fitout design and delivery. Tenants are achieving their post-COVID strategic planning requirements through either sourcing new space where they can start with a clean slate, or 'staying put' but collaborating with their landlords to bring forward lease negotiations, enabling them to right-size their space and fitout requirements, frequently in return for an extended lease term.

## Versatile co-working spaces on the rise

Commercial tenants are increasingly realising the benefits of versatile co-working spaces, also known as 'third' or 'flex' spaces. For landlords, having a dedicated co-working space in a building will only be commercially viable where there is significant tenant take up. The availability of co-working spaces in a building may influence the core leased office space required by a tenant, with critical considerations including:

- the types and suitability of co-working spaces available (for example, boardrooms, lounges and extra desks for use during peak periods);
- whether the spaces are exclusively reserved or prioritised for tenants of the building;
- whether the spaces are operated by the landlord, developer or a co-working provider; and
- the financial terms of use.

Co-working spaces are emerging as a key building amenity and office space differentiator. They provide a valuable form of office 'placemaking' by providing a space that enhances wellbeing and productivity and brings together a broader community of businesses.

In the wake of the pandemic, more organisations will be looking to de-risk and rethink how they use office space by leasing and fitting out the organisation's core space while utilising these collective spaces on an as needs basis, as an alternative to or in conjunction with incorporating expansion and contraction flexibility into leases.

## Space flexibility will guide deals

As hybrid working and the growth of collective spaces in buildings paves the way for the potential to change space requirements, commercial tenants are seeing the need to incorporate space flexibility into their leasing deals. Some key mechanisms through which commercial tenants may implement space flexibility include:

1. **Planning and starting early**. A lease renewal or search for new premises should commence well ahead of the tenant's lease expiry. The tenant's ability to negotiate better outcomes will be enhanced by the tenant determining its needs and requirements early. Owners are better placed to accommodate expansion and contraction rights and rights of first refusal for anchor tenants or tenants that are engaged in early pre-commitment deals. Tenants will of course need to find a balance between going to market early and the risk that early market engagement will require a tenant to, absent a flexible arrangement, prematurely 'lock in' its requirements.
2. **Expansion and contraction rights**. Expansion and contraction rights allow tenants to change their leased area due to evolving business needs. These rights are negotiated by tenants who anticipate changes in their future office space requirements, with key considerations being:
   - the ability of the landlord to lease expansion space when not used by the tenant;
   - when the right may be exercised and the length of notice;
   - the condition of the premises and status of fitout;
   - the amount of additional or reduced rent and incentive; and
   - other higher ranking expansion rights granted by the landlord.
3. **Rights of first refusal**. Rights of first refusal are a feature of larger leases and they compel a landlord to offer a lease to a tenant before leasing available space. There are myriad ways to structure rights of refusal. Ideally the lease terms would align with the tenant's existing lease, although the commercial terms such as the rent would be at market rates at the time.

Space flexibility comes at a cost, as landlords need sufficient certainty to lease the balance of their buildings. Tenants will need to plan their space requirements carefully by reference to their organisation's unique hybrid working behaviours.

## Greater adaptability in fitout design and delivery

Greater adaptability in fitout design and delivery are anticipated to become a feature in post-COVID builds to accommodate last minute modifications consequential on rapidly changing local conditions. This may lead to fewer integrated fitouts, as tenants seek to separate their ever-changing space requirements from base building specifications.

In the immediate future, developers may also seek to negotiate additional contingencies in anticipation of future COVID outbreaks. A further challenge arises in the context of regulatory and legislative change in relation to density and social distancing requirements.

The need for flexibility will impact on both the scope and nature of the works, and the delivery model / contract form. Adaptable fitout delivery and design is likely to require or allow for:

- fewer fixed walls to allow spaces to be reconfigured;
- flexible proportions of office, co-working, quiet and client engagement spaces;
- fewer features impacting the base build (for example, voids);
- minimum technology requirements to facilitate connection with remote workers;
- prioritising occupant health in fitout design by creating well-ventilated, natural light-permeated and green office spaces with enhanced hygiene measures; and
- prioritising wellbeing facilities such as gyms, cafes, retail and end of trip facilities.

Fitout contracts will need to contain robust and carefully considered variation provisions to enable reconfiguration of design to adapt to changing circumstances, with close attention being paid to building in (and fixing) time and cost contingencies.

Tenants may seek closer involvement in, and more control over design outcomes, trade contractor selection and (to protect against insolvency risk) direct avenues of recourse to suppliers and subcontractors. Design and construct, which for many tenants is procured on a 'set and forget' basis, may give way to different structures, in particular managing contractors with a guaranteed maximum price, and tenants who want complete control may engage in construction management.


