Continuity Through Crises

Perspectives on business risk, resilience and recovery in uncertain times

October 2020

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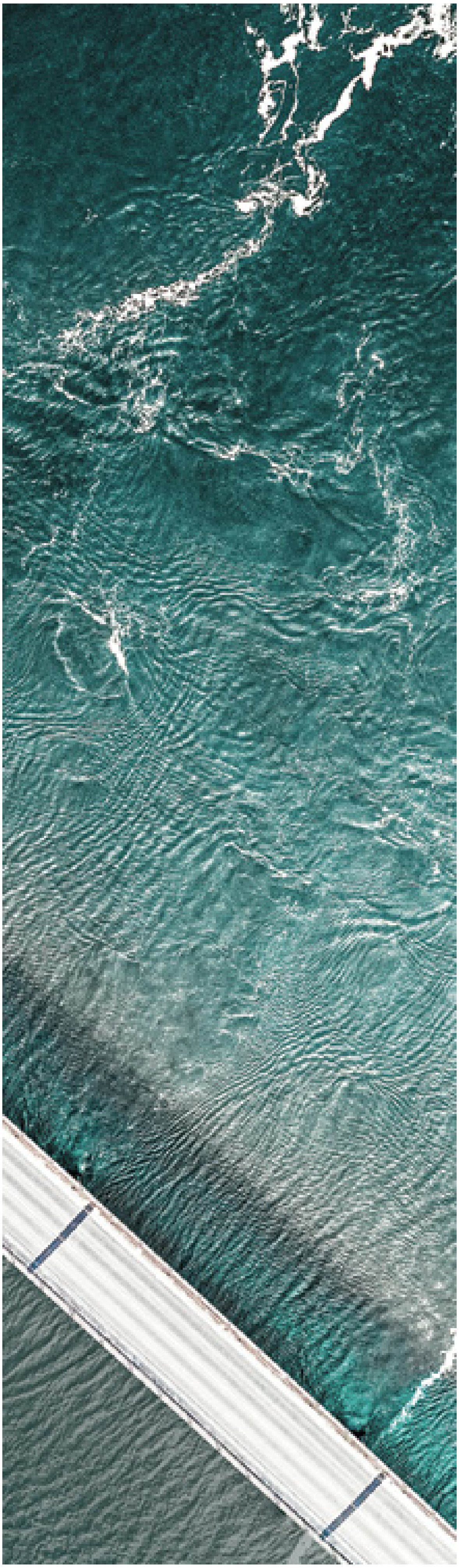

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By **Sandy Mak**, Head of Corporate and **Andrew Lumsden**, Partner

During times of crisis or uncertainty, directors have an integral part to play in ensuring that the organisations they lead effectively implement governance and risk models that can react to changing environments.

Boards can and should help to build an organisation better able to absorb the shocks from operational risks and balance sheet blows that arise from events like pandemics, natural disasters, regulatory change, cyber incidents, technology failures and changing community expectations.

If the current COVID-19 pandemic has taught corporate Australia anything, it is the limited value of 'prediction'. Few could have foreseen this time last year that our economy would shrink by an extraordinary 7% in the three months to June 2020 – the biggest collapse since the Bureau of Statistics began compiling records. Nor could many have predicted that, in order to save our economy from a worse result, the Federal Government would 'leave ideology at the door' and introduce an unprecedented level of government support – more than $100 billion in JobKeeper and expanded JobSeeker payments alone, enough to actually lift some household incomes even while some 643,000 Australians lost their jobs.

It is hard to plan for adversity while you are being confronted by it. Disturbingly, the Governance Institute of Australia's 2020 Risk Management Survey reveals that almost 40% of businesses are not regularly testing their risk and crisis plans. More worryingly, just 11% are regularly running scenarios around risk events to test how the organisation and employees will respond.

But organisations with a focused governance model – particularly those that have effectively planned for crisis events – will be more likely to recover successfully, prosper across business cycles and build resilient growth. They will also be in a better position to capitalise on the inevitable opportunities that emerge from a changing business environment.

So what should boards consider when designing a resilient governance model for the organisations they lead?

Scenario planning is key

In challenging times, boards can add real value by having already supported processes for testing entrenched beliefs and approaches. Scenario planning sessions can be used to argue for contrary positions.

Boards need to contemplate scenarios that explore changed circumstances and build proactive risk models that are both aggressive and defensive. Some scenarios may be more obvious than others, for example supply chain disruption, changed customer behaviours or impending regulatory change. Others may be less apparent, like infrastructure failure, allegations of inappropriate behaviour within an organisation or a foray into a different line of business. Market downturns, for example, can present good buying opportunities for organisations that have prepared themselves to take advantage of such opportunities. Putting M&A processes and teams together and advance planning increases the opportunity to take advantage of the changed environment.

Embrace the digital age

It is trite to say that organisations are struggling to manage technological change, be it a result of the shift to remote work, the adoption of business technologies or adapting to the likelihood that digital channels will serve a larger share of customers.

While they do offer opportunities, technology and related disruptions pose significant risks to growth. Weak consumer demand remains the most common risk to growth for many businesses, but business model disruptions and fast-paced technological changes are significant risks that have been amplified by the COVID-19 pandemic. Similarly, effective cyber-security defences and responses to evolving cyber-security threats are critical to protecting an organisation's business continuity, reputation and ability to grow.

Many boards lack confidence in understanding, much less embracing, technological change. Forward-looking organisations should use change scenarios to reassess their investment in people and systems, and consider appointing external advisers who are able to bring a digital perspective to governance models.

Take into account multiple stakeholder interests

COVID-19 has been another shock to what is a deeply disrupted business environment, with a widening disconnect between organisational and community expectations.

The role of a director involves weighing complex matters and decisions to safeguard both the short-term and long-term interests of an organisation. Those long-term interests extend beyond profit and shareholder return in any given year to consider the impact of organisational decision-making on employees, clients, suppliers and the broader community. As former Royal Commissioner Kenneth Hayne AC QC commented, "the longer the period of reference, the more the interests of all affected by a company's actions will converge in pursuit of the long term financial advantage of the enterprise."

Boards should seek to foster stronger relationships with communities, regulators, customers, owners and other groups of external stakeholders to help organisations understand and meet their needs.

React swiftly to policy change and regulatory intervention

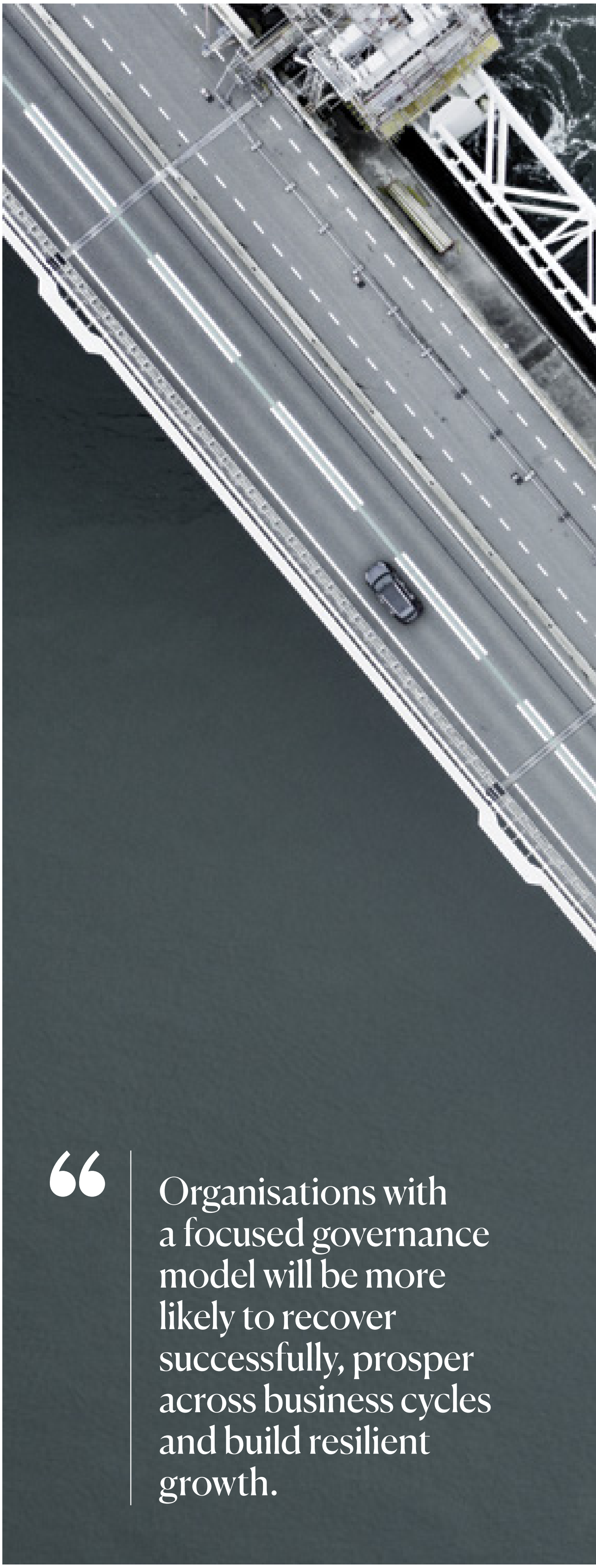
The traditional categories of damage to brand or reputation have been expanded by trends in human capital and people risks, whistleblower protection and exposure to modern slavery and anti-bribery and corruption risks. Increasingly, however, organisations are observing the impact of policy change and regulatory intervention on their businesses. Politicians run on platforms promising to decrease regulatory requirements, yet still impose new and poorly thought-through legislative responses to the crisis of the day.

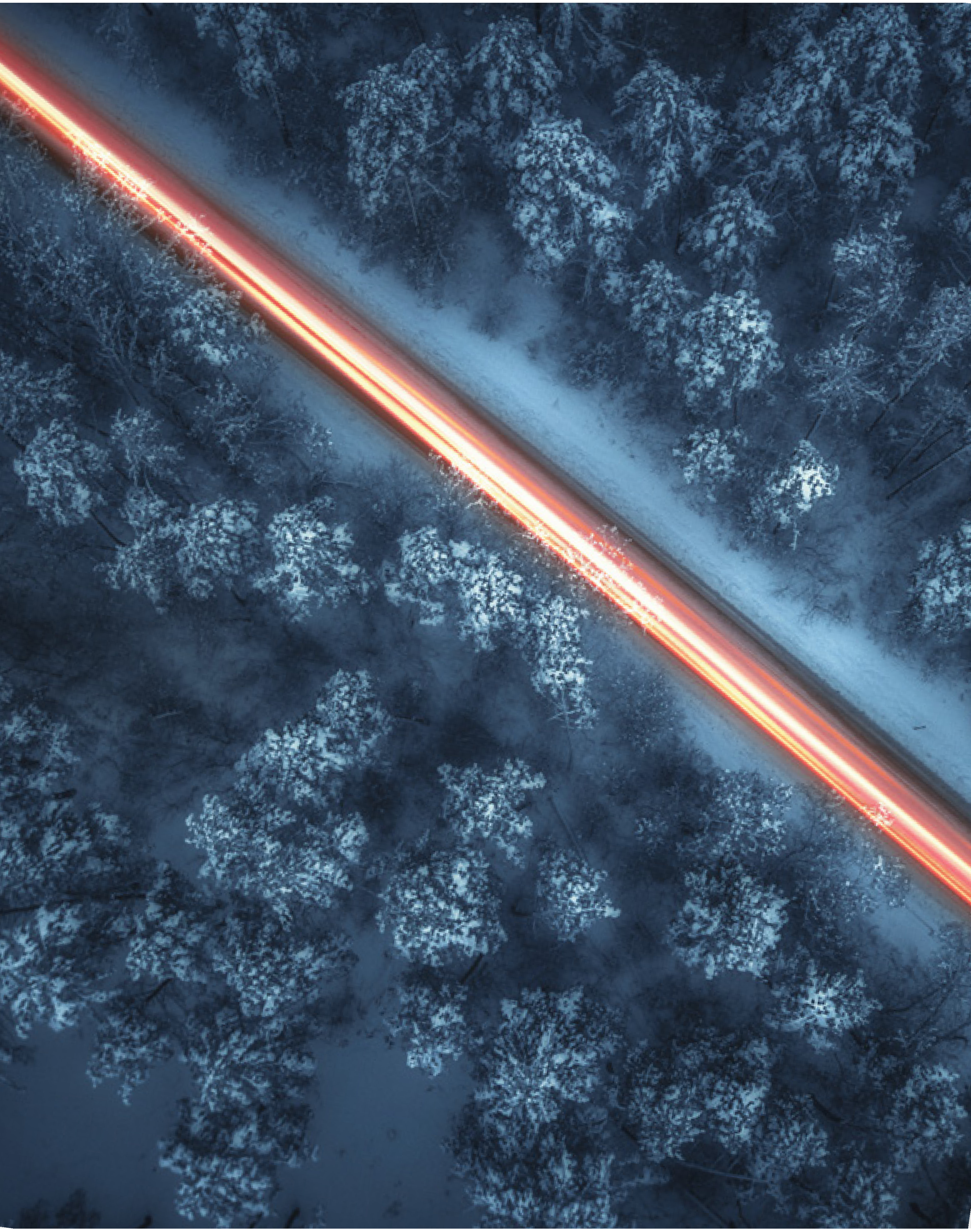
Boards have a key role to play in bridging the gap between their internal positions and external perceptions. The Banking Royal Commission is a powerful example of how many organisations took positions that seemed credible internally but were incredulous to outside observers and regulators. Even organisations that pride themselves on strong innovation and risk management cultures routinely ignore the impact of policy change and regulatory intervention until it's too late to do anything other than react to the changed groundswell of a 'set' political environment.

