The Next Lens

Perspectives on emerging legal, regulatory and commercial change

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Foreword

Australia continues to navigate a period of significant change and uncertainty influenced by geopolitical shocks, technological change and growing economic uncertainty. Against this backdrop, our clients must also navigate Australia's evolving regulatory landscape, with trends towards increased scrutiny on a number of issues including governance of emerging technologies, financing and deal-making, supply chain due diligence, and taxation.

As advisors, we seek to help organisations navigate these periods of change so that they can continue to execute on business strategies while minimising risk. This collection of articles aims to provide readers with a selection of relevant forward-looking insights which may aid them in achieving their goals over the coming year.

We hope you find it useful.

Gavin MacLaren

Senior Partner and CEO

Corrs Chambers Westgarth

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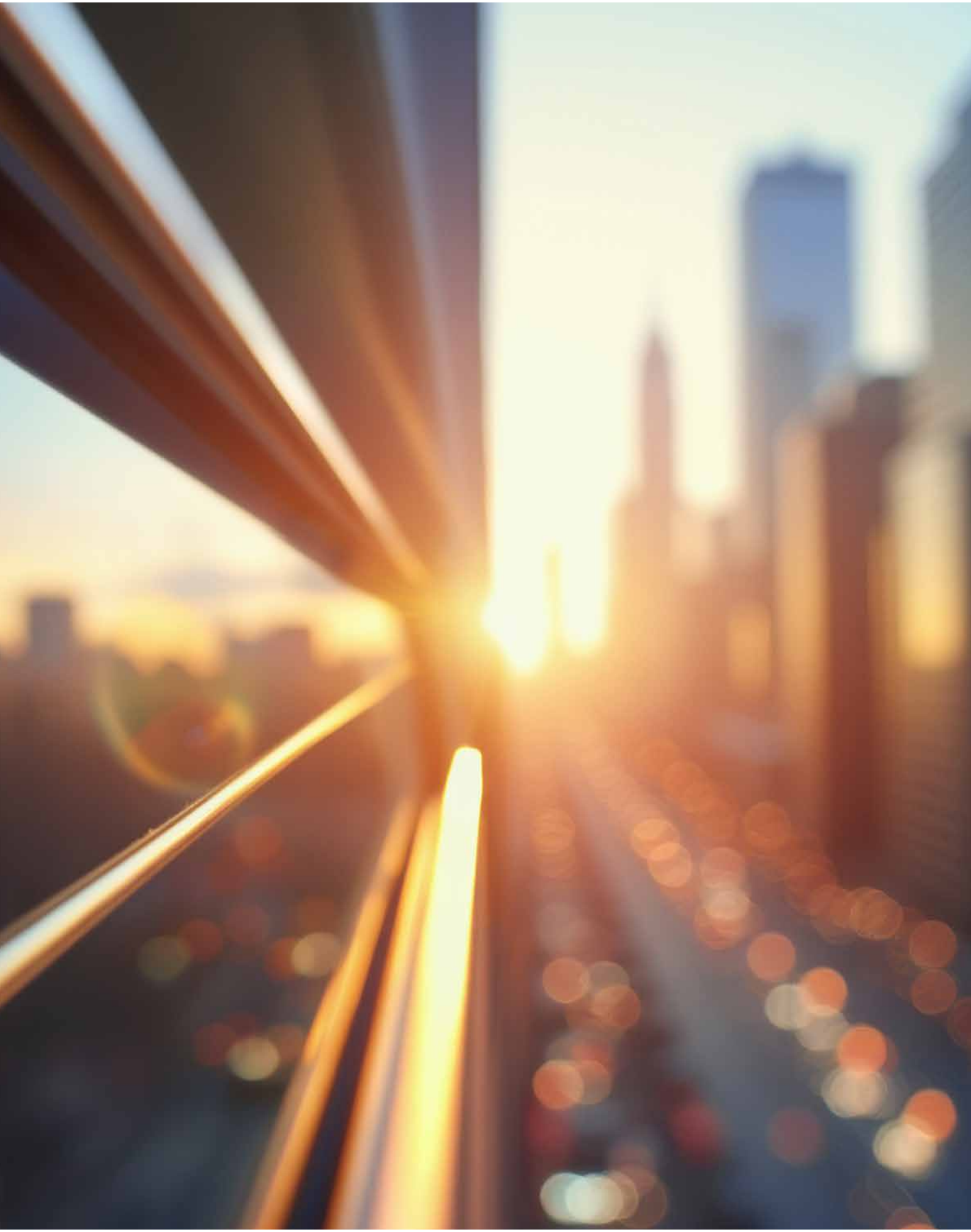

01

AI in the boardroom: judgment, information systems and the modern duty of care

By **Andrew Lumsden**, Partner, **James North**, Head of Technology, Media and Telecommunications, and **Eugenia Kolivos**, Head of Intellectual Property and Partner, TMT

Key insight

Artificial intelligence does not change directors' duties – but it is reshaping how those duties will be assessed. Courts are focusing less on decision outcomes and more on whether boards exercised informed oversight of the systems producing AI-influenced information. The inability to explain how AI was governed may matter more than the correctness of the decision it informed.

Artificial intelligence is now embedded in the systems through which directors receive, filter and understand information. The question for boards is no longer whether to use AI, but how to govern it. AI does not change the content of directors' duties – it changes the environment in which those duties are performed. In doing so, it exposes a longstanding reality of the duty of care and diligence: its focus is less on the correctness of decisions and more on whether directors have maintained effective oversight of the systems that generate and shape the information on which those decisions are based.

Recent authority confirms that this duty now operates in two settings: where directors rely on AI-influenced outputs in making decisions, and where AI itself is deployed within the organisation as a source of material operational and legal risk. Existing principles of reliance remain fit for purpose, but they place heightened emphasis on information architecture – ensuring boards have visibility of the limitations, risks and assumptions embedded in AI systems. Properly understood, the "old rules" still apply. The challenge for directors will be demonstrating that they have been applied, through robust AI governance and information systems.

The recent decision in Star[1] is not, on one view, about decision-making at all. It is about the systems through which information reaches directors. The Court's analysis did not turn on whether the directors made the "right" decisions. It turned on whether they had positioned themselves to receive information capable of supporting those decisions. The focus was on reporting structures, escalation mechanisms and the informational environment in which the board operated. For boards, this shifts the question from whether a decision was reasonable to whether the systems informing that decision were capable of supporting informed oversight.

That approach is consistent with earlier authority. In *Daniels v Anderson*,[2] directors were required to take a diligent and intelligent interest in the affairs of the company. In Centro,[3] they were required to read and understand the financial information placed before them. In *James Hardie*,[4] the limits of reliance on others were exposed in the context of board approval of misleading disclosure.

Star sharpens the point. The duty of care is increasingly concerned with whether directors have ensured that the organisation's information systems are capable of surfacing material risk in time for meaningful oversight. In that sense, it is a case about information architecture rather than decision-making. Much of the current discussion of AI in governance assumes that it presents a new category of legal problem. It does not. AI sits within the systems that generate and present information to directors. It acts as a filter, a synthesiser and, increasingly, a generator of information. It affects how board materials are prepared, how risks are identified and how trends are analysed.

Star has two clear implications for AI. First, where directors rely on AI-generated outputs, the organisation's information architecture must allow the limitations of that reliance to be understood before those outputs inform board decisions. Second, the use of AI within the organisation gives rise to material AI risks that this same information architecture must be capable of identifying and escalating to the board where appropriate.

1 *Australian Securities and Investments Commission v Bekier (Liability Judgment)* [2026] FCA 196 (*Star*).
2 *Daniels v Anderson* (1995) 37 NSWLR 438 (*AWA*).
3 *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291 (*Centro*).
4 *Australian Securities and Investments Commission v Hellicar* [2012] HCA 17; (2012) 286 ALR 501, the limits of reliance on others were exposed (at [162]–[163]. per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

Operationalising oversight of AI-informed decisions

For AI-enabled decision-making, the starting point for boards is not technical expertise, but structural oversight.

Directors should be able to answer at a minimum:

- *Where is AI used in the business?*
- *What decisions does it influence?*
- *Who is affected by those decisions?*
- *Can the outcome be reviewed or overridden by a human?*
- *Are outputs tested, or simply accepted?*
- *Can the process be explained and audited?*
- *If the system is third-party, what assurance exists as to its performance and limits?*

For material or high-impact uses of AI, board should expect evidence of four core elements:

Purpose – why AI is used and what it is not used for

Validation – assumptions, known limitations and material changes

Exceptions and overrides – flagged anomalies and human interventions

Assurance – data lineage, controls, audit logs and a named accountable owner

These are the mechanisms by which boards position themselves to interrogate AI-informed outputs and demonstrate disciplined judgement. Where AI outputs are adopted without testing or inquiry, there is a real risk that no relevant "judgment" has been exercised at all.

> "Where directors rely on AI-generated outputs, the organisation's information architecture must allow the limitations of that reliance to be understood before those outputs inform board decisions.