# Sustainability linked loans: key considerations for borrowers and treasurers

By **Clare Corke**, Partner, **Julie Myers**, Senior Associate and **Alex Nakayama**, Associate

While relatively new to the sustainable finance arena, sustainability linked loans (**SLLs**) are increasingly garnering the attention of businesses seeking to bolster their environmental, social and governance (**ESG**) profile.

SLLs offer flexibility and the potential for real economic benefits and positive ESG change, and we are seeing an uptick in SLL financings both domestically and internationally. But with opportunity comes responsibility, and there are many things borrowers and treasurers need to consider to ensure SLLs can be arranged, executed and managed successfully.

With a general move to social responsibility becoming the focus of investors, shareholders and financiers, and in particular the net-zero emission target year of 2050 on the horizon, we are witnessing a significant growth in sustainable finance globally. Momentum in the sustainable finance sector is growing as investors and lenders look to shift their capital allocation to ensure a more ESG-focused portfolio.

As the focus shifts towards environmental, social and governance responsibility, sustainability is now seen less as a risk management issue and more as an economic imperative. Many institutional investors have mandates to take ESG considerations into account when making investment decisions and having a clear ESG strategy enables corporates to respond to investor interest in this area and access financing opportunities.

## What are sustainability linked loans?

SLLs are loan facilities where the borrower is incentivised through the loan pricing to achieve pre-agreed sustainability performance targets (**SPTs**). Where SPTs are achieved, the borrower is rewarded with a decrease in the applicable interest rate (and conversely, a failure to meet SPTs may result in an increased interest premium).

Unlike green bonds and loans, or social loans, proceeds from SLLs are not required to be applied to specific purposes. They offer a higher degree of flexibility, and can be used for general corporate purposes. SLLs also have broader coverage and application across industry sectors as the SPTs may aim to achieve ESG goals beyond decarbonisation and cleaner energy, such as biodiversity, equality and diversity in the workplace, social and charitable investment and supply chain conditions.

The Sustainability Linked Loan Principles published by the Asia Pacific Loan Market Association, Loan Market Association and Loan Syndications and Trading Association set out a useful framework for agreeing SLLs, including that SPTs ought to be ambitious and meaningful based on recent performance levels of the borrower, and that a carefully considered mechanism to independently verify the borrowers' ESG performance is required. These aspects are critical for transacting parties to ensure rigour and integrity in SLLs, but also provide scope for borrower's to tailor their SPTs to matters that are important to their business and where they see an ability to improve performance.

## Opportunity for borrowers and treasurers

The recent increased focus on ESG and net-zero emissions target provides a ripe opportunity for businesses to look at their business models, and either implementing or ramping up sustainability strategies with a view to building these into funding strategies. SLLs provide opportunities for a range of large, SME and smaller entities to access a sustainability-linked finance product, whether through a large syndicated financing or more simple bilateral arrangement.

For borrowers to fully capitalise on the increasing market for SLLs, they need a coherent, meaningful and verifiable sustainability strategy. In working with their financiers to structure SLLs, borrowers will need to communicate their sustainability strategies, policies and objectives and assess what SPTs are appropriate and meaningful to underpin the SLL that can stretch the borrower to improve their ESG performance.

Company CEOs, in seeking to keep pace with the demands placed on them to meet ESG targets, can now also turn to their treasurers and CFOs to play leading roles to assist with developing a clear ESG agenda, and are more likely to reap the benefits. With a focus on the business' risk and funding requirements, treasurers and CFOs can not only play a key part in procuring SLLs, but in integrating and embedding ESG goals into broader corporate strategies to align the company's financial interests with ESG. Treasurers and CFOs, together with the CEO, are well placed within an organisation to be leaders and drivers of change in advancing sustainability goals. By embedding best practices in governance frameworks and strategy developments, they will be able to establish a strong foundation for conversations about SLL with financiers.

The cultivation of meaningful banking relationships will also be critical. Many of the major banks now have ESG teams to assist borrower clients with assessing whether SLL can be a funding option. The need for disclosure of, reporting on and testing of SPT goals in addition to financial performance also means that SLLs will require a greater level of engagement with financiers. By demonstrating sound knowledge of the company's ESG objectives and strategy and building strong connections with financiers focused on assisting with SLL products, treasurers and CFOs can place themselves in a position to effectively lead discussions for pursuing SLLs.

> "SLLs present a real opportunity for borrowers with sustainability strategies to access capital at lower financing costs.