Often, there is a disconnect that undermines efforts to engage productively with government and regulators. Too few organisations ask themselves why they are not succeeding in influencing regulatory decisions. This circumstance aligns with the well-known cognitive bias of excessive optimism. Boards can usefully assist management by putting themselves into the shoes of policy makers.

Further, because the typical career track of successful executives in many industries doesn't involve exposure to government issues, those executives are often personally ill-prepared for shifting political winds that boost the importance of regulatory issues. Boards are uniquely placed to protect against under-investment in regulatory relations and to provide oversight.

Properly implemented, good governance models can and should help organisations manage an environment where radical change is an everyday fact – in ways that are sustainable and serve as a source of competitive advantage.





Litigation's 'third wave'? Trends following the GFC, Royal Commission and COVID-19

By **Mark Wilks**, Head of Commercial Litigation, **David Anthony**, Special Counsel and **Daniel Argyris**, Associate

As communities around the world suffer their first and second waves of COVID-19, for Australian litigation the pandemic is akin to a 'third wave', coming after both the 2007-08 global financial crisis and the Banking Royal Commission.

While the commercial effects of COVID-19 may have as long a tail as its health effects, some preliminary trends are already emerging.

Australian courts adapted quickly to COVID-19 restrictions on gatherings by conducting their proceedings remotely, including lengthy trials. Barristers and solicitors have appeared from their chambers or offices or, especially in Victoria, their homes.

Even where hearings have been conducted in person, witnesses have given evidence by video-link due to travel restrictions or to reduce the number of people in the courtroom. At all stages, the courts have strived to balance the obligation to deliver open justice while complying with the various public health and social distancing regulations. These arrangements would once have been regarded by the courts as fanciful and we have no doubt that in-person trials will resume once the pandemic has passed.

But some aspects of the virtual courtroom will remain. In particular, short mentions and case management hearings may continue to occur remotely. This will avoid practitioners waiting outside the courtroom for many hours until the court arrives at their place in the list. Witnesses based overseas may be permitted to give evidence remotely, especially where their credit is not in issue. Electronic court books may become the norm for judges rather than a convenience for lawyers. Some hearings may continue to be conducted with lawyers appearing remotely from interstate, as has been the practice of the High Court in respect of special leave applications even before the pandemic.

These new approaches are neither wholly beneficial nor wholly problematic for lawyers and litigants. They will, however, generally improve the administration of justice and facilitate the courts' overarching interest in being just, quick and (relatively) cheap.

Regulators test positive for resilience

The courts' removal of red tape is also attractive to the legislature. For example, the Commonwealth has proposed to simplify and relax responsible lending rules – an unexpected development given both the global financial crisis and the Banking Royal Commission. The aim is to improve the flow of credit and aid the economic recovery, in a clear case of litigation's 'third wave' consuming its first two.

But while those changes should be attractive to lenders, the regulatory landscape in Australia remains considerably more strict than in the past two decades, and regulators will not lightly relinquish their powers.

The pandemic has not distracted, for example, the Australian Transaction Reports and Analysis Centre from seeking the largest civil penalty in Australian history. The Australian Securities and Investments Commission's (**ASIC**) operations continue unabated, as market participants (and particularly large banks) are buffeted by constant demands for the production of documents and information and for attendance at compulsory interviews. ASIC expects to enjoy the fruits of its labour by commencing proceedings, though the rate of new cases is less than had been threatened.

In part, ASIC may be distracted by a new set of 'pandemic-related enforcement priorities', especially enforcement against those who exploit consumers' weaker finances, employ the pandemic as part of scams or misleading conduct or fail to make appropriate market disclosures.

The Australian Competition and Consumer Commission (**ACCC**) has also pivoted to policing the pandemic. For example, it has been asked to authorise cooperation that would ordinarily constitute cartel conduct, such as between supermarkets in order to ensure adequate supply of groceries. It has also threatened to sue (and so extracted cooperation from) travel companies who refused to refund customers when flights were cancelled. In August, the ACCC signed a memorandum of understanding with the Australian Prudential Regulation Authority (**APRA**) to guide the agencies' cooperation and information sharing. As this exemplifies, COVID-19 has been no impediment to the proliferation of power among Australia's regulators.

From coronavirus to computer virus

While courts and regulators have continued apace, much of their work has been performed from home. The same is true of most businesses in Australia and is speculated to lead to a revolution in ways of working. That has been liberating for employees, but may also lead to the (inadvertent and damaging) liberation of data. For example, in the rush to adopt remote working, many organisations built ad-hoc networks without adequate testing, which may be vulnerable to cyber-attack.

There are well-publicised examples of videoconferences being observed by outsiders. At least one class action lawsuit has been commenced in the United States against a videoconferencing provider, and hundreds of individual complaints have been filed with American and United Kingdom law enforcement agencies. An action may lie against a company who uses videoconferencing services and who through negligence allows their clients' confidential information to be surveilled.

Australians are also providing sensitive personal and medical information when being tested for COVID-19 or 'checking in' to a restaurant. In Wales, the public health authority recently accidentally published the names, dates of birth and locations of more than 18,000 people who had tested positive to COVID-19. Actions may lie against a healthcare provider who suffers a data breach resulting in the disclosure of patient records.

Another type of health insurance

Regulatory and data risk remain high and not even a pandemic will prevent the courts from hearing those claims. Other claims arising from COVID-19 include business interruption and breach of contract, or may arise from government action including public health directions.

While some claims may be insured against, the effectiveness of those policies is in doubt. Many have historically excluded coverage for events caused by a 'quarantinable disease' under the *Quarantine Act 1908* (Cth). That legislation was repealed and the equivalent concept became a 'listed human disease' under the *Biosecurity Act 2015* (Cth). Some insurers failed to update their policy wording to reflect the new legislation, so their policies refer to an Act and a disease definition that no longer exists. It is unclear whether the outdated wording is effective to exclude COVID-19. Proceedings on that question are currently before the New South Wales Court of Appeal.

COVID-19 has caused the courts to adapt, not to falter, and the outcome of that reform may be a more efficient system of justice. On the back of the global financial crisis and Banking Royal Commission, regulators continue to amass power and have used it to respond to the pandemic while progressing their existing priorities.

Businesses who expected the global financial crisis to be the last for another hundred years have been buffeted by a more pronounced downturn, one that is attended by the risk of data breach and associated litigation. Further, those who suffer loss as a result of the pandemic find themselves at the mercy of insurance contracts written in another era.

While the long tail of COVID-19 will demand more analysis, it is clear that litigation is riding, and sometimes being buffeted by, a pronounced 'third wave'.

Investing in digital infrastructure post COVID-19

By **James North**, Head of Technology, Media and Telecommunications, **Robert Clarke**, Head of Financial Sponsors Group and **James Wallace**, Senior Associate

As traditional core infrastructure assets face COVID-19 related headwinds, digital infrastructure assets such as data centres and telecommunications networks – which are benefitting from the shift to remote working, online business and ongoing digitisation – have piqued the interest of pension funds and other investors.

But while digital infrastructure has much in common with traditional core infrastructure, it raises a number of unique risks that investors need to consider.

A traditional core infrastructure asset produces cash-flows to equity owners that are forecastable with a reasonably low margin for error. It also possesses certain characteristics, such as operating within an established and stable regulatory environment, maturity in operation beyond the start-up phase, protection against inflation and minimal risk of obsolescence or disruption by new technologies.

Cash flows for traditional core infrastructure assets are underpinned by long-term revenue contracts or concession entitlements. The assets tend to have monopolistic characteristics and are protected by strong barriers to entry (whether regulatory, contractual or market driven). Examples include electricity transmission infrastructure, airports, toll-roads and ports. The investment characteristics of core infrastructure suit long-term investors such as pension and superannuation funds, whose liability profile is similarly long-term.

Digital infrastructure, on the other hand, refers to the assets that support the digital economy. Examples include fibre networks and satellites that support internet connections, telecommunication towers that support mobile phone connectivity and data centres that support cloud computing services and data storage. Over time, it is likely that digital infrastructure will evolve to incorporate less tangible assets such as digital registries, exchanges, computer software applications and databases.

Impact of COVID-19

Investors seeking exposure to core infrastructure faced headwinds even before COVID-19, including intense competition for asset ownership and lower regulatory allowances. The impacts of the pandemic have only added to this pressure.

Government restrictions on physical movement and the subsequent declines in patronage and usage is negatively impacting returns on traditional core infrastructure assets. At the same time, COVID-19 has tested (and demonstrated) the importance of efficient, fast and reliable communications networks and other digital infrastructure.

Throughout the pandemic, digital infrastructure has proved to be recession-proof, while other markets continue to be volatile. In fact, 'macro' thematics – such as the growth in cloud computing and Internet of Things (IoT) applications, and geopolitical tensions increasing national security concerns – are likely to drive significant growth in digital infrastructure investment. Following a host of mobile phone tower transactions in Europe over the last few years, it also seems likely that there will be a reasonable number of digital infrastructure assets coming to market. One factor driving these transactions is the need for mobile phone carriers to release capital from their towers and data centres to re-invest in spectrum and network equipment for 5G mobile networks.

Data centre operators are also in need of significant capital funding to invest in the rollout of data centre networks, meaning there should be no shortage of greenfield and brownfield investment opportunities. Down the track, there is also the possible privatisation of the nbn, which would be the most significant investment opportunity to date in Australian digital infrastructure.

Considerations for investors

Investing in digital infrastructure raises a number of unique risks. Core infrastructure investors should consider the following:

- **Technology obsolescence.** The period of the investment needs to be considered in terms of the threat of technological obsolescence, not just the physical life of the asset. By its very nature, technology is always evolving. This means digital infrastructure is inherently exposed to technological disruption. For example, there is speculation that communications networks in regional locations may be disrupted by low earth satellite constellations, which can provide a broadband internet connection at a lower cost.
- **Unique regulatory risks.** Like core infrastructure, digital infrastructure tends to be highly regulated, but in unique ways. For example, telecommunications carriers have unique powers and immunities to enter land and install infrastructure without the consent of the land owner or occupier. These powers can impact the ability of a telecommunication facility or tower owner to leverage its assets and need to be well understood. Increasing scrutiny of technology monopolies by regulators also poses a risk. For example, the Australian Competition and Consumer Commission (**ACCC**) has been vocal in its concerns about a lack of regulatory structures to manage competition issues with PEXA (Australia's electronic property transactions platform).
- **Sophisticated technology customers.** Cash flows from some digital infrastructure assets are secured by contracts similar to those used for traditional core infrastructure. For example, customers of data centres tend to require long-term tenure rights (usually between 10-20 years) given the high costs of installing and relocating ICT equipment. However, data centre customers (such as Amazon Web Services) are sophisticated, with significant negotiating leverage and prescriptive contractual requirements. For example, Hyperscaler data centres will often require full carbon offsets for data centre power to meet the commitments technology companies have made regarding the reduction of carbon emissions.

> Digital infrastructure plays an integral role in the broader economy, and will continue to be an area in which long-term investors will participate.