AI and the duty of care and diligence

Section 180(1) of the *Corporations Act 2001* (Cth) imposes an objectively assessed duty of care and diligence on directors and officers. The Court considers what a reasonable person in the director's or officer's position would do, having regard to the responsibilities and circumstances of the office.[5]

The modern objective standard is anchored in *AWA*.[6] Directors must be in a position to guide and monitor management, cannot be passive and cannot rely blindly on others.[7] The "responsibilities" referred to in the statute extend beyond formal statutory duties and include "*whatever* responsibilities [original emphasis] the officer concerned had within the corporation, regardless of how or why those responsibilities came to be imposed on that officer".[8]

Whether the standard has been met requires a balancing of the foreseeable risk of harm against the potential benefits reasonably expected to accrue to the company by reason of the director's or officer's actions, taking into account the expense and practicality of taking alleviating action.[9] While directors are entitled to rely without verification on the judgment, information and advice of management and other officers, that entitlement is conditional.[10] A director's reliance must:

- involve an independent assessment of the information or advice provided;
- be made in good faith; and
- be based on reasonable grounds as to the competence and reliability of the person relied upon.

Reliance on AI-enabled systems can fall within this framework, but only if directors treat the system as standing in for a competent person (for example, an external expert or an internal team) and it satisfies those same statutory conditions. The analysis should therefore focus on the person responsible for the system and the controls surrounding its use. AI complicates that analysis. The statute is framed in terms of persons, not systems, and it is difficult to characterise an algorithm as an "expert" in its own right.

The better view is that the relevant expertise lies with the person or entity deploying or standing behind the system – whether an internal team, an external adviser or a vendor. That does not resolve the issue. Where systems are opaque or proprietary, a director's ability to assess competence, reliability and limitations becomes more difficult. The system does not substitute for that assessment.

Independent assessment remains a demanding requirement. A director cannot discharge it by accepting an AI-generated output at face value. AI introduces a structural tension into the reliance framework – the law assesses the competence of the person relied upon, but the output may be generated by a system that neither the director nor that person can fully explain, test or challenge. AI may inform a decision. It cannot constitute the decision.

AI and the business judgment rule

The business judgment rule in Section 180(2) of the *Corporations Act* operates where a director has exercised a judgment. It does not apply to failures of oversight or failures to engage with systems of information. That is not a defect in the law, but a constraint on how AI can properly be used in governance.

Where a director has not turned their mind to a matter, there is no "business judgment" to protect.[11] This has a direct implication for AI-enabled decision-making. If a director simply adopts the output of a system without interrogation, it is not clear that any judgment has been exercised. In those circumstances, the statutory safe harbour is not engaged. This exposes a structural tension. The attraction of AI lies in its capacity to produce faster, more consistent and often more accurate outputs than human judgment.

The business judgment defence has always been about process, not clairvoyance. *Rich*[12] clarifies aspects of the burden of proof and the requirement that directors be 'appropriately informed'. None of these authorities demand technical omniscience. They require an inquiring mind, proportionate reliance and credible documentation. The same principles apply in an AI context.

5 *Australian Securities and Investments Commission v Adler* [2002] NSWSC 171; (2002) 168 FLR 253 (at 346–347 [372(4)] per Santow J).

6 *AWA Ltd v Daniels* (1992) 7 ACSR 759.

7 *AWA*.

8 *Shafron v Australian Securities and Investments Commission* [2012] HCA 18; (2012) 247 CLR 465 (at 476 [18] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

9 *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395 (at 449–450 per Ipp J). The balancing exercise is not confined to commercial considerations or monetary consequences and extends to "all of the interests of the corporation": *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023 (2016) 336 ALR 209 (at 640–641 [459] per Thawley J).

10 *AWA* (at 868 per Rogers CJ).

11 See *Star* at paragraph 1436 and 1465 to 1467.

12 *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229; (2009) 236 FLR 1 (*Rich*).

The governance challenge presented by AI is therefore not technical, but structural. Directors are not required to understand how an algorithm operates at a technical level. They are required to ensure that the systems through which AI operates produce information that can be evaluated, understood and, where necessary, challenged.[13]

The critical question is whether the organisation has established systems capable of identifying and escalating material risks to the board. Where directors rely on AI-generated outputs, the legal issue is not whether the output was correct, but whether the systems through which it was produced were capable of supporting informed oversight. In an AI context, that means focusing on outputs, validation and accountability.

AI governance: board oversight, risk escalation and accountability

Governing the risks posed by AI tools themselves is as important as scrutinising the accuracy of their outputs. Consistent with the principles in *Star*, organisational structures must ensure that material AI risks (such as biased or inaccurate outputs, cyber security vulnerabilities, or breach of applicable laws relating to anti-discrimination or privacy) are identified, assessed and escalated to the board, with appropriate assurance that proportionate controls are in place to manage these concerns.

Clear responsibility for the implementation, oversight and monitoring of AI systems is essential. This may be supported through cross-disciplinary governance forums (an 'AI risk committee') and designated responsible AI officers, so that AI risks are understood and addressed at the appropriate level of seniority.

Only assessed and approved tools should be used, supported by an AI policy that sets out which AI tools and use cases are permitted, restricted or prohibited, with particular attention to high-risk domains. Shadow AI (unauthorised use of AI tools by employees) poses significant confidentiality, privacy and compliance risks and should be actively addressed.

Governance frameworks should also require consideration of whether proposed AI use cases create legal or regulatory, including risks arising under anti-discrimination, privacy cyber security or consumer protection laws. Directors should be satisfied that AI systems are subject to appropriate access controls and data governance.

Organisations may elect to publish a public-facing AI policy to build trust and clarify expectations, but such statements must reflect actual practices, else risk claims of misleading and deceptive conduct under the *Australian Consumer Law*. Taken together, these measures comprise the information architecture that *Star* demands. Just as directors cannot claim ignorance of financial misstatements in the absence of adequate reporting systems, they will struggle to defend failures of AI governance where no framework existed to identify, assess and escalate the risks AI poses.

Applying established directors' duties in an AI-enabled environment

AI does not represent a departure from established principles of corporate law. It is the context in which those principles will be tested most acutely. The duty of care does not require directors to decode technology. It requires them to ensure that the organisation's systems, including those incorporating AI, are capable of supporting informed oversight.

AI exposes a structural tension. The law assesses the competence of the person on whom reliance is placed. The decision may in substance be driven by a system that neither the director nor the delegate fully understands. That tension does not displace the statutory framework. It raises the standard of inquiry required to satisfy it.

The question is not whether organisations and directors will use AI, but whether they will be able to explain how the AI systems they operate are governed. Directors must be able to identify, understand and respond to the risks AI presents, and to demonstrate how judgment was exercised.

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13 In *Star*, the Court's focus was not on the merits of the board's decisions but on whether the board had positioned itself to receive information capable of supporting those decisions. The duty of care was engaged at the level of information architecture, not outcome.

02

Governance accountability after ASIC v Bekier & Ors: key lessons for boards and general counsel

By **Abigail Gill**, Head of Investigations and Inquiries, **Caroline Marshall**, Partner and **Lucy Terracall**, Partner

Key insight

ASIC v Bekier & Ors clarifies how governance accountability is likely to be assessed, with courts and regulators focusing on whether governance systems ensure material risks reach the board in time for meaningful oversight rather than individual actions or decisions. Where escalation systems fail, senior officers are exposed; where oversight systems break down, non-executive directors may be at risk.

The Federal Court's recent decision in *ASIC v Bekier & Ors*[1] delivered a clear governance signal for boards, officers and general counsel. The proceedings followed a series of domestic public inquiries and royal commissions into major casino operators and arose against a backdrop of heightened regulatory scrutiny in the gambling sector. However, the implications extend beyond that industry.

Brought by ASIC against 11 current or former Star directors and officers for alleged breaches of the statutory duty of care and diligence under section 180 of the *Corporations Act 2001* (Cth), the significance of the judgment lies in what it reveals about how courts and regulators are scrutinising the architecture of corporate accountability and board oversight – who knew what and when, and whether systems were capable of ensuring material risks reached the board in time to enable effective supervision.

While the Court found that the non-executive directors of The Star Entertainment Group Limited (**Star**) had not breached their duties, it held that the company's CEO and General Counsel breached their officers' duties by failing to ensure serious risks were properly escalated to the board. The judgment provides important guidance for both directors and officers.

1. Boards must control the information environment

The judgment contains a notable discussion of board pack overload. The Court emphasised that the board must "control the information they receive" and take reasonable steps to position themselves to guide and monitor management.[2] Directors are not passive recipients of board papers. The duty of care requires "real engagement with information provided to them", a "diligent and intelligent interest" in available information, and an "enquiring mind".[3]

In practical terms, modern director liability cases will involve the court in an examination of reporting structures, escalation mechanisms, board minutes and committee records – demonstrating whether the board exercised judgment, rather than simply receiving information.

2. Reliance on management has clear limits

Directors may rely on management to bring problems or irregularities to their attention, but only where there is no reason to doubt management's honesty, trustworthiness or competence. Absent grounds for suspicion, it may be reasonable to rely on advice without independently verifying underlying data or circumstances.

However, reliance on management is not a substitute for the board's own attention to matters that fall specifically within its responsibilities. Directors must bring an independent and inquiring mind to the information before them. When "warning signals" emerge, reliance without probing, challenge or verification becomes increasingly difficult to defend.[4] At that point, the obligation shifts from reliance to inquiry.

1 *Australian Securities and Investments Commission v Bekier & Ors (Liability Judgment)* [2026] FCA 196 (*ASIC v Bekier & Ors*).
2 *ASIC v Bekier & Ors*, at [382]–[383].
3 *ASIC v Bekier & Ors*, at [395] and [1945].
4 *ASIC v Bekier & Ors*, at [1464].