## Challenges and risks

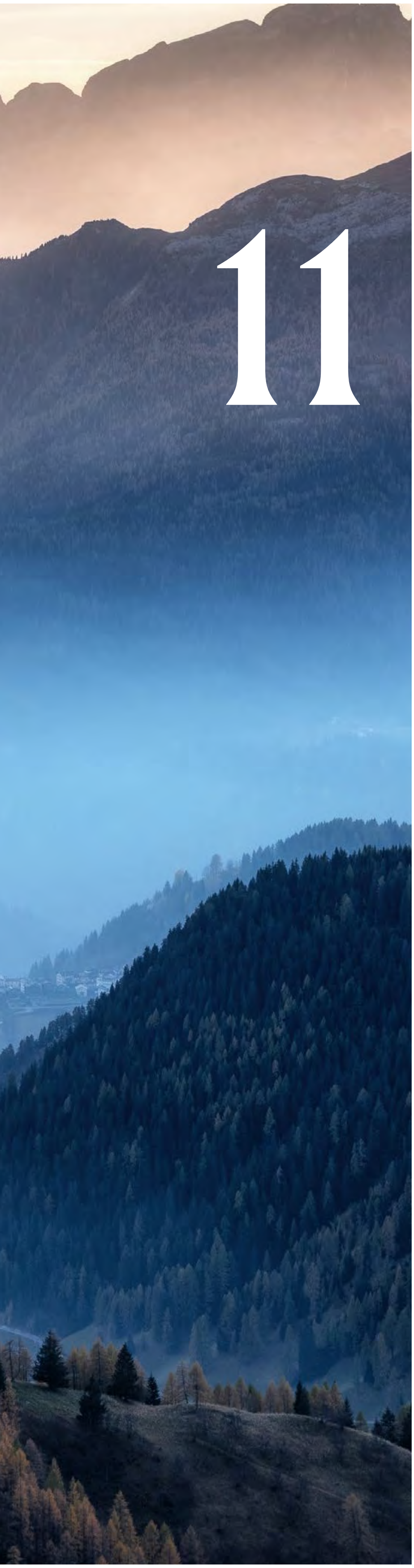
Once a borrower has entered into an SLL, they will need to be mindful of their ability to achieve the SPTs. Consequences of breaching an SPT will generally result in a pricing impact under the loan which would also need to also be considered in relation to its interplay with financial covenant compliance. Corporate treasurers and CFOs are therefore incentivised to play a key part in achieving SPTs, and working with the CEO to ensure a business-wide operational shift to integrate sustainability into business practices. In so doing, they must ensure understanding and engagement from key stakeholders. Identifying what specific changes are required, involving the right personnel and implementing well-considered messaging and incentives will be essential to reshaping the corporate approach to ESG and driving forward the business' sustainability agendas such that it may benefit from a lower interest rate margin.

A key challenge with respect to proceeding with SLLs is the higher transaction costs associated with negotiating an appropriate SPT framework and the ongoing monitoring and reporting requirements. Financiers and regulators are responding to these issues with some financiers developing their own frameworks internally to assist borrower clients with a baseline position.

Regulators are also developing frameworks to reduce costs and barriers to entry for borrowers to these products. For example, the Monetary Authority of Singapore recently launched a Green and Sustainability-Linked Loans Grant Scheme, under which certain transaction costs of both financiers and borrowers are defrayed for eligible green and sustainable financing, thereby increasing the accessibility of such funding, particularly for small and medium-sized enterprises.

Another challenge is that standard market practices have not fully developed for SLLs, and there is a need to build industry knowledge and understanding of SLLs. With an increase in SLL expected, an expansion in the SLL knowledge base will provide for greater ease of transacting.

While there are many aspects to consider to ensure SLLs can be arranged, executed and managed successfully against SPTs, they present a real opportunity for borrowers with sustainability strategies to access capital at lower financing costs, making them an attractive source of financing for businesses that are ready to commit to making a difference.



# 11

# Cyber in the boardroom: navigating an evolving governance landscape

By **Philip Catania**, Partner,
**Kit Lee**, Lawyer and
**Alexander Hender**, Law Graduate

In light of the increasingly sophisticated cyber threats being faced by many businesses, the Australian Government is planning to introduce a new set of standards to enhance the cyber governance landscape, which are likely to have far-reaching effects on how companies – and their directors – manage cyber security risks.

As the scope of directors' duties broaden and the measures of accountability for cyber security practices sweep into the boardroom, organisations will need to take action to ensure they are in the best possible position to mitigate cyber threats.

In July 2021, the Australian Government released the Strengthening Australia's Cyber Security Regulations and Incentives discussion paper (**Discussion Paper**) as part of its A$1.67 billion 2020 Cyber Security Strategy.

The Discussion Paper addresses a variety of cyber-related issues, but one key recommendation calls for the introduction of cyber security governance standards (voluntary or mandatory) applying to businesses **not** currently covered by sector-specific cyber governance rules – around two thirds of ASX 200 companies. The Discussion Paper sets out two potential governance standards:

1. Voluntary governance standards for larger businesses describing the responsibilities and processes for managing cyber security risk.
2. Mandatory governance standards which larger businesses would need to comply with in a specific timeframe.