- **Uncertain data ownership rights.** Protecting ownership of data assets can be difficult given that data does not sit comfortably as either a tangible or intangible asset. There is also conflicting case law on whether copyright subsists in a database. Privacy law reform and increasing scrutiny from the ACCC and other regulators is starting to encroach on the freedom to commercialise data assets that include personal information. For example, the Consumer Data Right will require businesses in the financial services, energy and telecommunications industries to share data assets with competitors.
- **Strict security obligations.** Given current geopolitical tensions and increasing cyber risks, an area of focus for Government is the ability of foreign powers and malicious actors to disrupt or extract data from critical digital infrastructure. The Government is legislating to ensure there is oversight by FIRB into all foreign investments, regardless of value, in certain digital infrastructure businesses. There is also regulator scrutiny throughout the life of these assets. For example, owners and operators of communications infrastructure are subject to onerous cyber security obligations, including the telecommunication sector security reforms (**TSSR**), which provide the Critical Infrastructure Centre powers to oversee and direct the security of communication systems and services.

Digital infrastructure plays an integral role in the broader economy, and will continue to be an area in which long-term investors will participate. The challenge for core infrastructure investors is to understand the unique risks at play in the technology and communications sector, which has been undergoing a combination of evolutionary and revolutionary changes.

Intellectual property and departing employees: key considerations for business

By **Kate Hay**, Head of Intellectual Property, **John Tuck**, Head of Employment and Labour, **David Fixler**, Partner, **Alex Dunlop**, Special Counsel and **Joanna Kramer**, Senior Associate

The COVID-19 pandemic is creating uncharted challenges for businesses across all industries, resulting in many having to make difficult decisions about their staff.

In times of crisis and uncertainty, identifying and protecting your business' intellectual property and dealing with employees fairly and transparently is more important than ever.

People and intellectual property (**IP**) are the most valuable assets in most businesses, and are central to success. Investment in both has the potential to pay big dividends, while the loss of either can result in significant risks.

When considering staff retention and redundancies in any environment, but particularly during times of crisis, what are some of the key IP considerations businesses should be mindful of?

Identifying valuable intangible assets

Staffing costs are one of the largest expenditure items for most businesses, and for good reason. Employees often develop and carry with them a business' most valuable asset: IP, which includes confidential information. That confidential information can range from information concerning price structuring, manufacturing processes, future business plans, client lists and other trade secrets.

Employees also develop direct and valuable relationships with customers which can be central to a business' reputation, ongoing workflow and capacity to get things done. For starters, you can't protect what you don't know you have. Businesses that do not have a full grasp of the intangible assets they possess should undertake an audit to determine which confidential information will be key for the immediate and longer term viability of the business. Where financial circumstances allow, businesses should be careful to retain employees who will be vital to the business' ability to recover as the economy improves.

Some key questions that should be asked include:

- Has the business been working on and investing in research and development for new products and processes? If so, which employees are key to allowing that to continue? What investment will be lost if those employees leave?
- Are there particular proprietary processes – such as the operation of certain machines or programs – which are only known by particular employees? If those employees leave, how much down time will be lost while others are trained?
- Which employees hold key client connections? What happens to those connections if the employee moves to a competitor, and how can the business ensure its legitimate interests are protected?

Faced with pandemic-induced, unprecedented economic volatility, making roles redundant may be unavoidable for many businesses. As well as ensuring the correct redundancy processes are followed, businesses should take steps to protect and retain their IP rights. Adopting a considered approach will help ensure that valuable assets are protected and key relationships survive.

Securing IP rights

Ideally, all employees will have contracts which expressly provide that all IP they generate during the course of their employment vests in the employer.

Businesses should check their staff contracts before departing employees leave. If their contracts do not include express terms assigning IP rights to the business, the business should take steps to secure those rights before the staff depart. Businesses should also consider whether any further cooperation would be required from departing employees in relation to the prosecution or defence of IP rights.

Review of restraint clauses

Businesses should review the restraint of trade clauses in relevant employment contracts, consider whether they validly seek to protect a legitimate interest of the business and look at whether they place reasonable limitations on former employees.

To the extent they do not, or are not, the business may wish to enter into new restraints with key employees on any termination of employment.

Requiring the return of confidential information

When employees leave, it is common for the employer to require (and verify) that the business' physical property has been returned or destroyed. The same rigour should be applied to confidential information, particularly that which is stored electronically in email accounts, portable drives or the cloud.

Return or destruction of confidential information such as customer connections or specialist company knowledge which an employee implicitly 'knows' can be more difficult to address, but well drafted restraint clauses can act as an effective deterrent.

> Investment in both people and intellectual property has the potential to pay big dividends, while the loss of either can result in significant risks.

Enforcement of post-employment obligations

If a business becomes aware that a former employee has contravened their post-employment obligations, it is crucial to take immediate and direct action to seek to restrain that conduct – prompt action will have the most impact.

Any delay may impact on the company's ability to be granted interlocutory or final relief from a court. Taking prompt and decisive action also sends a message to the wider market, and to remaining employees, that the business takes the protection of its IP rights and employees' post-employment obligations seriously and that misuse will not be tolerated.

Hiring of new employees

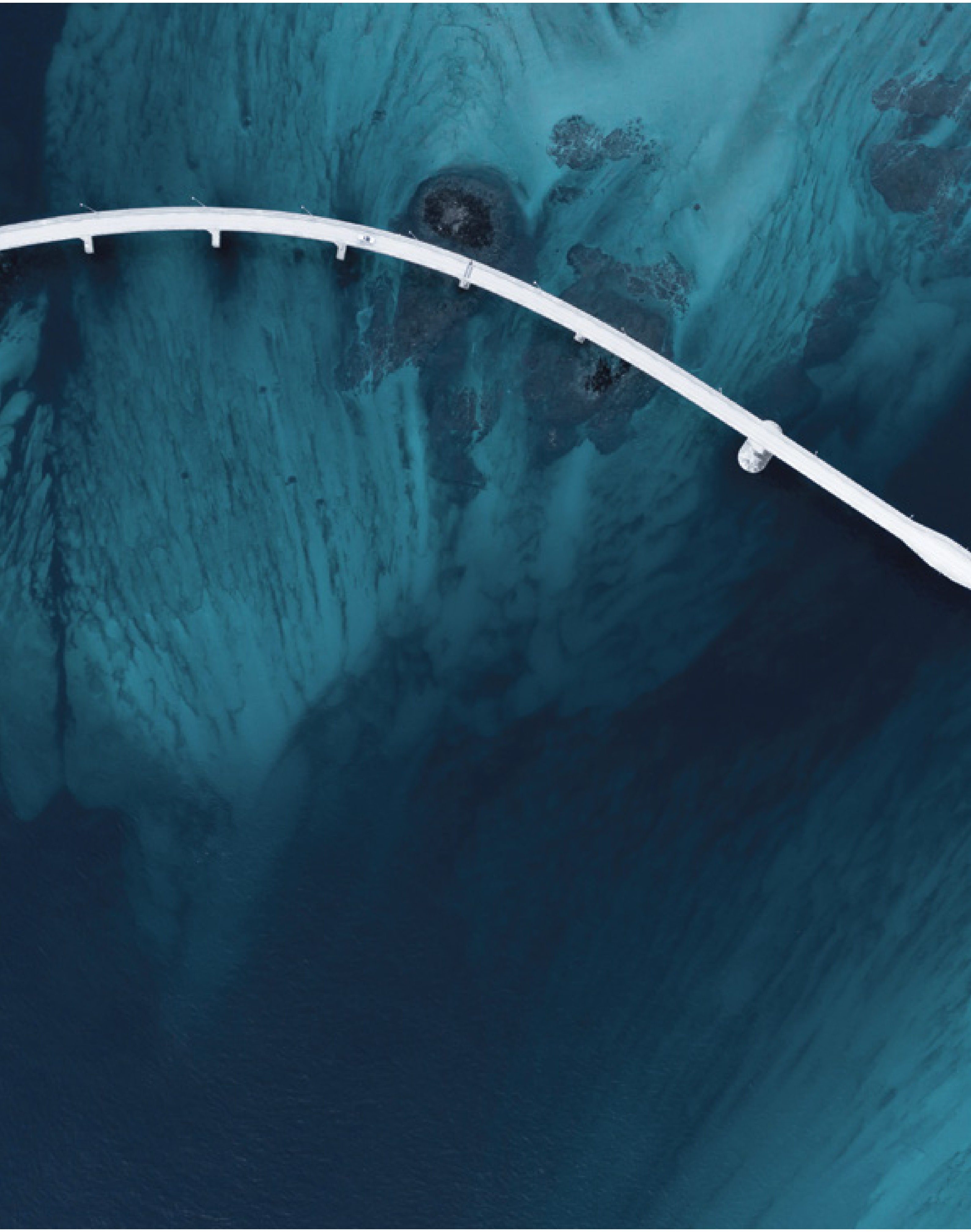
The other side of the coin is hiring new employees. Rather than reducing work forces during COVID-19, some businesses are aggressively hiring and may find themselves engaging new employees who have been let go by competitors.

Just as it is critical for a business to protect its own confidential information, it is equally important when employing a new employee (ideally before) for the company to be aware of:

- whether the employee is bound by any restraints or confidentiality obligations in favour of their former employer; and
- whether that employee might put at risk the new employer's entitlement to IP they create.

Any legal action taken by the former employer to protect its interests may prove costly for the hiring business from both a financial and reputational perspective.

Identifying and protecting your business' IP and dealing with employees fairly and transparently is always vital, but is more important than ever during times of crisis. If financially viable, hold on to key people and key IP. If departure is unavoidable, part on terms as graciously as possible to mitigate risks to your intangible assets and ensure the continued success of your business.



Why aligning anti-corruption and human rights approaches makes good business sense

By **Phoebe Wynn-Pope**, Head of Business and Human Rights and **Abigail Gill**, Partner

Environmental, social and governance (ESG) risks, in particular bribery and corruption and human rights risks, are often managed by different business functions within an organisation. But the advantages of harmonising approaches to ESG risks with common touchpoints are significant.

By aligning processes for reducing and mitigating the impact of integrity and human rights risks, organisations can strengthen their broader compliance culture and, ultimately, build stakeholder confidence in their approach to ESG matters.

The recent increased focus on improved accountability for ESG risks is encouraging organisations to consider the potential impact of their activities on stakeholders and other third parties, and to embed appropriate ESG risk management and compliance into decision-making and operations.

ESG risks are often managed by different business functions, but there is significant advantage in aligning the approach to risks that have common touchpoints. A compelling example is the connection between human rights and bribery and corruption. Poorly identified or inadequately addressed, corruption risks can leave organisations exposed to serious criminal findings, punitive penalties and reputational damage, and can lead to criminal convictions for individuals. Corruption also has far reaching human rights consequences. It enables the violation of human rights and diverts public funds, leaving governments with less resources to meet their obligations to deliver services and improve standards of living.

What can organisations do to harmonise their processes for reducing and mitigating the impact of integrity and human rights risks?

Commitment from the top

Effective leadership is critical to establishing a culture of compliance. By taking a strong, explicit and visible stance against bribery and corruption, the board and senior management can set the tone from the top and embed expectations of zero-tolerance compliance.

The UN Guiding Principles on Business and Human Rights (**UNGPs**) encourage organisations to commit to respecting human rights at the highest levels, and send a message throughout the organisation that identification, prevention and mitigation of human rights impacts are required of all.

Clear and holistic policies and procedures

From principle to practice, the UNGPs and key guidance on anti-bribery and corruption (**ABC**) measures[1] require that commitments to integrity and human rights are effectively operationalised into policies and procedures. Organisations adopting best practice ABC compliance will produce an enterprise-wide code of conduct in clear language that provides guidance on how to achieve the organisation's expectations of its people to avoid bribery and corruption. This should be accompanied by comprehensive, user-friendly policies and processes that put the guidance into effect, such as obligations to keep accurate books and records, requirements for approval for higher risk activities, prohibitions on offering improper benefits and indications that any concerns must be reported.

By taking a holistic approach to the implementation of policies and procedures it is possible to link conduct which may breach ABC laws and the potential adverse human rights impacts if that conduct is established. These policies and procedures should therefore incorporate human rights protections. Codes of conduct must demand respect for co-workers and the broader community, require safe and secure working conditions and build in accountability for misconduct. Alternatively, where stand-alone human rights policies are preferred (which the UNGPs recommend), they should incorporate integrity obligations to emphasise that corruption is not a victimless crime and the adverse human impacts of corruption can be significant.

> “The advantages of harmonising approaches to ESG risks with common touchpoints are significant.