3. The business judgment rule turns on evidence of judgment being exercised

The decision reinforces the Court's narrow interpretation of the business judgment rule under section 180(2) of the *Corporations Act*. The statutory safe harbour requires a conscious exercise of judgment – a "decision to take or not take action".[5] A director who simply fails to turn their mind to what safeguards ought to be in place has not made a business judgment.

Equally, the rule does not apply to ongoing supervisory and monitoring functions through which boards oversee corporate risk. In this context, board minutes assume critical importance. Minutes are the primary evidence that directors engaged – that they asked questions, sought further information, challenged assumptions and required follow-up where risks were identified. If the minutes are silent, it is difficult to establish that any business judgment was exercised.

4. Culture and values are matters of governance, not rhetoric

One of the more pointed passages in the judgment concerned organisational culture. The Court observed that while it is easy to be cynical about corporate governance statements identifying the board's role as "overseeing the Company's organisational culture and values", for boards who adopt them "one presumes they are supposed to be more than platitudes".[6]

For a casino operator, Lee J observed, "this was no ordinary enterprise"[7] and that the role demanded vigilance. The clear message is that culture is not an aspirational construct, but an aspect of risk governance that requires active attention – particularly where the business model carries inherent regulatory or reputational risk.

5. AI may assist understanding, but cannot replace judgment

Justice Lee acknowledged the "profound impact" of AI on how information is exchanged and analysed, noting that directors may already be using AI informally to prepare for board meetings.[8] However, his Honour warned that "the use of technology may assist comprehension, but it cannot displace… informed human judgment".[9] The judgment underscores the risks of informal "shadow" use of AI and the importance of governing its use intentionally through formal frameworks. Regardless of the tools employed, the core requirement remains the same – directors must be provided with information "in a form that is both comprehensive and capable of proper digestion".[10]

These observations sit alongside a broader trend in regulatory scrutiny of AI governance. Recent commentary from Australian regulators has emphasised weaknesses in board-level oversight, escalation and assurance mechanisms for AI-enabled systems. Together, these developments reinforce that the governance challenge posed by AI extends beyond information and escalation frameworks to whether those frameworks are capable of supporting informed oversight of AI-related risks.

6. General counsel responsibility for escalation

The decision is a reminder that the general counsel's duties are owed to the company, not to the CEO or other executives. Reliance on the CEO to escalate issues to the board is unlikely to excuse a failure to ensure the board is properly informed of material legal and regulatory risks.

An in-house counsel who is also a company officer cannot compartmentalise their duties by reference to their different roles. Legal training brings with it heightened expectations – general counsel can reasonably be expected to identify risks that other officers may not appreciate.

> "The decision is a reminder that the general counsel's duties are owed to the company, not to the CEO or other executives.

5 *ASIC v Bekier & Ors*, at [1952].
6 *ASIC v Bekier & Ors*, at [1952].
7 *ASIC v Bekier & Ors*, at [1952].
8 *ASIC v Bekier & Ors*, at [390].
9 *ASIC v Bekier & Ors*, at [1956].
10 *ASIC v Bekier & Ors*, at [393].

A broader governance lesson: what boards and officers can take away

The most important lesson from A*SIC v Bekier & Ors* arises out of the court's analysis of the effectiveness of the organisation's governance system as a whole – rather than the specific conduct of individuals, whether material risks were capable of reaching the board in time and whether directors and officers engaged meaningfully once they did.

From a practical perspective, the decision reinforces the following governance expectations:

Boards must actively manage their information environment.

This includes control over the form, volume and quality of board materials. Information overload may itself constitute a governance failure if it obscures material risk.

Reporting lines and escalation frameworks must function in practice.

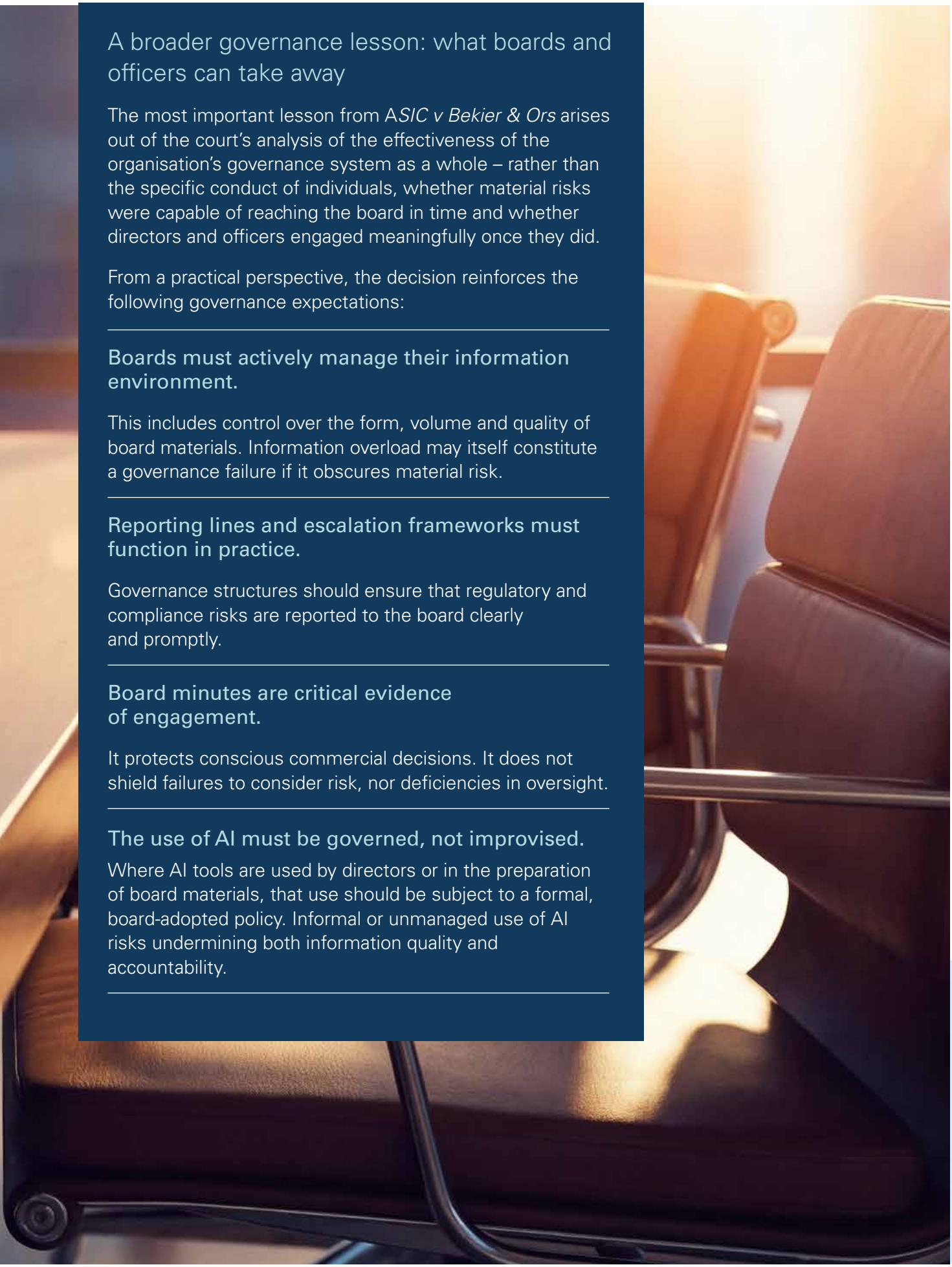
Governance structures should ensure that regulatory and compliance risks are reported to the board clearly and promptly.

Board minutes are critical evidence of engagement.

It protects conscious commercial decisions. It does not shield failures to consider risk, nor deficiencies in oversight.

The use of AI must be governed, not improvised.

Where AI tools are used by directors or in the preparation of board materials, that use should be subject to a formal, board-adopted policy. Informal or unmanaged use of AI risks undermining both information quality and accountability.



Why non-executive directors avoided liability

A question that inevitably arises is how the non-executive directors avoided liability despite the Court's findings of significant governance failures within the organisation. The answer lies in the Court's careful distinction between alleged failures of management and failures of board oversight.

ASIC faced a difficult evidentiary challenge. It alleged, on the one hand, that senior executives failed to ensure that critical risk information was escalated to the board, while simultaneously contending that non-executive directors should have identified the inadequacy of the information they received. Reconciling those propositions proved problematic on the evidence before the Court. In circumstances where the failures lay in management's escalation of information, ASIC was unable to establish that the non-executive directors had sufficient notice of the underlying risks to trigger a breach of their oversight obligations.

Governance liability, escalation failure and D&O insurance implications

Although the decision applies established, rather than novel, legal principles, it may nevertheless have meaningful implications for the directors and officers' insurance market. The current, relatively soft D&O insurance environment may shift if underwriters in Australia and London are not convinced that policyholder cohorts are actively managing governance risk, particularly in relation to information flow, escalation and board oversight.

Companies in the process of purchasing or renewing D&O insurance should therefore expect closer scrutiny from underwriters and be prepared to respond to more pointed questions about their governance frameworks and practices, including how material risks are identified, escalated and documented.