These proposed standards will likely impact the application of the directors' duties under the *Corporations Act 2001* (Cth) (**Corporations Act**) by shaping the scope of reasonable conduct that is expected of directors in respect of cyber security risk. While only presented at a high-level to date, the substance of the standards will be further clarified once the government has considered the public consultation submissions (which closed 27 August 2021).

## The cyber governance landscape

There are currently a number of sector-specific regulations which address cyber risks, including:

- the Australian Prudential Regulation Authority's CPS 234, which applies to banks and deposit-taking institutions, and attributes responsibility for a company's information security to the board;
- the *Security of Critical Infrastructure Act 2018*, which establishes a range of 'enhanced cyber security obligations' in respect of critical infrastructure assets; and
- the recent Ransomware Payments Bill 2021, which proposes the introduction of mandatory reporting of any ransomware payments to the Australian Cyber Security Centre.

More broadly, the Australian Securities and Investments Commission (**ASIC**) has stated that the directors' duties under the Corporations Act may govern directors' management of a company's cyber risks. However, the Discussion Paper highlights that the existing directors' duties lack the clarity and coverage necessary for enforcement to occur – there are currently no domestic cases where directors' duties have been found to have been breached by cyber security failures.

In particular, the Discussion Paper describes the following factors as contributing to this ineffectiveness:

- the Corporations Act was not originally intended to address cyber security issues;
- the broad scope and principles-based nature of director's duties; and
- directors' duties are focused on protecting the interests of shareholders, rather than customers.

## The impact on directors' duties

The introduction of cyber security governance standards (voluntary or mandatory) setting out responsibilities for directors in managing cyber risk would clarify the operation of the directors' duties. For example, section 180 of the Corporations Act provides that directors must exercise their powers and perform their duties with the degree of care and diligence that a reasonable person would exercise if they:

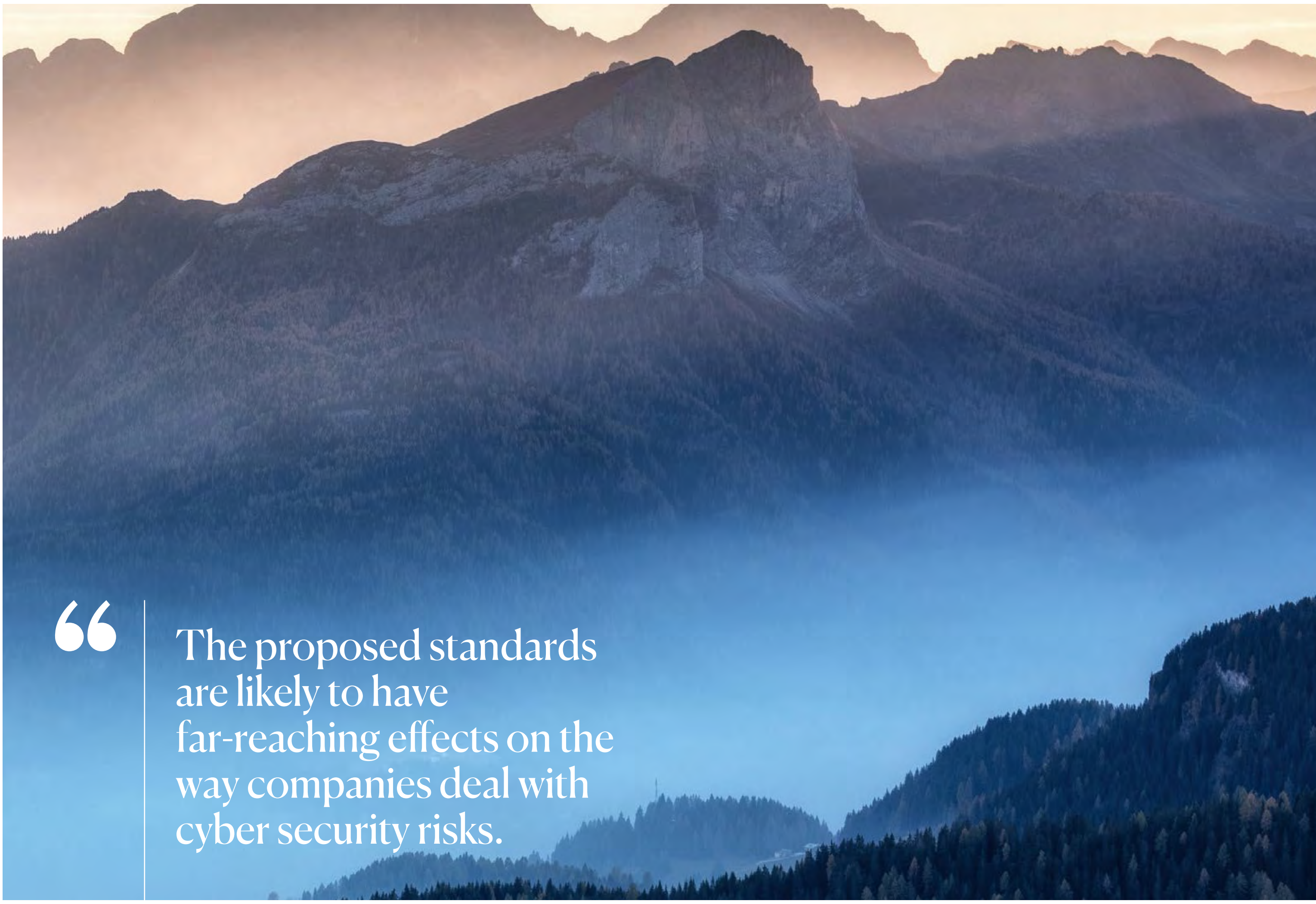
- were a director or officer of a corporation in the corporation's circumstances; and
- occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