1 See Criminal Division, US Department of Justice, *Evaluation of Corporate Compliance Programs* (Guidance Document, June 2020) 10–11; Australian Trade Commission, *Anti-Bribery & Corruption (ABC): Due Diligence in 12 Steps* (Guidance Document, 2019) 3; UK Bribery Act Guidance from the Department of Justice and Serious Fraud Office, available at: https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf and https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/bribery-act-guidance/

Identifying and understanding the risks

Promulgating tone from the top and developing appropriate policies and procedures will only be effective if ABC and human rights risks are identified accurately and the potential impacts are understood. This requires, in the first instance, an assessment of the risks in the context of the organisation's operations, including its supply chain.

Effective measures to identify and assess corruption and human rights risks will be tailored to specific industries and geographies. There is also a further opportunity to underscore the link between corruption and adverse human impacts if they are considered concurrently during risk assessment processes. This approach inevitably requires a review of a broader range of risk scenarios which is likely to identify potential issues that may not be apparent if these risk assessments are conducted in isolation.

Training and communication

Strong training and communication programs are central to ensuring ABC and human rights commitments are understood and put into practice throughout all levels of an organisation.

Key ABC guidance and the UNGPs acknowledge that to operationalise high level anti-corruption and human rights commitments, it is imperative that staff be trained to understand and identify how issues might arise, the applicable compliance obligations and the company's response procedures.

It is also essential to reinforce these important messages periodically, ideally through targeted communications addressing the parts of the entity and activities that create the greatest potential risk. Such communications also provide a further opportunity to highlight the link between conduct that breaches ABC laws and potential adverse human rights impacts.

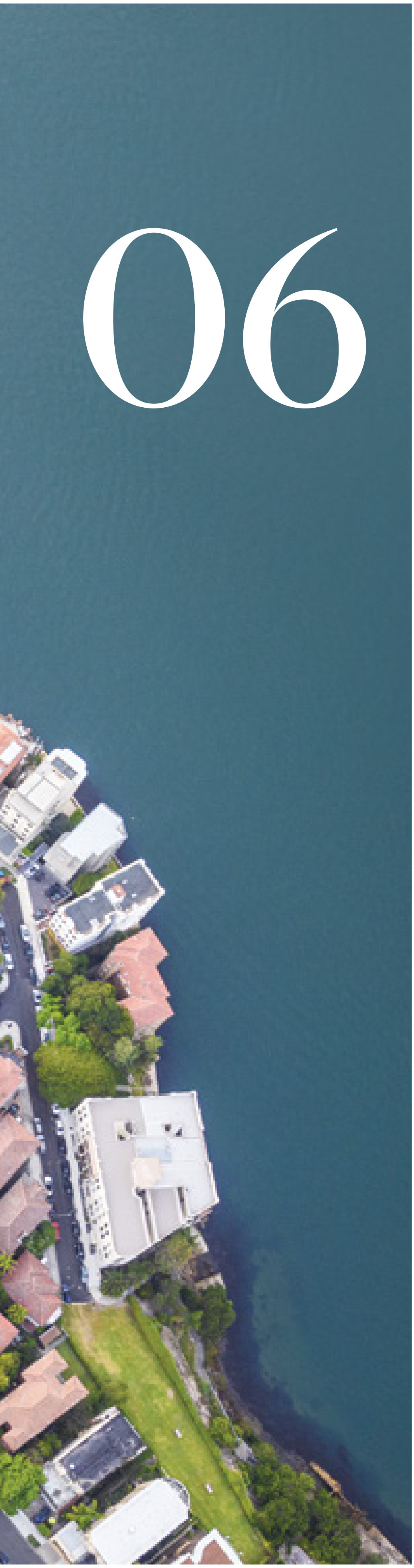
Grievance mechanisms and remediation

Accountability is central to protecting against human rights and corruption risks, and a confidential reporting mechanism[2] to receive and manage complaints is a critical element of a compliance program designed to mitigate both. Many companies have established procedures to encourage whistleblowing and confidential reporting of suspected improper or illegal conduct (including bribery and corruption), as well as human rights concerns connected to the entity's operations.

Where corruption or human rights issues are identified it is appropriate to consider remediation in any response. While the response to corruption will necessarily be different to adverse human rights impacts, a robust response (including remediation where relevant) that is communicated appropriately will also promote a stronger compliance culture and stakeholder confidence in the organisation.

By harmonising processes for reducing and mitigating the impact of integrity and human rights risks and embedding appropriate ESG risk management into their decision-making and operations, organisations will go a long way towards building a stronger compliance culture.

2 In a human rights context, this is called a grievance mechanism, see UNGP 29.



Build-to-rent: a (partial) antidote to the impacts of COVID-19?

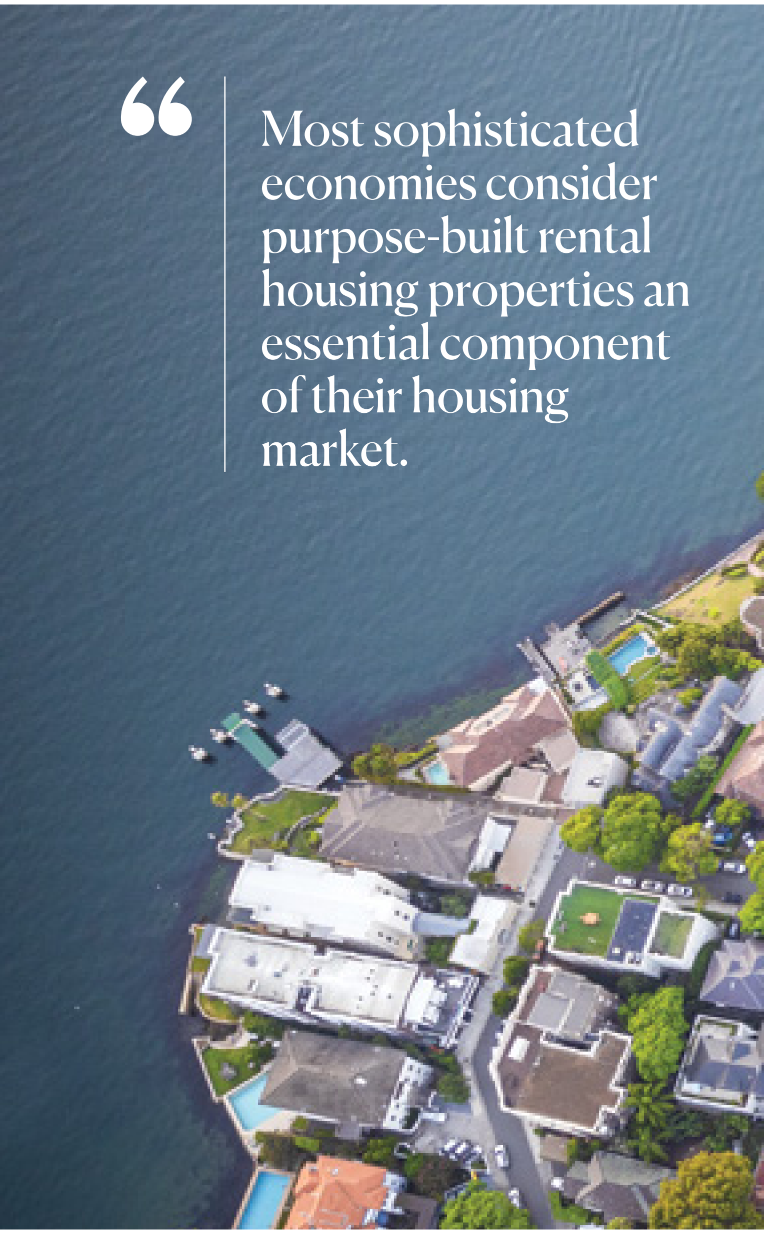
By **Paul Carrick**, Partner and
Henry Self, Partner

Purpose-built rental properties, commonly known as 'build-to-rent' in Australia, are considered an essential component of the housing market in most sophisticated economies.

In order to address an increasing demand for rental properties that the economic impacts of COVID-19 will only accelerate, a wider range of housing types, tenures and price points is needed in Australia, particularly in urban locations. Could build-to-rent be the solution to broadening Australia's housing horizons?

In comparison to other nations around the world, Australia does not offer a large degree of variety when it comes to housing alternatives. Our East Coast capital cities – namely Sydney and Melbourne – are considered to be some of the least affordable housing markets in the world, offering next to no purpose-built, professionally managed rental housing. With decades of buy-to-let investor activity in the past, Australia's residential sector is fragmented, with almost all private rented accommodation in the hands of individual landlords.

In recent years, a shift towards rental housing has swept across the globe. The combination of personal preferences and demographic trends, as well as constraints on purchase affordability, has meant that more individuals are not only renting, but renting for longer periods of time. This move towards rental accommodation is most pertinent to younger generations, but as the millennial generation ages, demand for rental properties will become multi-generational and continue to grow.



What is build-to-rent?

Most sophisticated economies consider purpose-built rental housing properties, commonly known as build-to-rent (**BTR**) in Australia, an essential component of their housing market. The United States (and many other nations which have an established market) refer to this asset class as 'multi-family' as multiple families live in a single building (with one owner). The term BTR reflects the nascent nature of this asset class in Australia – we don't have existing assets and, as such, new buildings are being built for the purpose of renting, rather than for the traditional purpose of selling.

BTR properties are large scale developments with a single owner who designs and procures construction with the intention of long-term ownership. They are developer-owned and managed on-site, offering amenities and services, community programing and 24/7 maintenance for residents, and give residents the opportunity to engage in a long-term, undisturbed tenancy in their apartments.

BTR housing represents an efficient use of land by bringing positive economic multipliers for the communities where such properties are developed. Given the increasing scale and ownership of BTR, this form of housing lends itself to major mixed-use urban renewal and could serve as a catalyst to attract other forms of investment to areas and precincts, as well as promote infrastructure investment. An advantage of BTR projects is that they do not rely on pre-sales to finance their development, the consequence being that positive consumer sentiment is not needed in order to facilitate positive economic output. For this reason, BTR is beginning to gain favour with state governments and further announcements relating to the sector are expected in the coming months.

A macro view is needed

From an investment perspective, BTR is very similar to other types of income generating properties. However, unlike other classes of properties, leases in BTR buildings are generally shorter term with tenants who are not entities of substance. This means that the normal test of weighted average lease expiry (**WALE**) and concepts of tenant covenant and pre-commitment are not as relevant. What is relevant is a macro view of the market, vacancy rates and rents, a location, design and strategy that will attract and retain tenants, and a proactive manager who can minimise debtors and keep the vacancy rate low.

Funding options

A shorter term WALE and turnover of tenants requires a new way of thinking from a financing perspective. For example, financiers of BTRs will need assurance regarding market demand for a project, the management arrangements of the property and the attractiveness of the building to tenants on an ongoing basis.

However, the progress of BTR off-shore and locally has shown that solutions are emerging. In off-shore markets, BTR housing has been categorised as a low-risk, core real estate asset class for institutional investment, providing for lower risks and lower yields over the long term. Since the model is dependent on occupancy and steady rental growth, owners are incentivised to deliver high quality product and amenities. This makes BTR attractive for superannuation, pension funds and risk-averse investors looking for returns over a period of decades. Locally, Qualitas has recently established a new fund backed by $125 million from the Clean Energy Finance Council for energy efficient, low-emissions BTR residential buildings. The BTR model incentivises adopting energy efficiency and renewable energy technologies as upfront costs are recouped during operations and in long-term asset value.

Recent bank financings in the BTR sector have taken the path of fund-through arrangements or development facilities converting to term facilities. Funding metrics have included the assessment of demand for the accommodation, sizing the overall facilities based on typical loan to development cost and loan to valuation (as if complete) metrics, as well as debt yield or forward-looking interest cover ratios based on expected occupancy and income. Once the development is complete, occupancy levels increase and income levels stabilise, the development facility converts to a term investment facility. This is not dissimilar to the approach taken on staff or student accommodation financings.

The BTR sector will also provide housing solutions for the affordable and social housing sector, supported by investment from superannuation, pension funds and the National Housing Finance and Investment Corporation.

Australian MIT tax regime

Foreign institutional investors generally invest in Australian real estate through managed investment trusts (**MITs**), which can generally avail themselves of concessional withholding tax rates on distributions to foreign investors.

In September 2017, however, the Commonwealth Government increased withholding taxes on residential investment (other than investments in affordable housing) from 15% to 30%. This is at odds with the position in other real estate asset classes such as student accommodation and boarding houses, which are considered commercial residential real estate and are taxed at a lower withholding tax rate. This tax position is a key impediment to the growth of BTR in Australia and in the past has been a point of difference from a policy perspective between the major federal political parties.