Governance accountability in practice: escalation, oversight and the modern risk lens

ASIC has announced it will not appeal the dismissal of the claims against the non-executive directors. Regardless, the decision confirms that modern governance liability operates on both sides of the boardroom table. Failures of escalation and information flow expose senior officers, while failures of oversight may expose non-executive directors.

More broadly, *ASIC v Bekier & Ors* underscores a shift in how governance risk is being assessed by regulators and courts. The focus is moving away from isolated decisions and toward the systems through which information is generated, filtered, escalated and recorded. For boards and senior officers, the critical question is no longer simply whether risks existed, but whether governance frameworks were capable of ensuring those risks reached the board in time to enable meaningful engagement.

Looking ahead, organisations should focus on reviewing the effectiveness of their governance arrangements post-*ASIC v Bekier & Ors* – how reporting lines function in practice, how material risks are prioritised and escalated, and how board engagement is evidenced. Enforcement focus will increasingly turn on the effectiveness of these systems, and whether accountability is matched by disciplined oversight at every level of the organisation.

> **ASIC v Bekier & Ors underscores a shift in how governance risk is being assessed by regulators and courts.**

03

Tax as a governance risk: what Australia's enforcement shift means for boards

By **Angelina Lagana**, Head of Tax Controversy, **Cameron Blackwood**, Head of Tax, **Costa Koutsis**, Partner, **Nathan Unitt**, Senior Associate and **Phoebe Maus**, Associate

Key insight

The most significant shift in Australian tax enforcement is not tax rates, but the convergence of transparency, enforcement and foreign investment scrutiny – elevating tax into a first-order governance and reputational risk for boards.

Australia's tax landscape is undergoing a structural shift. What is changing is not simply enforcement settings or technical rules, but the role tax now plays in governance, disclosure and foreign investment scrutiny. Legislative reform, a more assertive Australian Taxation Office (ATO) and heightened sensitivity to where value is created and allocated are converging to raise the stakes for boards and executive management. Tax is no longer a background technical function – it has become a visible proxy for economic contribution, commercial substance and risk appetite, with implications that extend well beyond revenue outcomes.

For multinational groups and large Australian enterprises, recent developments – from a broadened non-resident capital gains tax (NRCGT) regime to tighter interest deductibility under thin capitalisation – signal a clear policy tilt. Enforcement is more proactive, engagement expectations are higher, and tolerance for structures perceived to misalign with economic reality is narrowing. In this environment, the differentiator is not compliance alone, but the quality of board-level oversight of tax risk, governance frameworks and external narratives as scrutiny and enforcement intensity continue to rise.

The most significant shift is not only the enactment of the OECD Pillar Two regime – which requires large multinational groups with global revenue of at least €750 million to pay a minimum effective tax rate of 15% in every country where they operate – but the broader transparency obligations now imposed on multinationals. These measures collectively reflect a move away from tax outcomes being assessed solely through regulatory processes, and towards tax positions being exposed to public and stakeholder scrutiny.

Country-by-Country (**CbC**) reporting, including public CbC, requires detailed disclosure of jurisdictional profit allocations, related-party revenue splits and explanations of effective tax rates – effectively compelling organisations to explain any divergence between the tax actually paid and what might be expected based on headline tax rates. While increased transparency is a clear policy objective, there is a legitimate question as to whether this level of mandated disclosure creates real risks of misinterpretation or oversimplification, particularly where complex commercial or structural factors are involved. These disclosures may also place multinational groups at a competitive disadvantage relative to domestic peers or groups headquartered in jurisdictions without comparable public reporting obligations. In that context, boards should ensure that external tax narratives are deliberate, consistent and defensible – aligned with underlying positions, supported by robust transfer pricing evidence, and embedded within clear governance frameworks capable of withstanding regulatory and public scrutiny.

Foreign investment, tax and regulatory signalling: tightening fiscal scrutiny

Two developments in particular illustrate a broader tightening of the fiscal and regulatory settings applying to foreign investment into Australia, with implications extending beyond tax outcomes to capital structuring and investment signalling.

First, proposed changes to the NRCGT regime are designed to widen the definition of 'taxable Australian real property', capturing a broader set of interests with an economic connection to Australian land. These rules determine when foreign investors are subject to Australian capital gains tax on the sale of interests connected to Australian land and natural resources. The exposure draft process will be critical in shaping the final contours of the regime, particularly in light of ongoing appeals in *YTL* (and potentially Newmont) regarding the definition of 'taxable Australian real property' and the meaning of 'real property'. The unprecedented nature of the proposed 20-year retrospective change has understandably heightened concern among foreign investors about predictability and policy stability.

A similar dynamic is evident in the thin capitalisation regime, which was substantially amended in 2024 and is now under active review, with a stated focus on limiting the extent to which profits generated in Australia can be shifted offshore through related-party debt arrangements. While further refinement is anticipated, the current settings have created practical distortions – in particular disadvantaging foreign capital and foreign-backed consortia relative to purely domestic bidders competing for the same assets, even where borrowing is sourced from the same third-party Australian lenders.

Taken together, these reforms send a clear, if challenging, signal that Australia is tightening the fiscal terms applying to foreign capital. Investors will need to factor these developments into acquisition structures, financing arrangements and transaction risk assessments, particularly in sectors already subject to heightened FIRB and regulatory scrutiny. The 2026-27 Federal Budget reinforces this trajectory. Measures directed at multinational groups and large taxpayers – including expanded integrity settings, reforms aimed at limiting profit-shifting and protecting the domestic tax base, and additional ATO funding to extend and intensify compliance activity – underscore a clear policy intent to align tax outcomes more closely with economic activity in Australia.

For boards, the significance of these measures lies not only in their technical impact, but in the consistency of direction. The Budget signals that scrutiny of multinationals and cross-border arrangements will remain sustained and increasingly coordinated, heightening the importance of defensible tax positions, robust governance frameworks and clear alignment between tax outcomes and broader corporate narratives. That said, for agile and well-advised investors, this period of reform also presents opportunity. Those who engage early, invest in robust tax positions and governance, and anticipate regulatory sensitivities will be well positioned to navigate uncertainty and maintain confidence as the landscape continues to evolve.

ATO enforcement and litigation strategy: narrowing tolerance for tax risk

One of the more instructive features of the current environment is the growing tension between judicial guidance, legislative intent and the ATO's administrative and enforcement posture. While the courts have continued to recognise the legitimacy of tax planning within the bounds of the law, the ATO's approach reflects a materially lower tolerance for structuring perceived to lack commercial substance.

Recent decisions – including the High Court's decision in PepsiCo, the Federal Court in *Mylan* and the Full Federal Court in *Morton* – highlight that the mere presence of a tax benefit does not, of itself, establish a dominant tax-avoidance purpose. These cases underscore that lawful tax outcomes remain available where arrangements are commercially grounded and properly implemented.

Against that backdrop, the legislative and administrative response has been to progressively narrow the space in which such structuring can occur. The ATO has shown an increased willingness to deploy Part IVA and the Diverted Profits Tax (**DPT**), complemented by a steady pipeline of Taxpayer Alerts and Practical Compliance Guidelines signalling a sustained uplift in compliance intensity. From property development arrangements (TA 2026/1, draft PCG 2026/D2) to captive MITs (TA 2025/1) and capital management transactions (including *Hicks* and Bendell), the commonality is the ATO's focus on commercial substance – whether structures reflect a genuine economic reality or exist primarily to achieve tax outcomes.

The ATO's enforcement stance is increasingly backed by a readiness to litigate. The *Coca-Cola* matter, expected to be heard this year in the DPT context, alongside ongoing treaty-shopping disputes involving withholding tax, illustrate an appetite to test positions where the ATO considers the facts warrant it. In parallel, marketing hubs, related-party financing and intellectual property structures remain front-line risk areas, with the ATO increasingly pursuing primary transfer pricing arguments, often alongside alternative Part IVA or DPT positions.

This approach is not confined to any single sector. Multinational and domestic groups across superannuation, technology, life sciences, infrastructure, energy, mining and financial services can expect continued scrutiny under the ATO's ongoing assurance and risk-based programs, including where those programs intersect with FIRB oversight. For boards, the implication is clear: tax risk now sits squarely within the organisation's broader enforcement, dispute and governance strategy, rather than as a purely technical or reactive function.

State tax enforcement: workforce, investor and reputational risk

State taxes remain an active and increasingly contested area, with enforcement intensity continuing to rise across multiple fronts. In particular, the employee-contractor distinction remains a central focus for State Revenue Offices nationwide affecting not only traditional contracting industries but also the gig economy and, increasingly, white-collar roles. Recent litigation underscores the breadth of this scrutiny and the associated payroll tax exposure for organisations operating at scale.

At the same time, foreign surcharge duties and land tax regimes continue to apply across major States, including to foreign investors with exposure to critical industries such as housing. While there are limited pathways for relief to apply, these are often dependent on discretionary exceptions or non-reviewable ex gratia arrangements, creating uncertainty and reducing predictability for long-term investment and structuring decisions.

For boards, state taxes present a distinct but related layer of risk – one that can crystallise quickly, attract retrospective assessments and intersect with workforce strategy, transaction execution and reputational considerations. As enforcement activity intensifies, proactive assessment and governance of state tax exposure are becoming as important as managing federal tax settings.