There are minimum standards of care expected of all directors. For example, a director must:

- acquire a basic understanding of the business;
- be continually informed about the activities of the company; and
- generally monitor the business' affairs.

In assessing whether a director has contravened their duty of care, the court will attempt to 'characterise' the director according to the reasonable standard of care – that is, the court will identify what the director ought to have done with reference to existing case law, general industry practice and established standards (such as those described above).

The introduction of the cyber security standards will directly inform the characterisation of the director, and the conduct the director is expected to undertake in complying with their duty of care. According to the Discussion Paper, the standards will assist the court in defining the types of cyber risk failures that will constitute a breach of the directors' duties. Additionally, the standards will likely help to frame and complement the operation of other duties under the Corporations Act such as the corporate disclosure obligations (e.g. where a director fails to disclose a cyber breach likely to impact the value of a company's securities) and the duty to act in the best interests of the company and for a proper purpose.




## Looking ahead

It is unclear how the standards will be published and implemented at this stage (i.e. through amending legislation or a separate enforceable standard) and whether an independent regulatory body will be established to manage compliance with the standard. The Discussion Paper notes there is currently no regulatory body with the requisite expertise or resources to administer a mandatory standard for all large businesses.

However, we expect the formulation of the cyber standards to empower ASIC with sharpened tools to better enforce directors' and company officers' management of cyber threats and risks, potentially opening up the suite of liability and enforcement options under the Corporations Act (e.g. civil penalties, disqualification or orders to pay compensation).

While it is not envisaged that the proposed standards will implement specific technical controls, they are likely to have far-reaching effects on the way companies deal with cyber security risks. In particular, the standards will solidify the risk of directors being held liable for breaches of their Corporations Act duties in the event their companies do not have the necessary risk management framework in place to safeguard against cyber threats.


# Procuring and using regtech for compliance: risk and opportunity

By **Helen Clarke**, Partner,
**James Lucek-Rowley**, Special Counsel,
**Mizu Ardra**, Special Counsel and
**Viva Swords**, Senior Associate

Regtech – or regulatory technology – automates, streamlines and improves an organisation's ability to discharge its compliance obligations.

But while it offers numerous benefits, it can be difficult for companies to quantify the costs saved by replacing existing processes against the upfront capital and outsourcing risk associated with procuring a regtech solution.

Regtech started taking off as a concept from early 2016, and is now part of mainstream lexicon (at least in business circles). It is generally used to refer to technology used by organisations to manage or meet regulatory compliance obligations – including reporting on events such as transactions under anti-money laundering and counter-terrorism financing (**AML/CFT**) laws and connecting with data ecosystems, such as the data sharing regime under the consumer data right (**CDR**) or Australia's upcoming digital identity ecosystem – but is sometimes also used to refer to technology used by regulators to undertake regulatory and supervisory activities (sometimes also called 'supervisory tech' or 'suptech').

While the case for regtech is clear, it can be a hard internal sell. Some organisations find it difficult to gain traction to invest in systems that manage compliance, as opposed to systems that contribute more directly to revenue-generating operations – the use case for regtech is sometimes easier to sell where it addresses 'new' compliance obligations, such as the obligations of banks (and soon energy and telecommunication organisations) under the CDR. Further, many organisations have sophisticated programs to manage outsourcing risk which impose requirements prohibitive to regtech providers (often start-ups and small businesses with limited existing clients).

## How to 'de-risk' regtech arrangements

How can organisations gain the assurance they need to procure regtech with confidence? AUSTRAC's *Expectations of RegTechs* publication includes the following recommendations for organisations procuring regtech:

- verify that the regtech provider has an understanding of the relevant Australian regulatory framework, as well as the specific products and services provided by the procuring organisation;
- clearly understand the regulatory obligations that the regtech addresses (and the regulatory obligations that the regtech does not address);
- ensure that any solution originally developed for a jurisdiction outside Australia meets the requirements of Australia's regulatory framework;
- verify that the regtech provider will provide ongoing support for the solution; and
- ensure that there are processes to keep up-to-date with changes in compliance obligations, regulatory guidance and industry trends.