Jobs and economic activity need to be at the forefront of the Australian Government's response to the economic impact of the COVID-19 pandemic. BTR can create thousands of construction and property management jobs almost immediately, and BTR properties also provide a greater sense of community, something that will be of increasing importance given the prevalence of feelings of isolation arising from the COVID-19 crisis.

Taking the upside: considering alternative restructuring processes in 2020 and beyond

By **Cameron Cheetham**, Head of Restructuring, Insolvency and Special Situations and **Michael Catchpoole**, Partner

Australia has posted a record fall in its GDP in 2020. At the same time, following a series of temporary measures introduced due to COVID-19, Australian insolvency filings have hit record lows.

As temporary support measures are eased, boards and investors will need to grapple with the consequences of short-term economic conditions and longer term structural changes to certain sectors. Combined with higher levels of counter-party financial delinquency, many businesses will need to reposition their capital structures and ongoing commitments in order to survive and prosper.

Historically, most public companies have favoured attempts at consensual informal restructurings until reaching the point of insolvency and then appointing administrators to limit directors' liability for insolvent trading.

While administration has some appealing features, it also has severe limitations, including unpredictability, expense, contractual counter-party termination risk and considerable publicity. Typically, the later an administration is commenced, the more time-constrained and value-destructive the process will be to existing stakeholders.

There are two processes that offer a potentially superior pathway to administration for large companies, and have the potential to produce economic upside for stakeholders compared with administration or purely consensual approaches.

Australian scheme of arrangement

As an alternative to appointing an administrator, a scheme of arrangement can allow a business to continue trading 'as usual', while pursuing a fundamental restructuring of its obligations, including any onerous contracts, rental payments and other arrangements with counter-parties.

A scheme can be tailored for a range of proposals in respect of one or more classes of creditors. It is possible to propose amended and extended payment terms or to reduce debt obligations (e.g. by offering to swap debt for equity), and it can be a way to manage guarantees and other associated liabilities.

A scheme can be proposed while a business is solvent and, subject to the safe harbour relief, there may also be scope to propose a scheme where the business is insolvent or during a period of forbearance from key creditors. A scheme offers:

- a restructuring process for large corporations where management remains in control;
- a binary outcome (in the sense that the proposal is either accepted or rejected along the lines proposed);
- an ability to novate, vary or otherwise reconstruct the corporate structure;
- an ability to bind secured creditors and shareholders subject to achieving voting thresholds;
- an ability to obtain releases or other protections for directors and management; and
- an ability to obtain recognition and protection for subsidiaries or operations in many overseas locations.

When planning ahead, it is preferable to allow at least six months for the implementation of a scheme process, although it can be possible to shorten the timeframe to around three months. It is also preferable to allow time for pre-engagement with major stakeholders and to generate support among voting creditors. In order to approve the scheme, it will be necessary to obtain approval from a majority by number and 75% by value in each relevant class of creditors.

Two major limitations of the Australian scheme procedure are the potential for hold-out classes of creditor to stifle restructuring attempts and the lack of any clear pathway for new 'super-senior' style credit facilities absent existing secured counter-party consent.

> **Businesses should start early in identifying potential pathways to protect viability or transform the capital structure.**

Cross-border process

Even where there is limited connection with the relevant overseas jurisdiction, it may be worth considering the availability of a foreign law process, with a view to having those foreign proceedings recognised and protected in Australia. An Australian business with some presence overseas will often be eligible to commence foreign insolvency proceedings which offer enhanced flexibility compared to Australian processes.

Where there is some barrier to a purely domestic solution, offshore solutions are often worth considering. In particular, there are more flexible procedures available in:

- England and Wales, under the new Part 26A 'restructuring plan' procedure (recently used in the Virgin Atlantic restructuring);[1]
- the United States, under the Chapter 11 regime; and
- Singapore, under the scheme procedure as amended in 2017.[2]

1 *Corporate Insolvency and Governance Act 2020*, with effect from 26 June 2020, inserting new Part 26A of the Companies Act 2006 (after the existing scheme provisions in Part 26).

2 *Singapore Companies Act* (Cap. 50), amendments in force since 23 May 2017. Singapore's Companies Act requires a 'substantial connection' with Singapore, but now expressly includes carrying on business in Singapore, having substantial assets in Singapore or having finance documents governed by Singapore law.

Some of the key features are compared below:

Feature	Australian scheme	English new Part 26A scheme	US Chapter 11	Singaporean scheme
Board control	Yes during scheme approval and, with leave of Court, post-approval for administration of scheme	Yes	Yes – management remains in control	Yes
Moratorium / stay	No automatic stay but ipso facto stay for contracts since 1 July 2018	No – but stand-alone moratorium can be applied for (subject to eligibility). Extension of existing 'essential supplies' regime to protection from *ipso facto* clauses in supply contracts	Yes – automatic stay against creditor actions upon filing	Yes – 30 days from application for moratorium
Cross-class cram-down	Only within each creditor class, where majority by number and 75% by value within class	Yes – new Part 26A procedure adds cross-class cram down, subject to court approval, in addition to cram-down within classes (majority by number and 75% by value)	Yes – (within unimpaired classes on 2/3 of vote and acceptance by at least one impaired class)	Yes – cram-down available across all creditors if majority by number and 75% by value
Potential for super-priority DIP financing	Not without agreement of secured creditors	No	Yes	Potentially by Court order

The timeframe for a cross-border approach is, again, likely to be longer than for a voluntary administration appointment – it will vary but is likely to take months rather than weeks. There can also a degree of risk in implementing an offshore approach, because the outcome of the overseas process (in particular US Chapter 11 proceedings) can be open to contest or result in the loss of control to third-parties.

Even if an offshore approach is not pursued, it can be useful to work out what can be done if needed because the availability of a back-up plan can assist in reaching a negotiated outcome.

Both of the alternative restructuring processes discussed above have a longer runway than a voluntary administration appointment, but potentially allow for better outcomes.

Businesses should start early in identifying potential pathways to protect viability or transform the capital structure, so that voluntary administration does not become the only back-up plan. Initial contingency planning and option generation is not an expensive exercise in the context of the potential benefits.

Maintaining an ESG focus in times of crisis

By **Louise Camenzuli**, Head of Environment and Planning and **Christine Covington**, Partner

Despite COVID-19, climate change and environment organisations remain attentive, and the public's preference for carbon-neutral industry continues to rise. Corporations cannot allow their environmental, social and governance (ESG) agenda to stagnate in uncertain times.

The current market disruption resulting from COVID-19 presents an opportunity for companies to assess their ESG standing, implement and expand their corporate ESG policies and take action to improve their resilience to future crises.

Increasing shareholder activism is just one reason an ESG focus has merit for companies. In March 2020, the Rainforest Alliance Network (**RAN**) released its 'Banking on Climate Change' report into the financing of the fossil fuel industry by 35 private-sector banks. It found that since the Paris Agreement in 2016, a number of the banks had funded US$2.7 trillion worth of fossil fuel projects. RAN has now called for an immediate end to the financing of fossil fuel expansion and real commitment toward the phasing out of fossil fuel financing.

According to Stockhead, the incidence of shareholder activism in Australia doubled in 2019. Already this year, shareholder advocacy groups – including Institutional Shareholder Services (**ISS**), the Australasian Centre for Corporate Responsibility (**ACCR**) and Market Forces – have brought several resolutions calling upon Australian corporations to set Paris Agreement-aligned emissions reductions targets, particularly in the area of scope 3 emissions.

While few climate-related resolutions have found favour with the majority of investors, support is growing and the status quo is shifting. Turning up the temperature, the Australian Securities and Investment Commission (**ASIC**) announced in December 2019 that it would begin targeting ASX-listed companies that fail to adequately report on their exposure to climate-related financial risks.

Emerging crises

Shareholder activism aside, future crises are plainly on the horizon. Health experts and economists predict that pandemics of COVID-19-like proportions will become more frequent. The EcoHealth Alliance, a US-based non-profit research group, has found that pandemics could cost the world as much as $23.5 trillion over the next 30 years.

In a number of countries, climate change has aggravated bushfire conditions, exacerbating the overall level of bushfire-related damage and increasing the economic fallout. In Australia, initial estimates of the tangible costs of the 2019–20 bushfires suggest they could be as high as $100 billion. This qualifies as Australia's most costly natural disaster to date.

To survive and thrive, corporations will need to be proactive in preparing for the shocks generated by future crises and other known risks.

> To survive and thrive, corporations need to be proactive in preparing for the shocks generated by future crises and other known risks.

There is an upside

As the most recent global economic downturn, the 2007–08 global financial crisis (**GFC**) represents a relevant yardstick in analysing the relationship between business survival during crises and their management of ESG issues.

A 2016 study by Harvard University found that American companies with good ESG policies achieved 'above average' financial performance for the 2008–9 financial year. They experienced a 40–45% lower cost of debt than their counterparts. The study suggested that companies with a strong ESG focus did not experience the significant declines in share price their industry peers did during the crisis, and were better prepared for sudden industry changes. In 80% of the companies studied, there was a clear link between sustainability practices and increased share price performance.

Perhaps more importantly, the GFC refocused individual and shareholder attention on corporate ESG responsibilities. This is demonstrated by the significant increase in the popularity of ethically managed funds following the GFC, with assets under management in ESG portfolios growing by 25% in 2014 and 2015 to an estimated US$23 trillion by the start of 2016. It would be reasonable to assume that the same dynamic will play out as a consequence of the current COVID-19 pandemic.

Improving resilience

The market disruption caused by COVID-19 presents an opportunity to implement and expand corporate ESG policies.

The fragility of supply chains could not have been more starkly demonstrated than over the past few months of pandemic-related disruption. For this reason alone, companies should use this time to review, identify and mitigate against strategic and operational risks. From a supply chain perspective, human risk factors and issues such as natural resource depletion, human rights violations and corruption are increasingly subject to regulator and consumer attention. Now is the time for corporates to align their assets to organisational values, minimise their headline risks and enhance their reputations.

Companies that incorporate ESG principles reduce and manage risk by investing in activities with long-term growth prospects that can withstand future potential crises, such as climate change or the next global pandemic. An analysis undertaken by investment bank HSBC has revealed that shares in ESG-aware companies have outperformed non-ESG companies during the COVID-19 pandemic by as much as 7%. In the aftermath of the current economic downturn, investors will be looking to see how businesses have identified and mitigated future risks in order to preserve and enhance their value.

With the public's increasing preference for carbon-neutral industry, the current market disruption provides an excellent opportunity for businesses to review their compliance practices and ESG policies to take competitive advantage.

Perhaps even more significantly, updating these policies and ensuring there is no loss of focus on the compliance framework is critical in developing companies' risk tolerance and resilience. Communities, regulators and shareholders are unlikely to be particularly forgiving of those that allow their compliance focus to slip.

History repeating? Tax challenges and opportunities in the COVID-19 environment

By **Rhys Jewell**, Head of Tax and **Cameron Rider**, Partner

As the COVID-19 health crisis in Australia begins to diminish, the spotlight will increasingly turn to appropriate measures to repair the economic damage caused by the pandemic.

In the aftermath of the 2007–08 global financial crisis, the Commissioner of Taxation saw the Australian Taxation Office as playing an integral role in bringing the Federal Budget back into balance. Could history repeat itself in the COVID-19 environment?

During COVID-19, the Federal Government has pulled many levers to support Australian businesses, including establishing wage subsidies in the form of JobKeeper, deferring tax payment obligations and introducing instant asset write-off and accelerated depreciation rules to encourage continued investment.

The Australian Taxation Office (**ATO**) has played a vital role in delivering the Government's initiatives to date. It has also offered important COVID-19 related relief in the areas of tax residency, permanent establishments and thin capitalisation, where compliance with the relevant rules may be temporarily difficult. However, it is becoming clear that this should not encourage business to think there will be any relaxation of the Commissioner's approach to extracting from them what he considers to be an appropriate share of the national tax collections.

As the focus of the Government's COVID-19 response shifts to repairing the economy, will the ATO play a significant role? An initial sign that it may has been a series of taxpayer alerts released by the Commissioner earlier this year, including after the onset of COVID-19. These alerts warn multinational groups that the ATO will scrutinise arrangements for cross-border financing by non-resident investors of investments in Australian businesses where there are certain features that might reduce future Australian income tax revenue as the economy recovers from COVID-19. The ATO has made it clear that it will focus on such arrangements and whether they might attract an application of the thin capitalisation, withholding tax, transfer pricing or general anti-avoidance rules. The timing of these alerts is particularly pertinent considering that the COVID-19 crisis is likely to see the survival of many businesses dependent upon restructuring that could reasonably be expected to involve injections of capital and changes to the debt to equity mix.