Enforcement outcomes and dispute trends: signals for boards

The practical impact of these developments is already evident in enforcement outcomes. The *ATO's Public Groups Disputes and Settlements Report* provides a useful snapshot of where regulatory focus is concentrated and how disputes are resolving in practice. 70% of income tax audits are directed at global profit shifting, and 72% of settlements occurred before or during the audit phase, with a further 17% resolved at the objection stage and only 11% proceeding to litigation. Total settlement variance stands at 36%, meaning the ATO secured approximately 64% of the disputed amount it considered payable.

These figures point to two parallel trends. While a significant proportion of matters are resolving short of litigation, the ATO has demonstrated a clear commitment and willingness to litigate where it considers the position warrants it. Over the next 12 to 24 months, organisations should expect sustained and heightened ATO assurance and compliance activity, with particular scrutiny of governance frameworks, data quality, technical positions and the documentation supporting key decisions. For boards, the data reinforces that early engagement, robust documentation and disciplined governance are central to managing tax enforcement risk in the current environment.

Governing tax risk in an era of heightened enforcement

In this environment, effective oversight of tax risk has become a core governance responsibility for boards and executive leadership. This requires more than awareness of individual reforms. It demands active engagement with legal and tax advisers to interpret evolving guidance, assess implications for existing and proposed tax positions, and understand how enforcement and transparency settings interact with broader business strategy. Equally important is maintaining strong governance and escalation frameworks to ensure that tax teams are appropriately resourced and emerging issues are identified and addressed early.

Organisations that invest in this capability now will not only mitigate regulatory and dispute risk, but will also be better positioned to respond confidently to future reform and identify legitimate structuring opportunities, as the landscape continues to shift. The message is clear: in an era of heightened enforcement, greater transparency and rapid regulatory change, a proactive and well-governed approach to tax risk is no longer optional – it is a strategic necessity.

04

The next phase of workplace regulation: technology, surveillance and data governance at work

By **Nick Le Mare**, Head of Employment, Labour and Safety, **Ronan Boothman**, Partner, **Jodie Burger**, Partner, **Clare Mould**, Special Counsel and **Rachael Malarowski**, Senior Associate

Key insight

Workplace regulation has entered a phase of convergence, where technology use, data governance, wage integrity and safety obligations are increasingly regulated as interconnected systems. As AI-driven management and real-time compliance become embedded in work, boards will be judged less on policy intent and more on whether governance, data and financial controls operate effectively in practice – not just on paper.

Technology is reshaping how work is organised, monitored and managed faster than legal and regulatory frameworks can adapt. Algorithmic scheduling, productivity monitoring, biometrics and artificial intelligence (AI) supported decision-making promise efficiency and scale for business, but they are also multiplying legal exposure and regulatory scrutiny. Legislative change is already underway, with further reforms anticipated, and inaction or reliance on legacy governance approaches will leave organisations playing catch-up.

At the same time, workplace regulation has moved beyond traditional silos. The next phase is characterised by convergence, as mobility in the labour market, integrity in pay and entitlements, workplace health, safety and wellbeing, and privacy and the use of technology are increasingly regulated as interconnected systems. As these issues converge, boards and senior leaders will be judged less on the mere existence of on-paper policies and more on whether their governance, data and control frameworks operate effectively in practice.

Three interrelated themes are now shaping regulatory expectations around technology at work. First is **transparency and consultation** – the expectation (and sometimes, the legal imposition) that workers understand what data is monitored and collected about them, how automated or AI-supported decisions are made and how they can be challenged. Second is **fairness and bias**. Automated screening and performance management and productivity tools must be explainable and auditable for discriminatory outcomes, particularly where they influence pay, progression or termination decisions. Third is **health and safety**, where intrusive surveillance and pace-setting software can be psychosocial hazards in their own right.

These strands are no longer regulated in isolation. Recent developments, such as NSW provisions enabling WHS entry permit holders (with notice) to require reasonable assistance to access and inspect digital work systems relevant to suspected contraventions, illustrate how deeply technology governance now intersects with safety obligations. SafeWork Australia has also identified AI, automation and new forms of work as sources of potential new WHS risks, signalling further regulatory action ahead. The next phase will reward organisations that treat these issues as a single governance challenge – mapping data flows end-to-end, allocating clear ownership for model and system performance, and aligning privacy, discrimination and WHS controls within an integrated governance framework that can be demonstrated in practice.

AI in recruitment and workforce management

The regulatory net around AI at work is tightening rapidly, particularly in recruitment and workforce management. From 10 December 2026, amendments to the *Privacy Act 1988* (Cth) will require APP entities to disclose the use of automated decision-making in their privacy policies, capturing AI-driven recruitment screening, performance evaluation and algorithmic management tools. While the employee records exemption offers some relief, its scope is limited and does not extend to recruitment processes or the management of contractors and labour hire workers. With AI-enhanced recruitment reportedly used by a significant proportion of Australian organisations, the resulting uplift in compliance, transparency and governance expectations will be significant.

Work health and safety regulation is also moving decisively into this space. The *Work Health and Safety Amendment (Digital Work Systems) Act 2026* (NSW) is the first Australian law to impose specific WHS duties in relation to AI-enabled and digital systems at work. Under the regime, PCBUs must ensure that such systems do not create excessive workloads, unreasonable performance metrics, intrusive monitoring or discriminatory decision-making. WHS entry permit holders are also granted powers to access and inspect relevant digital work systems on just 48 hours' notice. These developments reflect a broader regulatory shift toward treating algorithmic management as both a data and safety risk, rather than a purely operational issue.

> The regulatory net around AI at work is tightening rapidly.

At the same time, regulatory focus on labour mobility is increasing, reshaping traditional employer controls over workforce movement and retention. Proposed reforms restricting non compete clauses for low and middle income workers, together with continued judicial scrutiny of restraints more generally, are narrowing reliance on contractual limits. In practice, this shifts emphasis toward alternative governance levers – including data protection, intellectual property control, confidentiality enforcement and cultural retention strategies – all of which intersect directly with how organisations deploy, monitor and manage AI-enabled workplace systems and secure workforce related data.

Employee monitoring, workplace surveillance and regulatory risk

Workplace surveillance is under increasing regulatory and legal scrutiny. Proposed reforms in Victoria, backed by the Government in November 2025, would require employers to prove that any surveillance is reasonable, necessary and proportionate to a stated legitimate objective. The legislation is deliberately technology-neutral, covering AI-driven analytics, keystroke loggers, biometrics and neurotechnology without needing amendment for each new tool. Where surveillance data informs automated decisions that could significantly affect a worker, human review will be required, reinforcing regulatory expectations around accountability and oversight.

Employee redress for getting things wrong has also escalated. Since 10 June 2025, the statutory tort for 'serious invasion of privacy' has given people an additional avenue to seek redress for privacy harms through the courts for intrusion on the individual's seclusion or misuse of their information. While defences remain available, including consent or lawful authority, the new tort materially increases litigation exposure for employers whose surveillance or monitoring practices are unauthorised or misuse personal data.

In this context, the collection and use of facial recognition technology and biometric data represent a particular flashpoint. Biometric data is classified as 'sensitive information' under the Privacy Act and attracts a higher degree of protection. While the employee records exemption remains at play, it does not apply in all use-cases, and the Australian Privacy Principles (**APPs**) apply to the solicitation and collection of sensitive information from employees. As a result, consent frameworks and data security practices need to be front of mind, with organisations required to demonstrate clear necessity, informed consent (where relied upon), robust access controls and defensible data-handling practices in operation, not just on paper.

Managing regulatory risk: immediate focus areas

The regulatory environment around technology at work is evolving quickly. Recent reforms, combined with increased regulatory scrutiny, mean organisations are now being assessed on whether their governance frameworks operate effectively in practice – not just whether policies exist.

Boards and senior leaders should focus on four practical priorities:

1. Strengthen data vigilance

Ensure technical controls are in place to detect and prevent unauthorised access, downloads and misuse of confidential or sensitive information, including data generated or handled by AI enabled systems.

2. Embed AI governance

Robust AI governance is no longer optional. Clear acceptable use rules, ongoing AI risk assessment and defined human in the loop controls are now central to regulatory compliance and the long term integrity of organisational data.

3. Prepare for incidents before they occur

Organisations should maintain a credible incident and crisis response framework that enables rapid identification and containment of data and technology incidents, clear allocation of responsibilities, timely regulatory assessment and coordinated engagement with advisers where escalation is required.

4. Extend oversight beyond the organisation

Technology risk increasingly sits across labour hire, contractors and suppliers. Aligning supply chain oversight with emerging cyber security and data governance standards is essential to achieving end to end resilience.

Wage integrity and real-time regulatory assurance

As regulatory expectations around technology at work intensify, similar shifts are occurring in relation to pay and payroll compliance. Wage and payroll compliance risk is moving from episodic audits to near real time regulatory assurance. Upcoming reforms, including the shift to payday superannuation and tougher responses to underpayment, significantly raise expectations around the accuracy, auditability and timeliness of payroll systems. These changes increase the stakes for boards, particularly where payroll data relies on automated inputs, digital rostering tools, labour hire arrangements or algorithmic decision-making.