A further consideration is that it may be difficult to negotiate an indemnity or liability cap that covers an organisation's exposure to compliance breaches. Even if this was included in the contract negotiation, given that potential fines may be in the order of millions or even billions of dollars, a regtech provider may not be able to satisfy a claim under an indemnity or for significant liability.


We recommend that organisations seek to de-risk regtech arrangements by:

1. Ensuring they have full visibility of the entire 'solution stack' when conducting due diligence in respect of a regtech solution and its provider before procurement. Identify all third parties (including related entities) who will provide any part of the solution, whether technology or services, and ensure inclusion of appropriate subcontracting obligations in the contract with the provider.
2. Requiring the regtech provider to hold adequate insurance to cover the quantum of most anticipated claims.
3. Including rights to audit the regtech, or otherwise requiring the regtech provider to demonstrate the regtech's compliance, and exercising those rights regularly. Organisations should be keen to identify and require the provider to remedy any compliance breaches at the earliest possible stage.
4. Requiring the provider to provide regular reports about the regtech's activity, and scrutinising those reports. Where the regtech replaces existing manual compliance processes, verify that the reports demonstrate similar or better compliance results than pre-regtech processes.
5. Including a 'change in law' clause and actively monitoring for changes in law, regulatory guidance and industry developments that might affect the regtech solution (or require the provider to do so). A number of areas of law, including cyber security and AML/CTF, require organisations to be aligned with improvements in security and risk monitoring. This means that a regtech solution that meets legislative requirements at the procurement date will become non-compliant if, over a number of years, those improvements are not made.

6. Including a comprehensive list of the parties' respective responsibilities in relation to compliance obligations. This should ensure that the 'limits' of the solution are fully articulated and understood, and your organisation knows when a particular activity or issue is 'passed over' to it (such as notifying individuals of an eligible data breach of personal information).

## What happens when regtech goes wrong?

While regtech can be used to manage a wide range of compliance obligations, recent learnings largely come from regtech used to meet AML/CTF obligations. Given the sophistication of those seeking to exploit Australia's financial system, it is crucial that organisations carefully consider whether regtech alone is sufficient for them to detect financial crime.

While the processes deployed to identify and manage risk will be unique to each organisation, best practice to 'future-proof' any business mandates the importance of:

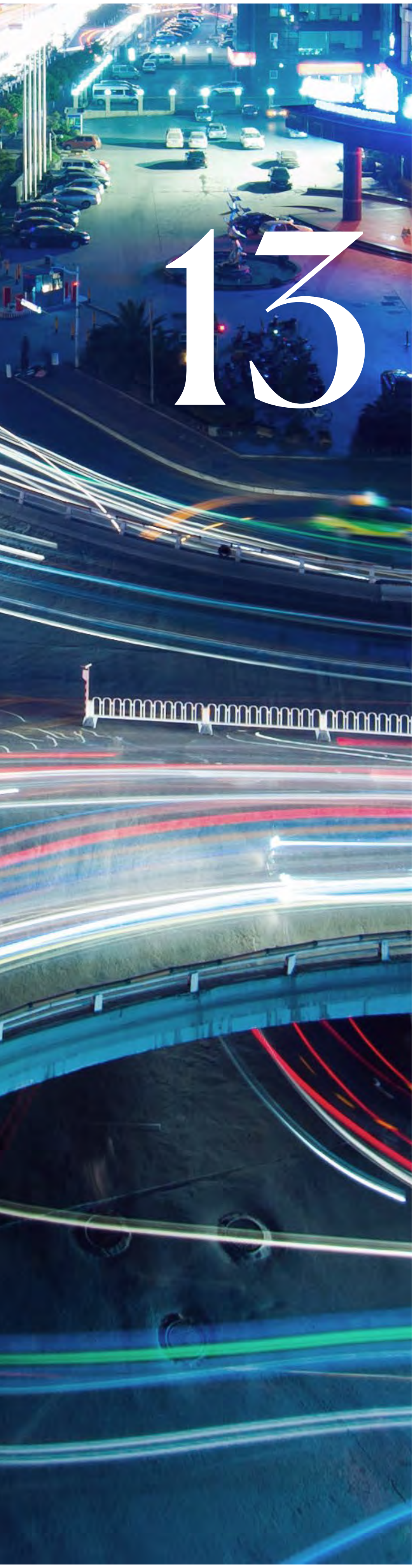
- Training – regtech is part of the solution, but the risk of human error when software is implemented or a failure to understand how regtech operates exposes a company to the risk that data obtained is inaccurate and, in turn, that regulatory reporting is deficient.
- Resourcing – even the most robust AML/CTF program will stand to fail unless supported by a strong internal team and sufficient processes to track operational performance, provide assurance and permit management oversight.
- Agility – respond to red flags which emerge from new products, adapt to new forms of criminal activity and treat your AML/CTF program as a 'live' document that grows with the innovation of your organisation.