Another sign is that the ATO has been taking a more proactive role in providing input to the Foreign Investment Review Board (**FIRB**) in relation to requests for government approval of multinational acquisitions or restructures of Australian business enterprises. In this role, it is closely scrutinising proposed structures, sometimes requiring further detailed information, and in some cases recommending special tax conditions be added to FIRB approvals. Foreign companies seeking FIRB approval may need to consider providing further tax-related information as part of their initial applications with a view to minimising the risk of ATO information requests which have the potential to delay the progress of applications. However, the ATO is certainly doing all it can to ensure applications are dealt with in the normal time-frames.

Looking beyond enforcement activity, attention will be turning to the potential for new taxation measures to help pay for COVID-19 relief measures and repair the broader economic damage. There is likely to be a tension as the Government looks to tax reform to stimulate economic growth while at the same time keeping an eye on managing / reducing deficits from COVID-19.

In the past, federal governments have dealt with this by implementing new 'short-term' special levies, such as the 'Budget Repair Levy', which was payable between 2014 and 2017. However, such measures may not be appropriate in the current environment. With many households in no position to take on increased tax burdens, implementing a special levy would likely have a negative effect on economic recovery.

The major Australian banks have also been subject to levies in the past, such as the 'Bank Levy'. Given the important role they continue to play in the COVID-19 environment by allowing loan and credit relief to businesses and households however, the Government will likely not want to burden the financial sector with increased tax costs. Another traditional source of revenue in difficult times has been to announce a new crackdown on tax avoidance. This usually involves a raft of new anti-avoidance measures to be added to the ATO's toolkit. Watch this space.

Further, the Government – like governments across Europe, Asia and the non-US Americas – has been musing over the merits of adopting a new digital services tax. Like the United States, Australia has taken the position that any such tax needs to be adopted as part of an Organisation for Economic Co-operation and Development (**OECD**) consensus. That so far has been lacking, but the OECD is due to release new proposals that it claims have consensus backing. Whether imposing additional tax burdens on electronic commerce is good policy is also open to serious debate. Again, watch this space.

Many Australian and multinational businesses face monumental challenges in responding to the current COVID-19 health and economic crisis and in preparing to operate in the new 'COVID-19 normal'. While some businesses will see opportunities present themselves, particularly in terms of M&A, keeping an eye on the current and emerging Australian tax landscape will remain important in the months to come.

Productivity with flexibility: the 'silver lining' of the new workplace

By **Jack de Flamingh**, Partner, **Eugenia Kolivos**, Partner and **John Casey**, Overseas Legal Advisor (Admitted in Ireland, England and Wales, not Australia)

In this year like no other, adaptability has been critical to business survival. The unprecedented embrace of flexible work by many organisations in the face of the pandemic has spurred a widespread acceptance that things can and should be done differently, and working from home will likely be the 'new normal' for many beyond COVID-19.

But for workplace flexibility to be sustainable in the long term, employers must anticipate, not just navigate, the potential issues that lie ahead.

The data emerging in Australia and internationally about the productivity benefits of working from home is positive, if not compelling. McKinsey & Co research indicates 80% of people enjoy working from home, 41% claim to be more productive and 28% claim to be as productive. Meanwhile, a survey by two Australian academics of 6,000 Australian public servants in June and July 2020 revealed that only 8.4% of managers rated their teams less productive, with the balance rating their teams as operating at either the same or higher productivity than before. A Harvard Business School study found that working from home has given American workers the (apparently not contradictory) combination of higher job satisfaction and longer working hours.

The acceptance of 'working from home' is starting to permeate our legal and employment framework. In August 2020, Fair Work Commission President Iain Ross released a statement described as 'a starting point for discussions between parties' on work-from-home arrangements in the COVID-19 era. The statement noted that most modern awards incorporated no working from home or telework provisions prior to the COVID-19 crisis, and proposed wide ranging amendments to awards that would, for example, permit employees to work from home, work the same number of hours over less days, share reduced hours over a team and take double leave at half pay. Many of these proposed changes echo the temporary changes made to certain modern awards earlier in the crisis.

The changes that support the recovery will likely be permanent pillars of a modern workplace with estimates that up to 30% (or four million) workers can work from home. This is great news for workers whose roles are typically autonomous or computer-based (including professional services, managerial or clerical workers), those with previously lengthy commutes or who live in remote areas and those with caring responsibilities. But that is not to say everyone can or has benefitted. There are mixed feelings about those lucky enough to have the option. Many with caring responsibilities have struggled with school and childcare closures forcing them to be all things to all people including worker, carer and teacher. Many long for human interaction and thrive off the energy of others. Nonetheless, if productivity levels remain high, the entrenchment of working from home as an option to embrace also presents cost savings and benefits for employers.

For every silver lining, however, there remain clouds. For flexible work and working at home to sustain the productivity claims, employers need to not only navigate, but anticipate, the turbulence ahead. Four key issues employers should consider are:

1. **Workplace health and safety.** Working from home raises its physical challenges – for example, anecdotal evidence indicates that chiropractors and dentists are seeing a surge in patients with cracked teeth (from stressed grinding) and cracking backs (from poor ergonomics) – but the greatest challenge is that of mental health.

   Working from home can be isolating, and working from home when in isolation can be overwhelming. So many aspects of this crisis can increase the stress and anxiety felt by employees – the unprecedented Government-enforced isolation and varied approach across states, the anxiety about health and the health of family and friends, the precarious economic environment – not to mention the simple fear of the unknown. To combat this, employers should consider:

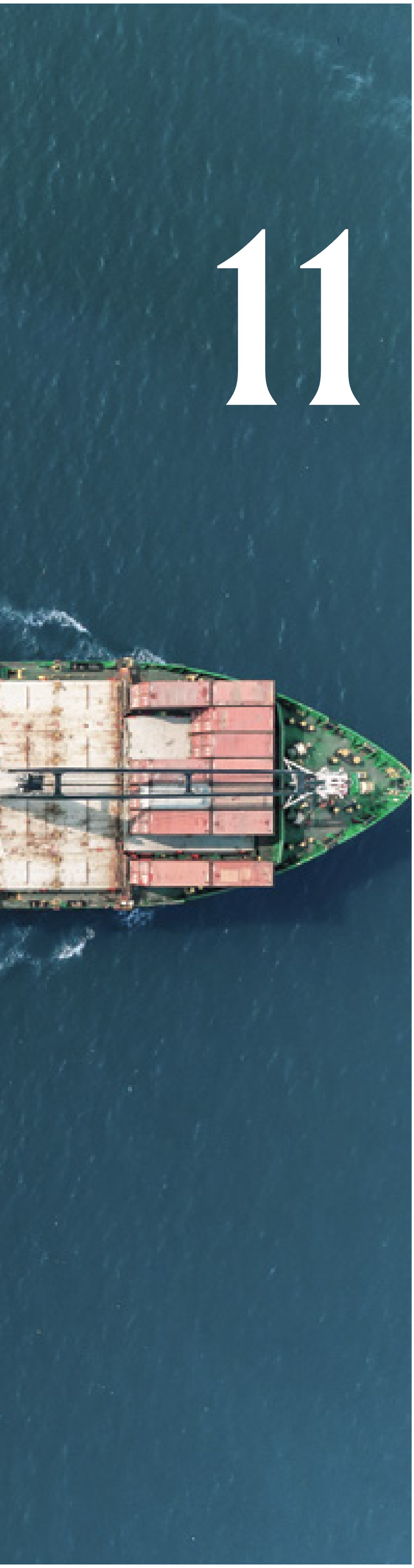
   - organising employee training sessions on the health and safety challenges of working from home;
   - checking in with employees regularly;
   - providing, subsidising or reimbursing the cost of certain equipment (such as ergonomically safe seating);
   - fostering an environment where employees can openly raise concerns about working from home and respond to such concerns; and
   - being alive to risks almost entirely unique to working from home (most obviously, the threat of domestic violence).

2. **Underpayments.** After a COVID-induced hiatus, issues of employee underpayments (pejoratively referred to as 'wage theft') returns as the defining workplace governance and compliance challenge of 2020. The Fair Work Ombudsman has highlighted '[l]arge corporate underpayments' as a priority issue for 2020-21, and while there may be additional regulator flexibility for already struggling industries, there will not be for everyone else. The temptation to put aside the keeping of proper records will not be an answer. Employers must carefully consider how they track hours of work and implement systems (which may include self-reporting) to enable the accurate recording of time worked, including overtime.

3. **Confidentiality.** Most employers' confidentiality protocols are tailored to all employees working from a single place. Employers should consider whether they need to update their confidentiality policies, their cybersecurity policies and their software / hardware to ensure that their commercially sensitive information remains protected in the world of a dispersed workforce. They must remain mindful, however, not to cross the line of invasive digital surveillance technologies which are threatening employees' privacy.
4. **Protecting personal information.** A dispersed workforce also raises data security issues, particularly where parts of the workforce may be collecting or handling repositories of personal information, including sensitive information, from a remote location. Those organisations that are subject to the Australian Privacy Principles (**APP Entities**) are required to take such steps to protect personal information from, amongst other matters, misuse, loss and unauthorised access. APP Entities are also required to take such steps to destroy or de-identify personal information where it is no longer needed for the original purpose of collection. Employers should ensure they have implemented policies and procedures for managing and guiding their workforce through the organisation's ICT and physical security requirements for handling and storing documentation to ensure it is discharging privacy law obligations and minimising the risk of off-site data breaches.

As it becomes increasingly likely that working from home will become the new normal for many, the common expectation is that employers will be responsive and accommodating. The success or failure of working from home within each organisation will largely be determined by investing in a framework that supports engagement and trust. Regardless of what's over the horizon, working flexibly is a long-term play.

> The acceptance of 'working from home' is starting to permeate our legal and employment framework.



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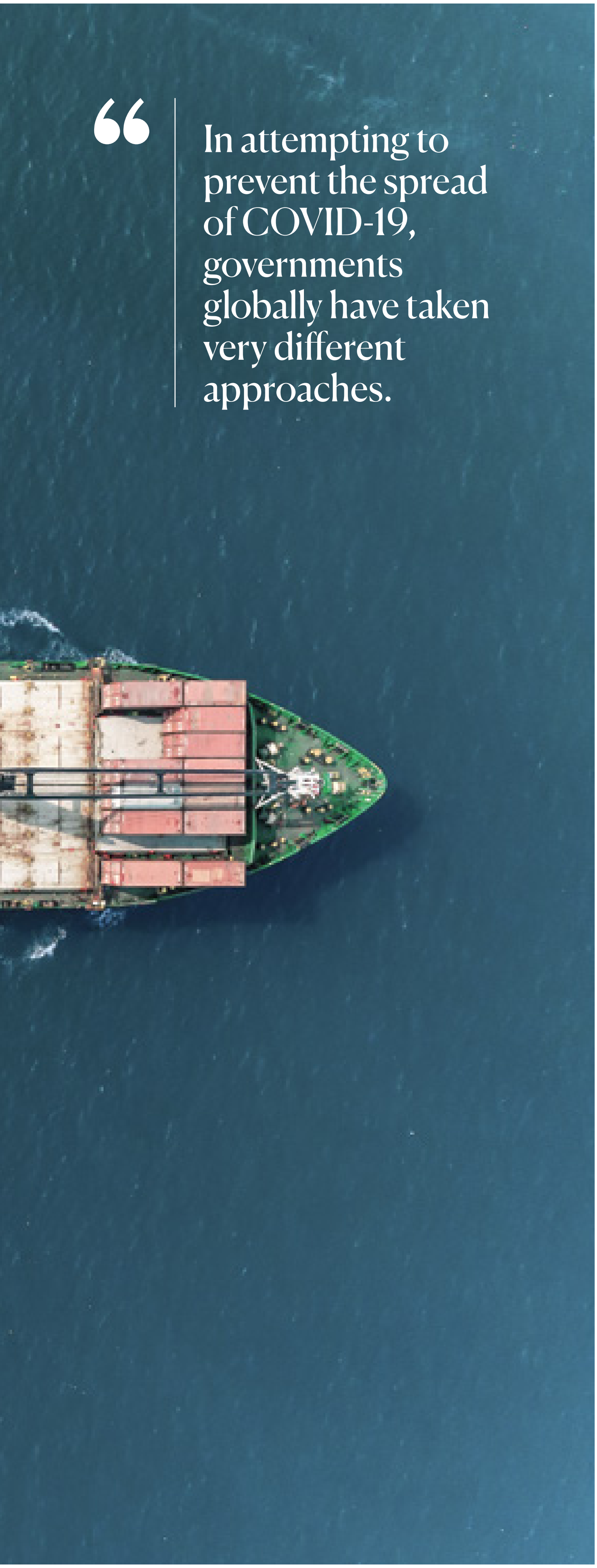
Can government crisis control measures interfere with your foreign investment?