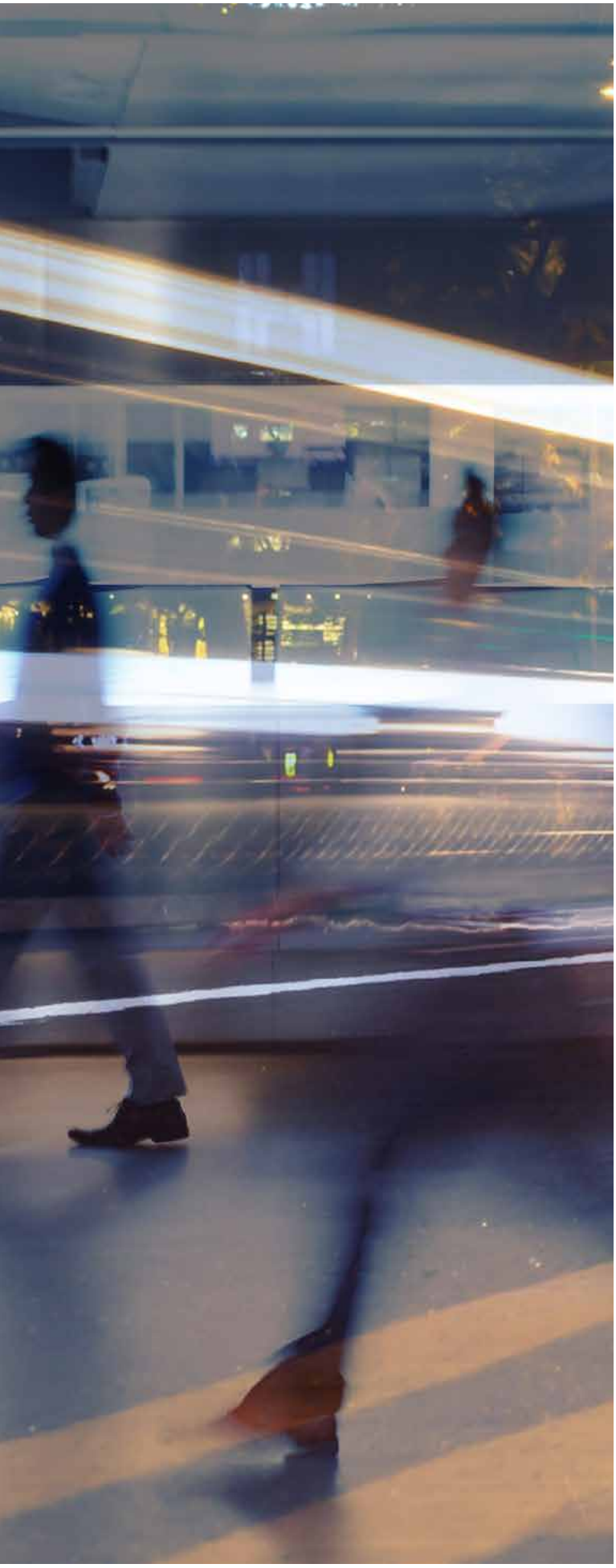
In this environment, wage integrity becomes a systems problem rather than a transactional one. Organisations need confidence in the quality of underlying data, clarity on ownership of payroll inputs across business units and suppliers, and the ability to detect, investigate and remediate issues quickly. As with AI governance more broadly, regulatory risk will turn less on isolated errors and more on whether controls are designed to operate continuously and at scale.

Shadow AI in the workplace: governance, security and liability risk

Shadow AI – the use of AI tools and platforms by employees without organisational approval or oversight – is a growing blind spot for employers. Often operating beyond the visibility of IT, security and legal teams, shadow AI introduces legal and operational risks across data security, information management, model outputs and decision-making at a scale that many organisations are not yet equipped to govern.

From a security perspective, unapproved AI tools can introduce unmanaged integrations, unsecured APIs, and personal device access points into a company's systems, giving hackers easy access to attack surfaces that security teams may be unable to identify, let alone defend. These risks are compounded where sensitive commercial or personal data is entered into third-party tools with opaque training, storage or reuse practices.

Legal exposure also materialises where senior leaders had no oversight. Employers may face vicarious liability for biased or discriminatory AI-assisted decisions, as well as potential copyright infringements if tools are trained on protected data or produce outputs similar to existing works, even when the employer had no idea the tool was being used. As regulators focus more closely on practical governance and accountability, shadow AI highlights the limits of policy-only controls and reinforces the need for clear acceptable-use rules, detection mechanisms and enforceable oversight across AI use in the workplace.



Departing employees, data theft and regulatory exposure

Data theft by departing employees – including the taking of client lists, pricing structures, technical specifications or source code to personal devices or cloud accounts – is a growing trend that gives rise to commercial and regulatory risk at the intersection of contract, intellectual property, privacy, criminal and (particularly, but not exclusively for ASX-listed entities) corporate law. Where highly sensitive commercial information or personal data is involved, data exfiltration can give rise to an obligation to report to national or state privacy regulators, or to ASIC or APRA.

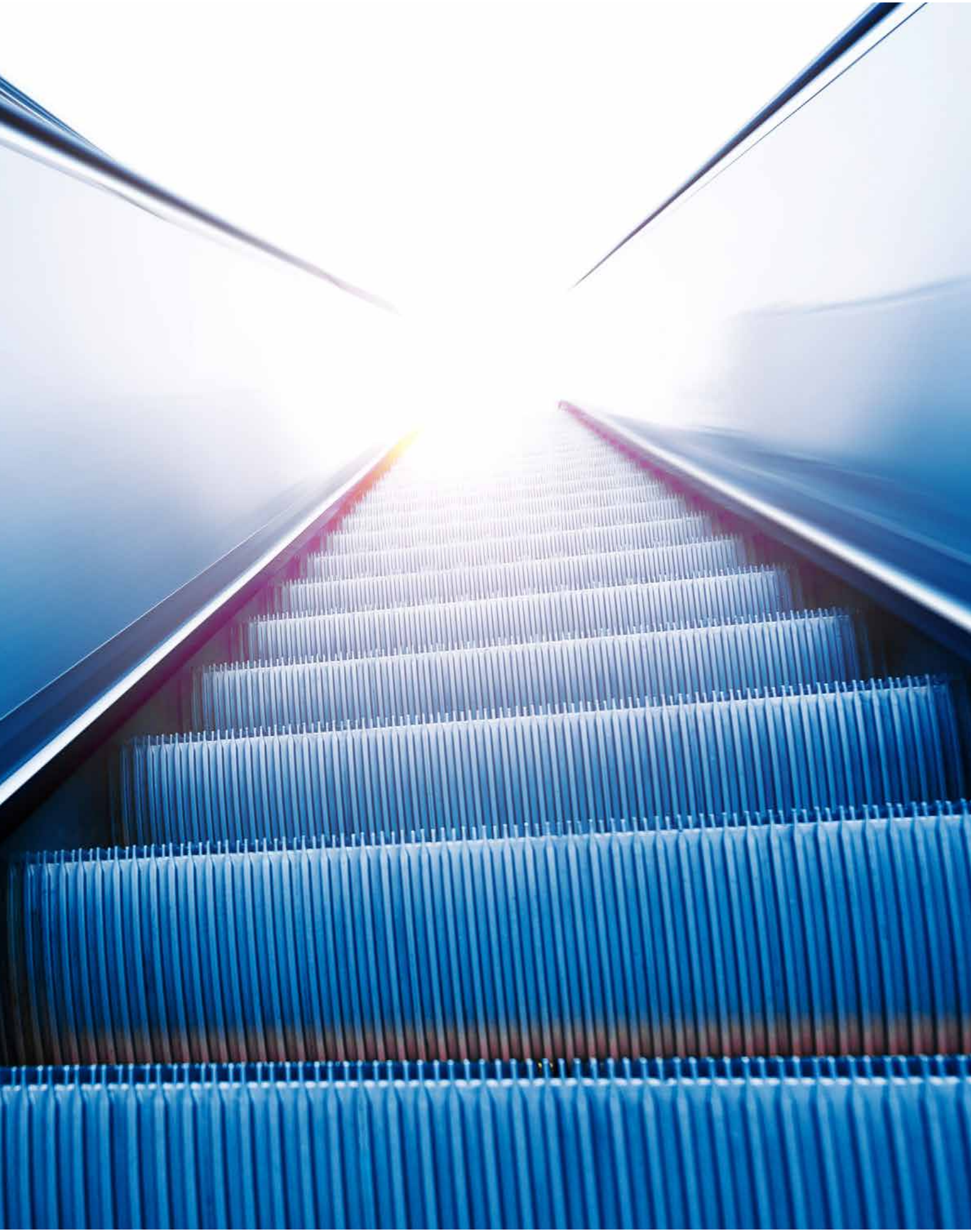
Regulatory scrutiny of employee data exfiltration is also extending beyond traditional contractual and intellectual property claims. The focus is increasingly on how organisations detect, escalate and respond to such incidents in practice. Effective responses require close coordination between legal, data security and governance functions, supported by early preservation of digital evidence and clear escalation pathways to enable timely regulatory engagement. This, in turn, reinforces the importance of integrating technical controls, forensic capability and legal response planning across the employment lifecycle rather than treating data theft as a purely post-departure issue.

What boards need to know about converging workplace regulation

The next phase of workplace regulation is defined by convergence. As technology, data use, wage integrity and safety obligations are increasingly assessed as interconnected systems, the focus of regulatory scrutiny is shifting away from policy design and toward operational effectiveness. Boards are being judged less on articulated intent and more on whether governance, data and control frameworks function reliably across the full lifecycle of work.