Moreover, it is imperative that when regtech detects an issue, be it systemic or otherwise, there are systems in place which ensure clear reporting of the problem, the reporting extends across various arms of the business and that senior management and the board are equipped with the information they need to have proper oversight and discharge their obligations.

The Senate Committee on Australia as a Technology and Financial Centre has been investigating and reporting on regtech and fintech since September 2019. It has released three issues papers and two interim reports, and is due to issue its final report by 30 October 2021.

The work of the Committee is broad, and has included recommendations on technology enablers (such as encompassing digital means in laws about meetings and signatures), taxation arrangements to encourage the development of regtech and specific regtech areas such as digital identity, the CDR and financial platforms.

If the Committee's recommendations in the final report are adopted by government, then the road ahead for regtech (and its adopters) looks promising.




# De-risking digital marketing strategies in the COVID-19 era

By **Eugenia Kolivos**, Partner, **Alexander Mau**, Associate and **Bethany Lo Russo**, Associate

From TikTok ads to influencer social media posts, one of the many legacies of the COVID-19 era will be the manner and means by which we receive advertising.

Our need to stay digitally connected during the pandemic has exponentially increased our smartphone dependency, resulting in soaring rates of digital and electronic marketing. With government bodies and regulatory authorities doubling down on their enforcement efforts in this space, how can organisations ensure they remain compliant with the ever-changing legal landscape?

All forms of marketing must comply with the Australian Consumer Law (**ACL**), and digital marketing is no exception. Given its primary object is to protect consumers, the ACL contains a number of prohibitions relating to trade or commerce. Of particular importance for advertisers to note are the prohibitions against false or misleading representations and misleading or deceptive conduct (or conduct that is likely to mislead or deceive).

While the ACL is fairly prescriptive in relation to the former (for example, representations with respect to specific product features or characteristics), the latter can encompass a much wider range of conduct, including omitting or failing to disclose important facts or circumstances. One area where digital marketers often come undone is in failing to disclose commercial arrangements or sponsored content, particularly where the lines between advertising and genuine endorsement are blurred.

Digital marketing must appeal to short attention spans and rapid-fire fingers. For this reason, it is arguably even more crucial to ensure that the overall impression created by the ad is not misleading or deceptive. Important information should be called out in the body of the ad, not buried in a disclaimer and, if the use of a disclaimer is necessary, it should be prominent and appear on screen for long enough to be read in full. Navigating the intricacies of the ACL and understanding the key issues on the radar of the Australian Competition and Consumer Commission (**ACCC**) is no small feat. However, non-compliance with the ACL can have significant financial and non-financial consequences.

In addition to complying with statutory requirements, advertisers are typically expected to self-regulate through compliance with various general and industry-specific codes, including a number of codes adopted by the Australian Association of National Advertisers (**AANA**). The AANA codes are technology and platform-neutral, meaning they apply across all forms of digital marketing, including on existing and emerging digital and social media platforms.

At the core of the AANA's self-regulatory system is the Code of Ethics, which sets out the overarching compliance principles for advertising and marketing communications. The Code of Ethics is supplemented by several specific codes dealing with, among other things, food and beverages, environmental claims, wagering, and advertising and marketing to children (the latter being of particular significance recently).

There is no doubt that digital marketing is an effective way to reach a young demographic. However, businesses should be aware that advertising to children is generally subject to greater regulatory scrutiny, so compliance with AANA's Children's Advertising Code is crucial. The code broadly applies to advertising which is directed primarily, and has principal appeal, to audiences aged 14 and younger, and seeks to prevent advertising which goes against prevailing community standards in relation to, among other things, alcohol, safety and social values. The code also places limitations on the use of popular personalities or celebrities in advertising to children.

A number of digital and social media platforms have the capability to profile users by age. Age profiles should be used responsibly by businesses advertising on such platforms, particularly businesses that sell market restricted products. Restricting who is able to view advertisements based on age (often called 'age-gating') is a good practical measure to employ in this regard.

Many businesses may be surprised to learn that user-generated content (**UGC**) can also be subject to the self-regulatory codes. For example, UGC is subject to the AANA codes where it appears on a website or social media site that the business owns, or is endorsed or promoted by the business on an external site or platform (for example, 'liking' or 'sharing' the UGC). Businesses should closely monitor and remove any UGC that is not compliant with relevant legislation or voluntary codes as soon as practicable after becoming aware of such content.

Although compliance with the AANA (and other) codes is on a voluntary basis, businesses are expected to comply with determinations made by the Ad Standards Community Panel, and where a complaint made to Ad Standards is upheld, the offending ad must be removed or modified as soon as possible.