By **Joshua Paffey**, Head of Arbitration and **Lee Carroll**, Special Counsel

In response to a global crisis such as a conflict or pandemic, governments across the world engage in a difficult balancing act of protecting public health, mitigating economic damage and avoiding interference of private rights such as trade and investment.

States are likely, however, to be challenged for implementing crisis control measures that interfere with an investor's private rights. Can a foreign state interfere with investment into that state? And what are a corporation's protections and remedies for any such interference and loss?



In attempting to prevent the spread of COVID-19, governments globally have taken very different approaches. Countries such as Italy and India have introduced measures to suspend manufacturing, construction and mining. Spanish and Irish governments have taken steps to nationalise private hospitals and health care, while at the other end of the scale, the Swedish government has allowed bars, restaurants and businesses to remain open and unfettered, putting the onus on the elderly to remain inside.

Government crisis control measures may be challenged by investors if the measures breach protections the state owes the investor under an international investment agreement – an agreement between two or more states that contains rights and protections to promote private investment between the states.

The most common types of international investment agreements are bilateral investment treaties (**BITs**), multilateral treaties or free trade agreements (**FTAs**). Australia is a party to 16 different bilateral investment treaties.[1] To make a claim under an international investment agreement, an investor relies on the investor-state dispute settlement (**ISDS**) provisions in the agreement.

While every international investment agreement is different, there are a number of investor protections that are common across agreements. It is possible that an investor could make a claim under an international investment agreement arising from the government imposed crisis control measures on the following bases:

1. **A breach of an investor’s right to fair and equitable treatment (FET).** Generally, international investment agreements require the state to ensure an investor receives FET. One of the key drivers of this protection is transparency. For example, a state that made public statements guaranteeing certain businesses would not be shut down during a crisis, and subsequently mandated that those businesses be shut down, may be in breach of its requirement to afford investors FET.

1 Australia is party to bilateral investment treaties with Argentina, China, the Czech Republic, Egypt, Hong Kong, Hungary, Indonesia, Laos, Lithuania, Pakistan, Papua New Guinea, the Philippines, Poland, Romania, Sri Lanka, Turkey and Uruguay.

2. **A breach of an investor's right to full protection and security (FPS).** The FET protection in international investment agreements generally is accompanied by an obligation for a state to provide FPS to an investor and its investments. However, whether the FPS protection applies only to physical security or extends to legal and commercial protection has divided international tribunals and remains unsettled.
3. **A breach of the national treatment standard (NTS).** The NTS exists to ensure that foreign investors and their investments will be treated no less favourably than domestic investors and their investments. A tribunal may find that a state has breached the NTS if the government implements measures that discriminate against foreign investors. For example, a number of governments globally have implemented COVID-19 measures that mandate the closure of airports and prohibit flights in or out of the country. If a state government subsequently implements 'bail out' measures that only applied to domestically-owned airlines, the state may face a claim that it has breached the NTS.
4. **Indirect expropriation by the state.** Indirect expropriation by a state occurs when a state implements measures that have the effect of controlling or interfering with the use, value or benefit of an investment. An ICSID Tribunal held that a series of state measures over a period of time that has the same effect may also constitute indirect expropriation. In Spain, for example, the government has issued a Royal Decree that has the effect of allowing the government to assume control of private hospitals and clinics in an attempt to 'nationalise' the Spanish health system and its response to COVID-19. Such measures may provide a basis for an investor to allege indirect expropriation by the government.

If it can be established that government-mandated crisis measures are incompatible with a state's obligation under a relevant international investment agreement, the question will turn to whether the state has a valid defence to a claim. A state may have a defence under the relevant international investment agreements and / or at customary international law. Where an exception exists under an international investment agreement and the exception applies, the international investment agreement obligations will not apply to the crisis control measure.

Only a few bilateral investment treaties include general exceptions of a similar nature. For example, some BITs include exceptions for non-discriminatory measures necessary for the maintenance of public order or permit actions taken in circumstances of extreme emergency or for the protection of its own essential security interests. While general exceptions in BITs are rare, exceptions are increasingly present in recent bilateral FTAs.

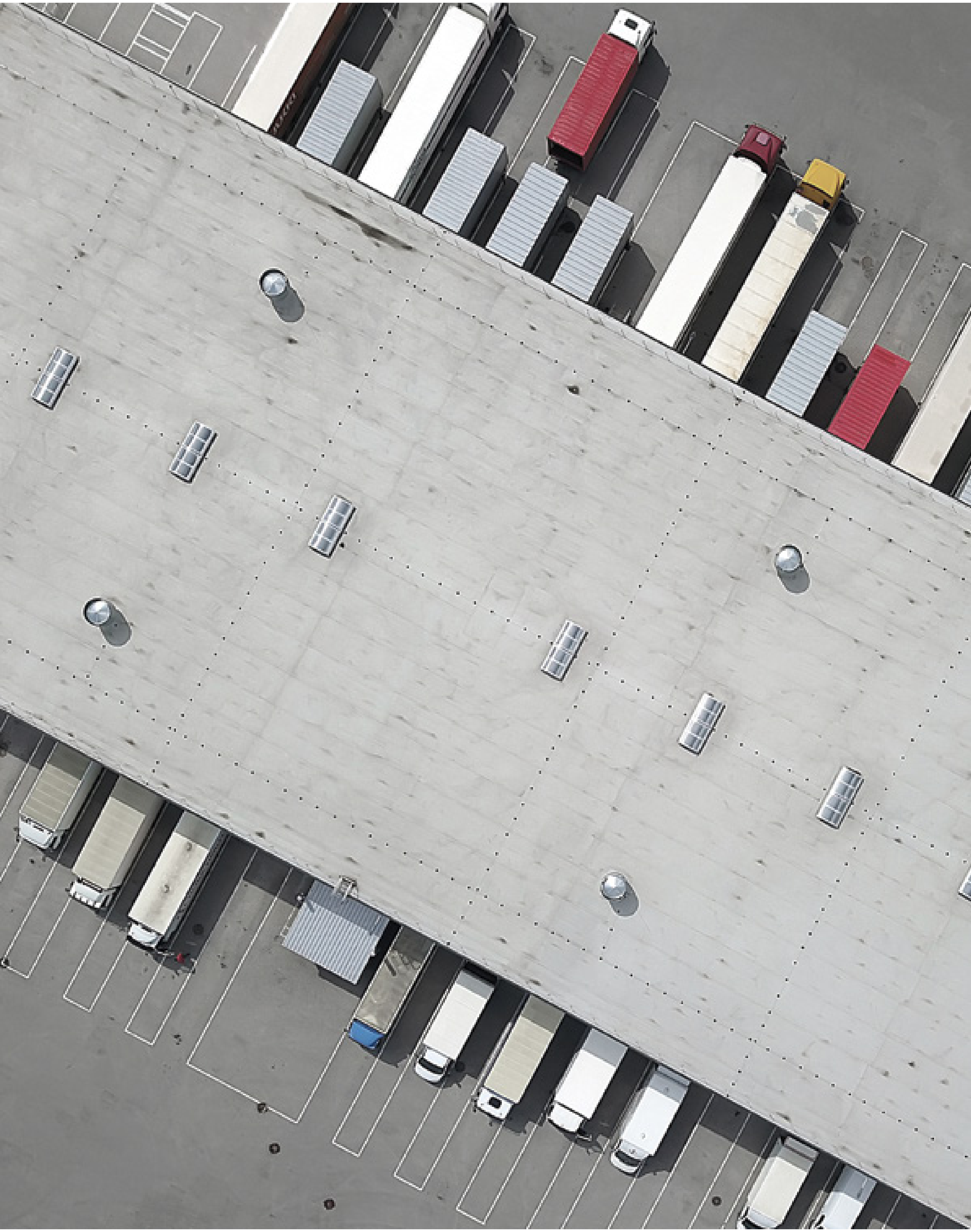
States may also defend against crisis measure-related treaty claims on the basis of customary international law defences.[2] One of the most common customary international law defences is 'necessity'. This defence requires that a state must fulfil four requirements:

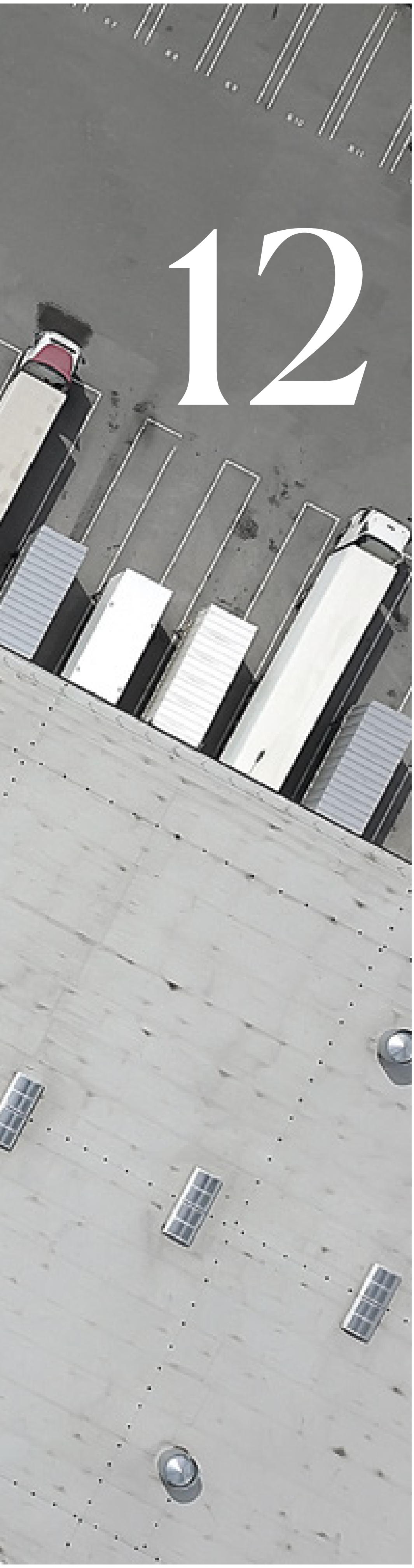
1. That a grave and imminent peril exists.
2. That that grave and imminent peril threatens an essential interest.
3. That the state's act must not seriously impair another essential interest.
4. That the state's act was the 'only way' to safeguard the interest from that peril.

The plea of necessity will be excluded if the obligation in question excludes reliance on necessity and the state contributed to the situation of necessity.[3] Satisfying the requirements of necessity is a high bar, and the level of contribution by the government to any crisis will become a critical factor.

As the above attests, foreign investment protections exist in a number of BIT and FTA instruments. So too do avenues to pursue compensation for losses incurred by your foreign investments in breach of those protections.

2 See the International Law Commission's Articles on State Responsibility 2001, Chapter V.
3 Ibid, Article 25.





Real estate sale and leasebacks in a COVID-19 world

By **Nathaniel Popelianski**,
Head of Property and Real Estate
and **Paul Carrick**, Partner

In the COVID-19 environment, shoring up the balance sheet is high on the agenda for many corporates.

Sale and leaseback transactions allow organisations that own and occupy real estate to free up capital by monetising the asset, while continuing to run their business from it.

The pre-COVID-19 market saw growing demand from institutional investors and fund managers for long-term predictable income. This trend has continued into the COVID-19 market, and sale and leaseback transactions can present an attractive option for this class of investor.

While sale and leasebacks are not new, a resurgence emerged pre-COVID-19, with a number of deals completing in late 2019 and early 2020, and activity is growing in the manufacturing, industrial, logistics and data centre spaces.

Key considerations for asset owners

Asset owners looking to sell and leaseback an asset should carefully consider the following:

1. **Environmental risk.** Environmental risk is often the most contentious risk allocation issue in sale and leaseback transactions, particularly where the site has pre-existing contamination. The most favourable position for a seller is to pass all environmental risk to the buyer and for that liability to remain with the landlord under the lease.