This expectations shift extends beyond technology and people risk to financial exposure. Entitlements risk – including accrued leave, superannuation and termination liabilities – is now widely recognised as a balance-sheet and liquidity issue, requiring proactive oversight rather than reactive remediation during periods of change or stress. Taken together, these developments reinforce a clear message: organisations that integrate controls across disciplines, anticipate regulatory interaction and can demonstrate that systems work in practice will be better placed to manage risk, meet evolving regulatory, workforce and stakeholder expectations, and mitigate reputational harm.

Expanding liability and regulatory risk



05

The evolution of regulatory enforcement: where escalation is coming next

By **Abigail Gill**, Head of Investigations and Inquiries, **Caroline Marshall**, Partner and **Kate Gill-Herdman**, Partner

Key insight

The focus of key regulators is shifting – away from guiding regulated populations in their adaptation to new laws towards greater enforcement activity defined by how quickly and assertively regulators can deploy their powers with the benefit of new technologies. The practical shift for businesses requires continuous, technology-enabled monitoring of compliance risk in an environment of accelerated scrutiny.

Global forces – including geopolitical uncertainty, the accelerating pace of AI and technological development, and mounting environmental pressures – are reshaping regulatory reforms and related enforcement priorities. In recent years, Australia's regulatory landscape has seen a period of rapid and wide-ranging reform, with significant impacts from new merger reforms, privacy and online safety, financial crime and ESG regulation.

As regulators test the boundaries of expanded powers and embed oversight for new regimes, the next phase of regulatory risk will increasingly be defined by the speed, intensity and focus of enforcement activity into 2027 and beyond.

Businesses operating in Australia are likely to see increased regulatory risk in these six areas:

1. AI regulation and governance: applying existing laws to emerging technologies

In the wake of Anthropic's announcement about its AI model Mythos and the US government's recent order prohibiting access to certain Anthropic models by foreign nationals, Australian regulators have issued clear signals in relation to AI governance and risk management. The Australian Securities and Investments Commission (ASIC), the Australian Prudential Regulation Authority (APRA), the Australian Communications and Media Authority (ACMA) and the Australian Competition and Consumer Commission (ACCC) have all emphasised the importance of strengthening cyber resilience and implementing systems to manage the risks associated with AI-enabled technologies.

The Australian Government recently confirmed that its regulatory approach to AI will build on established legal and regulatory frameworks as the foundation for addressing AI-related risks as they emerge. This approach differs from that adopted in other jurisdictions where AI-specific regulation has been adopted, most notably the European Union, where the AI Act legislates a risk-based approach to the development and use of AI in the EU, with differing obligations depending on the level of privacy risk presented – there is strict regulation for high-risk systems (and outright bans for some) and lighter touch transparency obligations for lower-risk AI models.

In Australia, the focus of future reform will be influenced by the effectiveness of the regulatory response to new and emerging AI technologies relying on existing laws on privacy, data protection, intellectual property and consumer protection. Early indications of this have been evident in recent cases where the Office of the Australian Information Commissioner (**OAIC**) has sought to apply the *Privacy Act 1988* (Cth) to AI-enabled facial recognition technologies.

To guide responsible AI development and use, the Australian Government has adopted voluntary AI Ethics Principles, last updated in December 2025. Treasury also concluded that the principles-based approach to consumer protection under the Australian Consumer Law is broadly fit for purpose in an AI-enabled environment. Overseas enforcement activity provides some insight into how these issues may evolve in practice. For example, in the United States, the Federal Trade Commission has commenced an inquiry into consumer-facing AI chatbots, focusing on steps taken by seven companies to evaluate potential harm from chatbots when acting as companions, particularly for children and teens.

For organisations, the practical implication is that AI-related risk will continue to be assessed through established compliance lenses, and an expectation that governance, systems and controls should already be capable of responding to these issues.

A key challenge for Australian organisations operating across jurisdictions will be maintaining compliance with a range of different regulatory requirements that continue to evolve alongside AI innovation, as well as regulatory expectations around cyber resilience and AI risk management.

2. Online safety: evolving enforcement expectations

Australia's world-first ban on under-16s accessing social media (introduced via amendments to the *Online Safety Act 2021* (Cth) in December 2025) has positioned Australia at the forefront of digital platform regulation. The eSafety Commissioner has signalled that it will pursue major platforms for inadequate age verification and compliance failures.

While the social media ban is subject to constitutional challenge in Australia, it forms part of a broader global shift towards more active regulation of digital platforms. In the United Kingdom, new child safety duties (in force from July 2025) require digital platforms to conduct risk assessments and deploy age assurance measures to prevent minors from encountering harmful content. In the United States, the Kids Online Safety Act has been reintroduced to Congress, and in the EU, the European Commission has commenced proceedings against major platforms for alleged non-compliance with child safety obligations under the Digital Services Act.

These developments are also beginning to be tested through litigation. Examples include a March 2026 decision by a Californian jury considering the first-ever social media addiction claim, and similar actions may follow in other jurisdictions.

3. Financial crime and scams regulation: expanding scope

Anti-money laundering and counter-terrorism (**AML/CTF**) reforms became effective from 31 March 2026 for entities already caught by the regime, and from 1 July 2026 for newly regulated entities. These reforms implement some of the most significant expansions of Australia's financial crime regime since its inception, including an extension of the regime to lawyers, accountants and real estate professionals, and updating requirements relating to program design, transfers of value and ongoing customer due diligence.

The reforms also give AUSTRAC jurisdiction over regulated entities' compliance with financial sanctions laws and require entities to screen customers against Australian sanctions lists as part of their customer due diligence processes. This represents a notable shift in oversight, given that sanctions oversight has historically sat with the Australian Sanctions Office and the Australian Federal Police and is likely to result in increased regulatory activity in this area.

In Australia, sanctions enforcement has so far remained nascent. While proceedings against individuals for sanctions breaches have been brought in the past, there has yet to be a criminal prosecution of a corporation for sanctions offences. However, the Australian Sanctions Office has been establishing a substantial volume of guidance notes and advisory material and engaging in targeted supervisory campaigns, which may be a precursor to future enforcement activity. Alongside these developments, Australia also continued to impose new sanctions in response to global armed conflict, and reforms of Australia's sanctions regime must be finalised before the *Autonomous Sanctions Regulations 2011* (Cth) sunset on 1 October 2027.

Alongside these developments, Australia is also moving to address the growing impact of scams. ACCC data suggests that Australians lose more than $2.5 billion to scams each year, and Australia's new Scams Prevention Framework (**SPF**) introduces mandatory obligations on banks, telecommunications providers and digital platforms to prevent, detect and respond to scams.

Internationally, there has been a similar shift towards stronger intervention, including scams compensation frameworks in the UK and Malta, and shared responsibility models in jurisdictions such as Singapore. Australia's approach differs in seeking to regulate the full lifecycle of scams, extending responsibility across multiple sectors rather than concentrating liability within financial institutions alone.

The proposed rollout of the SPF on 31 March 2027 will give rise to a number of practical challenges, including the apportionment of liability between the three sectors, and how companies can show they had adequate scams controls in place. Regulated sectors will also need to develop internal dispute resolution mechanisms and allow for complaints to be referred to external dispute resolution before the Australian Financial Complaints Authority, a body previously only dedicated to resolving financial services complaints. The details of the regime also remain unlegislated and subject to further public consultation, with a relatively compressed implementation timeframe for affected sectors.

4. Private credit regulation: transparency, governance and rising enforcement focus

Regulators have responded to the rapid expansion of the private credit market and concerns about key vulnerabilities in the sector. The International Monetary Fund has issued repeated warnings about opaque valuations and hidden leverage. ASIC has responded by making private credit an enforcement priority, flagging material shortcomings in disclosure, fee transparency, conflict management and governance.

This enforcement landscape is consistent with developments in other jurisdictions. In the US, the US Securities and Exchange Commission is pursuing cases against private fund advisers for undisclosed conflicts of interest tied to fees and expenses, while in the UK, the Financial Conduct Authority has identified valuation practices in private markets as a supervisory focus area.

These developments indicate the shift towards far greater regulatory engagement with private markets is unlikely to abate any time soon. Scrutiny is likely to increase, particularly in areas such as valuation, disclosure and governance, as regulators continue to take a more active approach to regulation following ongoing reviews and ASIC litigation.

> The regulatory landscape in 2026 and beyond will be defined by the implementation of recent reforms, accelerated implementation timelines and a corresponding increase in regulatory scrutiny.

5. ESG and greenwashing: a focus on disclosure

2026 has seen the first sustainability reports filed under Australia's new climate-related financial disclosure regime, which now sits alongside financial reporting obligations in the Corporations Act. Those sustainability reports disclose material climate-related financial risks and opportunities, scope 1, 2 and 3 greenhouse gas emissions, information about the governance of, and risk management for, those risks, and an assessment of the entity's resilience to climate-related changes using scenario analysis based on increases in global temperatures.

While the modified liability regime under the legislation provides reporting entities with a three-year period of immunity from civil claims by private litigants, this does not extend to any proceeding brought by ASIC. While ASIC has indicated that it will take a 'proportionate and pragmatic' approach to supervision and enforcement, focusing on supporting entities to meet reporting expectations, it has also indicated it will rely on its new directions power to engage with reporting entities to interrogate statements it has identified as incorrect, incomplete or misleading. Reporting entities should be mindful that ASIC's enforcement approach is likely to toughen as reporting entities become familiar with the new requirements.