## The power and pitfalls of big data

In today's digital world, businesses of various sizes and industries are recognising the value of big data and its ability to generate insights from customer data and create more targeted advertising campaigns. However, once this information can be used to reasonably identify individuals (such as if it is combined with names of individuals), it becomes personal information and its collection and handling must comply with the *Privacy Act 1988* (Cth) (**Privacy Act**).

Under the Privacy Act, organisations are only permitted to use or disclose the personal information of an individual for direct marketing purposes in certain circumstances, such as where the individual has consented or would reasonably expect the organisation to use or disclose their personal information for those purposes. Generally, the safest approach is to obtain express consent via opt-in mechanisms. However, many businesses try to obtain implied consent via opt-out mechanisms or assume that all of their current and previous customers would reasonably expect their personal information to be used or disclosed for direct marketing purposes. While this may maximise the reach of a marketing campaign, it may not necessarily be complaint with the Privacy Act.

Similarly, under the *Spam Act 2003* (Cth) (**Spam Act**), electronic marketing messages (such as emails and text messages) generally can only be sent with the recipient's express or implied consent. These messages must also contain a 'functional unsubscribe facility'. The Australian Government recently tightened this requirement by prohibiting certain types of unsubscribe facilities that did not allow recipients to easily unsubscribe (e.g. if they required recipients to provide additional personal information, or create or log in to an account, in order to unsubscribe). Earlier this year, one online shopping destination was served an infringement notice of A$310,800 for using these types of prohibited unsubscribe facilities.

If a business sends a non-compliant email to a large mailing list, multiple contraventions of the Spam Act will simultaneously occur, attracting significant penalties as seen last year in the retail food sector.

With digital and electronic marketing continuing to be invaluable marketing tool in this digital era, and government authorities and regulators placing a sharper focus on this space, there is no better time for businesses to ensure that they are, to the extent possible, compliant with the ever-changing legal landscape while still achieving their marketing ambitions.

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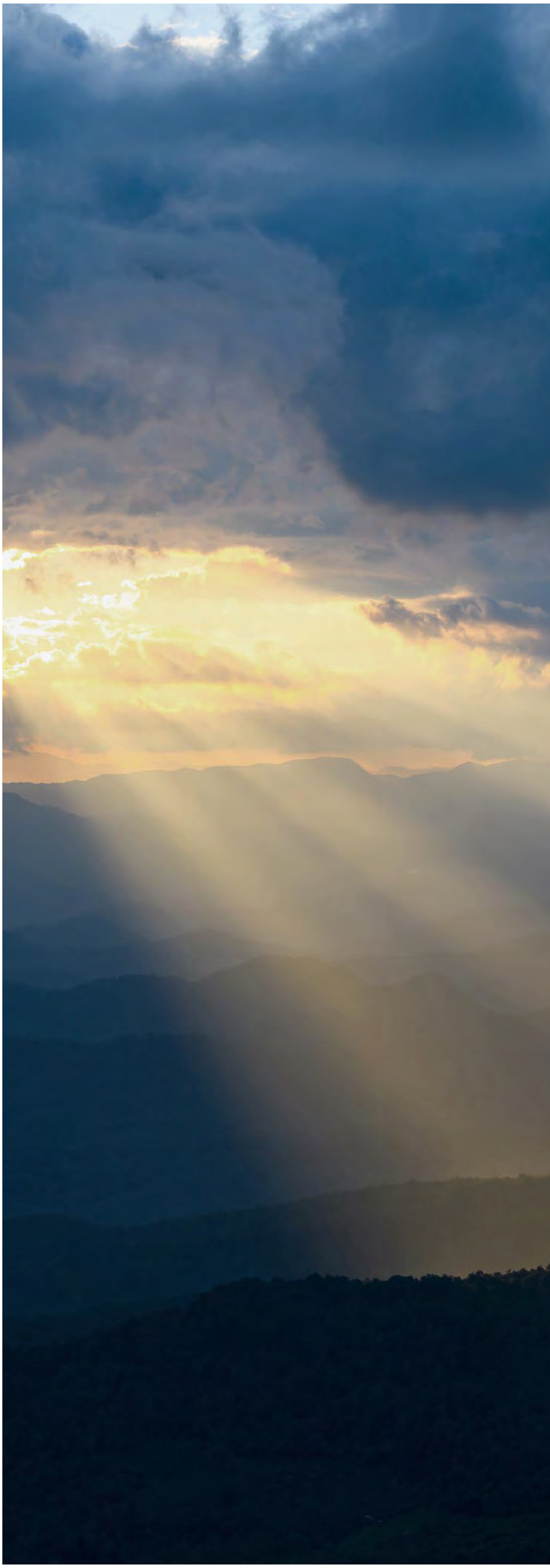

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