   While this position may, on its face, be appealing to sellers, a more nuanced approach that reflects the seller's knowledge of the site may prevent a large price reduction that is the likely result of the buyer accepting uncertain remediation liability.
2. **Landlord dealings.** Sellers should consider their position on the landlord's right to deal with its interest in the lease. Some considerations include:
   - whether to restrict the landlord's rights to sell to particular classes of buyer (such as the tenant's competitors);
   - whether a right of first refusal on landlord sale is appropriate (such rights are typically resisted by institutional grade buyers as they can inhibit an effective sale process);
   - how to enforce any breach of a restriction on landlord dealings (typically, a caveat is the only way of preventing a transfer of land in breach of the lease); and
   - imposing restrictions on the change in control of the landlord.
3. **Whole of land lease.** Sellers should consider whether all the land is required to be leased back or whether part of it can be carved out and sold as a development asset. When considering this, sellers should:
   - ensure the lease includes landlord covenants to ensure the carved out land is used in a way that is compatible with the tenant's use of the premises; and
   - in relevant jurisdictions, check any technical subdivision requirements that may be triggered by the grant of a part of land lease.
4. **GST treatment**. Sellers should consider whether they can legitimately put the lease in place before settlement (and then sell subject to the lease) to obtain the benefit of the going concern exemption. This requires the seller to have an alternative operating entity to be the tenant.

   If there is no alternative operating entity to whom the lease can be granted pre-settlement, the lease will need to be granted from the buyer to the seller after settlement and the supply of the property will be taxable. Here, the main benefit of the going concern exemption is that it reduces the stamp duty (which is calculated on the GST inclusive price) payable by the buyer, which in turn will typically increase the price attainable for the asset.
5. **Put yourself in the buyer's shoes.** Sellers should consider the likely priorities and concerns of potential buyers ahead of negotiations. In particular:
   - Sellers should conduct a vendor due diligence before putting the property to the market and consider whether a due diligence report is to be made available to bidders. This flushes out any issues that may need to be addressed and enables potential buyers to submit firmer offers having regard to what has been disclosed.
   - Security for seller warranties can be particularly relevant to buyers in a sale and leaseback scenario where the tenant is a special purpose vehicle (**SPV**) of limited substance.
   - In the COVID-19 environment, there will be increased focus on tenant solvency. Landlords may require greater security at commencement or additional security if certain triggers around the tenant's financial standing are met during the term.
   - Concerns around tenant security may be heightened if the tenant is an SPV or the site is heavily contaminated and the lease provides that the tenant has end of term remediation obligations.
6. **Foreign Investment Review Board (FIRB) approval.** Depending on the identity of the buyer, FIRB approval may be required for the acquisition of the freehold by a foreign buyer. There will be heightened scrutiny from FIRB where the asset affects 'national security'.

   The concept of national security is constantly evolving and includes data centres and critical infrastructure. In the COVID-19 world, 'critical infrastructure' may include key manufacturing sites and supply chain infrastructure, including key distribution sites. The FIRB process needs to be managed at the outset in order to minimise approval times.

> Sale and leaseback activity is growing in the manufacturing, industrial, logistics and data centre spaces.

COVID-19 and renewable energy policy in Australia: the path forward

By **Anthony Arrow**, Partner and
Jane Hider, Partner

Despite the impacts of COVID-19, Australia remains in the midst of a lightning-fast transformation to a green energy future.

But the increased risks of delay and cost blowouts associated with project development during a global crisis of this magnitude are significant, and the renewable energy sector is not immune to the effects of constantly changing domestic and international government regulation and policy.

Throughout the COVID-19 pandemic in Australia, major restrictions have been imposed on the movement of people, coupled with widespread border and business closures. These measures will continue to have a material adverse impact on the critical supply chains necessary to develop projects, as will regulations that limit the number of people permitted to work on a construction site.

A number of renewable energy and storage projects will undoubtedly have been suspended as a result of government measures introduced to tackle the pandemic. We are also yet to see the real impact of what is likely to be vast numbers of domestic and international insolvencies at all levels of the supply chain caused by this global crisis.

But despite this, Australia is still in the midst of a lightning-fast transformation to a green energy future. Governments around the country have been exploring opportunities to fast-track projects and other initiatives that will stimulate the economy, save and create jobs and potentially solve the various challenges that stand in the way of the transformation.

The barriers to a successful transformation to a green energy future have been well documented. They include:

- the absence of federal policy certainty;
- significant constraints (and disincentives to investment) that arise from an obsolete grid which was never designed to accommodate intermittent generation assets;
- battery storage systems or distributed energy systems; and
- energy regulations, which are inconsistent across states and territories and have not kept up with pace of change in generation technologies.

One recent example of government policy stimulating renewable energy development is the Queensland Government's commitment to creating three new renewable energy zones and investing $145 million of the State's money in these new zones. This announcement follows closely behind Queensland's creation of a $500 million 'Renewable Energy Fund', focused on investing in a range of renewable energy projects including generation and storage. The fund is a part of $4 billion in loans designed to help stimulate the Queensland economy.

New South Wales has also committed to establishing three renewable energy zones, designed to play a role in delivering affordable generation and helping the State prepare for the expected retirement of thermal generation plants at the same time. The Victorian Government has recently announced the commencement of a market sounding to bring new renewable energy projects online as part of what will be its second reverse auction program. The program is being designed to help drive Victoria's economic recovery from COVID-19.

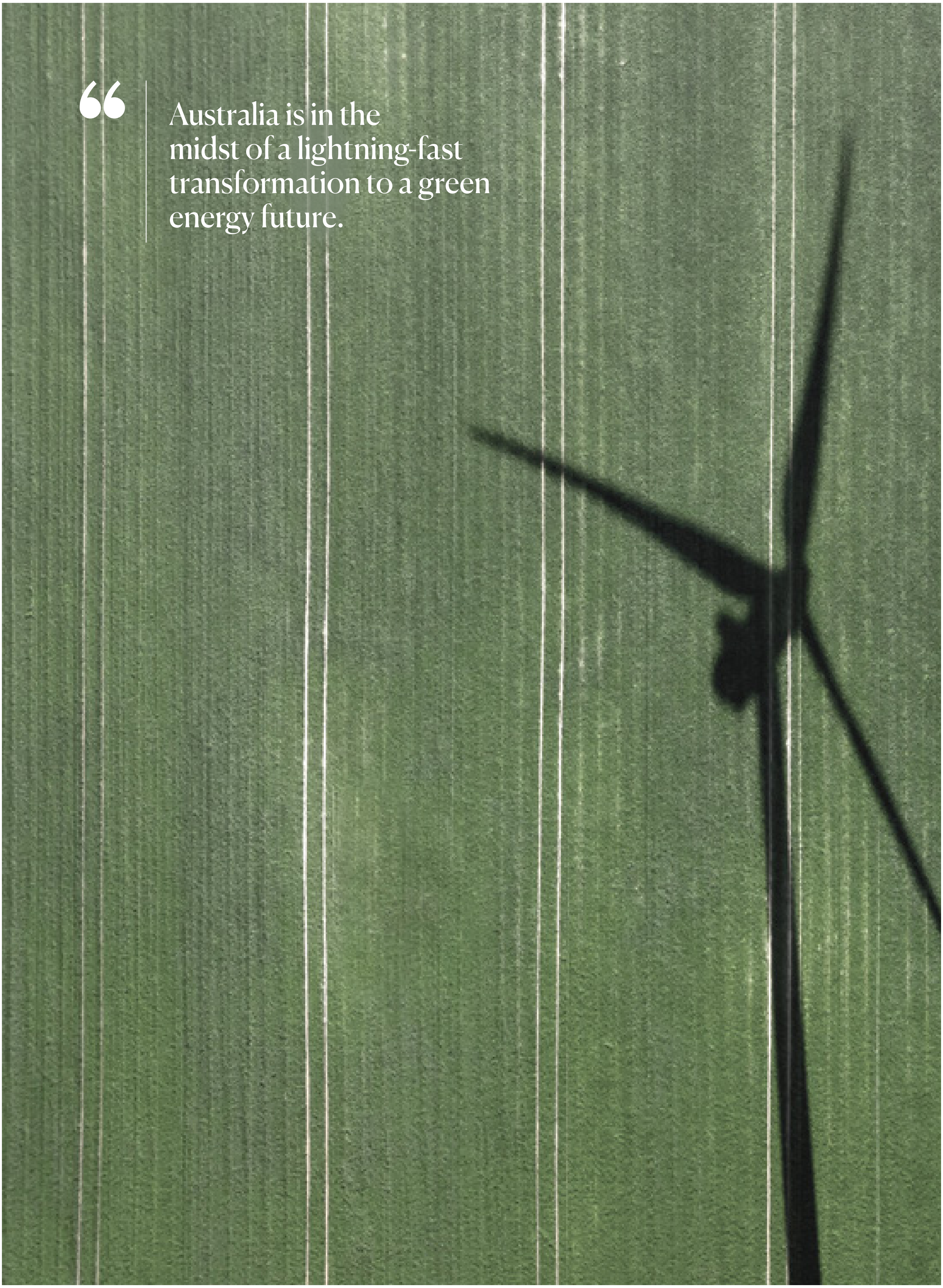
The recent announcement that the Commonwealth may support the construction of a new gas fired power station to provide dispatchable power certainty creates a range of uncertain dynamics in the industry, including the extent to which the Commonwealth Government intends to (further) intervene in the National Energy Market (**NEM**) and the impact that might have on private investment and competition.

While the aforementioned initiatives will undoubtedly increase private sector investment in renewable energy generation assets and storage solutions, and embed renewables as part of the energy mix across the country, the level of such investment cannot be predicted with any certainty. There also remains a significant lead time between the announcement of these initiatives and any soil being turned on a project, meaning the stimulus effects will be some time away.

Further, the lack of coordination between the Commonwealth, States and Territories and the absence of a firm commitment to investing in an urgent and extensive upgrade of transmission networks also means that one of the largest and most significant barriers to the transformation to a green energy future is not being addressed. It is hoped, however, that the replacement of the Council of Australian Governments (**COAG**) with a national cabinet will engender more consistent and certain policy development across Australia.

The renewable energy sector is not missing the skills, resources or liquidity necessary for the private sector to develop renewable generation assets and storage projects. What is lacking, however, is regulatory reform and the transmission infrastructure and government policy certainty necessary to underpin it.

Amidst the many government stimulus initiatives in light of COVID-19, we would do well to focus on avoiding or at least mitigating a repeat of project delays, cost overruns and project failures arising from the inability to achieved grid connections, the imposition of higher than anticipated marginal loss factors and curtailments that have had a crippling impact on project economics.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Australia is in the midst of a lightning-fast transformation to a green energy future.

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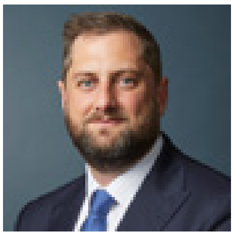

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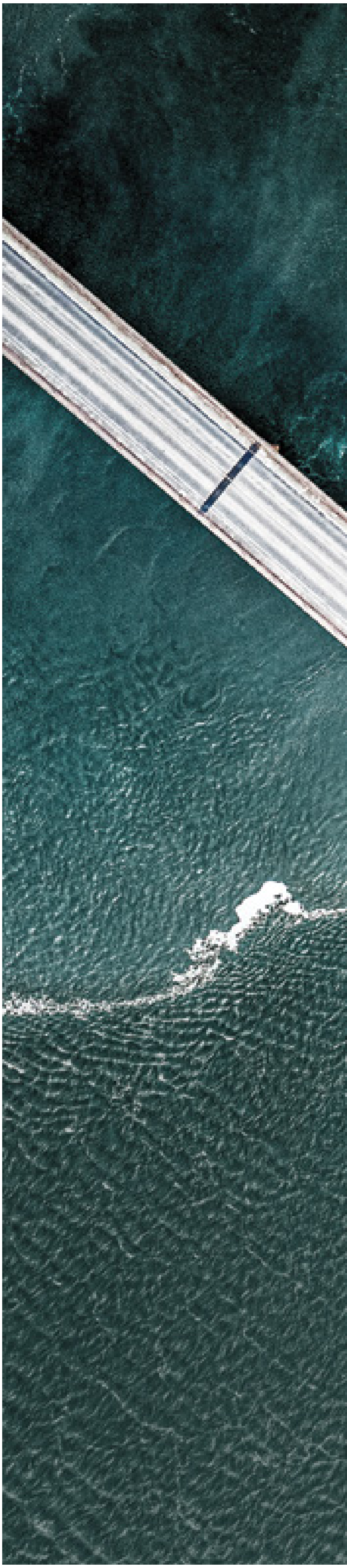

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