In parallel, both ASIC and the ACCC have continued to pursue enforcement action in relation to greenwashing and associated governance failures. The ACCC has brought numerous greenwashing enforcement proceedings and ASIC has also pursued actions against superannuation funds and fund managers for misleading sustainability-related claims in financial products. ASIC's approach has evolved from pure greenwashing claims to enforcement action for governance failures that contributed to misleading sustainability-related claims.

6. Corporate crime and bribery: evolving enforcement and global coordination

Recent developments suggest a changing global landscape for foreign bribery enforcement. In February 2025, a US executive order paused certain aspects of enforcement under the Foreign Corrupt Practices Act. In response, UK, French and Swiss regulators announced the creation of the International Anti-Corruption Prosecutorial Task Force in March 2025, and the Australian Federal Police established Taskforce Solaris in October 2025, a dedicated unit focused on preventing, detecting and investigating foreign bribery and corruption.

In April 2026, the European Union also adopted a new EU Anti-Corruption Directive, which introduces uniform definitions of public officials, tightens the corporate penalty framework, and requires national implementation of further anti-corruption measures by 2028.

While the mutual legal assistance obligation for foreign bribery investigations and proceedings in the Organisation for Economic Co-operation and Development (**OECD**) Anti-bribery Convention is routinely engaged between countries, the OECD has recently published research highlighting the growth in coordinated multi-jurisdictional investigations and resolutions in relation to foreign bribery, particularly for large transnational bribery cases. The research cites the benefits of 'synchronised accountability' and the use of credit-granting and penalty-offset frameworks to ensure that sanctions are effective, proportionate and dissuasive, while avoiding duplicative penalties. Cross-border enforcement (and resolution) is also more likely to guarantee a fairer redistribution of the unlawful gains from foreign bribery between the participating jurisdictions. Almost all of the multi-jurisdictional resolutions studied for this research involved some form of non-trial resolution, such as a Deferred Prosecution Agreement (**DPA**) or Non-Prosecution Agreement.

In Australia, attention is also turning to the potential introduction of a DPA regime under the Criminal Code as part of the review of the new foreign bribery regime that was introduced in September 2024. A DPA regime would allow companies accused of foreign bribery to seek settlements with prosecutors in exchange for financial penalties and strengthened compliance programs (potentially on a coordinated basis where there are investigations involving other jurisdictions). Comparable frameworks in the US and UK already have DPA schemes and they are commonly utilised in anti-corruption enforcement action against organisations. One further argument in favour of a similar regime in Australia is that it may encourage greater self-reporting by companies.

From compliance to readiness: the next phase of regulatory enforcement

The regulatory landscape in 2026 and beyond will be defined by the implementation of recent reforms, accelerated implementation timelines and a corresponding increase in regulatory scrutiny. Across the enforcement areas discussed above, technological capability – particularly the use of AI – is expected to enhance regulators' ability to detect wrongdoing, identify patterns and prioritise investigations.

At the same time, there is a growing expectation that regulated entities will use technology to enhance their compliance systems and processes.

The traditional approach providing extended transition periods following reform is beginning to shift. Recent frameworks, including the SPF and the amended AML/CTF Act, have been introduced without transitional compliance periods, possibly reflecting an expectation that organisations should be able to implement new requirements more quickly, supported by technology-enabled systems and controls.

In this environment, the regulatory focus needs to shift to swift implementation of risk-based controls and demonstrating readiness in practice. The organisations that will be best placed to respond will be those that leverage technology to enhance risk management and fast-track compliance, maintain clear and adaptable governance frameworks, and anticipate how regulatory expectations may evolve over time.

06

Australian class action risk: what global litigation trends signal for boards and executives

By **Chris Pagent**, Head of Class Actions, **Frieda Chan**, Partner, **Lara Hall**, Partner, **James Emmerig**, Special Counsel and **Emerson Hynard**, Senior Associate

Key insight

Australian class action risk is no longer shaped primarily by domestic precedent. Overseas litigation, regulatory action and global funding dynamics increasingly operate as leading indicators – setting the direction, timing and form of claims that later emerge in Australia.

Class action risk is increasingly being shaped beyond Australia's borders. For boards and senior decision makers, understanding developments in foreign jurisdictions – including overseas proceedings, regulatory action and litigation funding dynamics – is now critical to anticipating litigation risk in Australia.

Claims that gain traction in the United States, the United Kingdom and Europe frequently inform the strategies adopted by plaintiff firms and funders locally. This trend is accelerating as class action markets globalise, capital flows across borders and regulators and courts overseas test novel theories that reshape expectations of corporate accountability.

As class action and collective action regimes around the world continue to expand and mature, the gap between developments abroad and class action risk emerging in Australia is narrowing. While Australia is regarded as a relatively active and sophisticated class actions market, with class action settlements totalling roughly A$1.6 billion in 2024/25, it remains small in scale relative to global activity, and susceptible to global litigation and regulatory trends,

The breadth of offshore class actions highlights why international trends matter when assessing what may lie ahead in Australia. The United States remains by far the largest class action jurisdiction globally, recording more than 1,700 class action settlements in 2025, with total settlement values of approximately US$79 billion, dominated by antitrust, product liability and securities fraud matters.

Other jurisdictions are also experiencing rapid growth. In the United Kingdom, the class actions market has expanded significantly over the past decade, as the Consumer Rights Act 2015 introduced a new opt-out regime for competition law collective actions in the Competition Appeal Tribunal (**CAT**). In the European Union, the EU Representative Actions Directive adopted in 2020 has required all EU countries to implement at least one collective redress mechanism for consumers, with the aim of harmonising regimes across EU countries.

'Copycat' class actions driven by overseas litigation will remain a dominant feature

Australian plaintiff firms and litigation funders are increasingly looking offshore for inspiration, with foreign jurisdictions operating as incubators for new causes of action and funding strategies before they are implemented in Australia.

Plaintiff firms have been candid about this approach. Maurice Blackburn has described one current class action as explicitly modelled on 'similar proceedings in the USA' as well as 'class actions in the UK Competition Tribunal and Canada'. After a recent US ruling against two technology companies, Shine Lawyers announced it was 'investigating how an Australian claim could be run'.

Australia has already seen multiple waves of copycat litigation, particularly in relation to medical and pharmaceutical products (including talc, medical implants and cold and flu medicines), in the automotive sector, and more recently, in technology-related claims. We expect this trend not only to continue beyond 2026, but also to broaden into new industries and sectors, particularly those experiencing heightened or emerging regulatory scrutiny.

Australia's class actions regime features a relatively low threshold for commencing proceedings – there is no 'certification' step as in the US and UK, and only one substantial common issue of law or fact needs to be identified. Australia's robust regulatory framework facilitates consumer and product-based claims, and overseas claims alleging defective or unsafe goods can often map well onto Australian Consumer Law claims. At the same time, Australia's adverse costs regime – where the losing party typically pays the winning party's costs – can deter more speculative claims that might otherwise be viable in jurisdictions without similar costs exposure.

Novel class action claims are expanding the range of Australian targets

As overseas plaintiff firms continue to push and test new claim theories, local counterparts are increasingly following suit, particularly where novel claims align with Australia's regulatory and damages landscape. As a result, claims pioneered offshore are reshaping the domestic class actions risk landscape and expanding the pool of businesses exposed to potential claims. For example, one Australian plaintiff firm is consulting with a US law firm to explore a potential class action concerning 'proton pump inhibitor' medication.

While enthusiasm for securities and shareholder claims has softened in recent years following a series of plaintiff losses at trial, we have seen an uptick in employment, consumer and product claims. Looking ahead to 2026 and beyond, we expect to see greater diversification in Australian claims, particularly into areas such as privacy, data, cyber, climate change, human rights, and other emerging areas of regulatory and social concern (both in Australia and overseas).

In the UK, given that only competition law class actions can be brought on an 'opt-out' basis, there have been instances in which plaintiffs have looked to shoe-horn consumer rights into this regime in creative ways. In 2024, a claim was commenced seeking damages for alleged 'data or information abuse' by a technology company where the excessive pricing allegation has been framed as the cost to consumers being requirements to provide data to use certain services. In 2025, another claim accused six water and sewage companies of under-reporting pollution, allegedly resulting in higher prices through an abuse of market dominance (although the CAT declined certification in that case). The later claim was ultimately not certified. Against this background, the UK Government has asked the Law Commission to consider the potential introduction of a consumer class actions regime.

Australia's uptake of novel claim categories adopted in other jurisdictions has not been uniform. For example, privacy litigation has emerged as a centrepiece of the business model of the US plaintiff bar in recent years, and while privacy class actions are an area to watch locally – and representative complaints can and have been made under the *Privacy Act 1988* – only a handful of privacy class actions have been commenced in Australian courts to date.

Foreign regulatory activity is shaping Australian class action risk

Regulatory enforcement overseas is increasingly acting as a trigger for Australian class action activity. For example, recent Australian proceedings have taken inspiration from foreign regulators' engagement with areas including PFAS contamination and phenylephrine based medicines. Enforcement action and public scrutiny by foreign regulators can act as a catalyst for class action activity in Australia, particularly given the relative strength and flexibility of Australia's consumer protection or product safety regimes, which can often be leveraged without the need for issue-specific reforms. We expect activity by regulators overseas will play an increasingly important role in shaping investigations and new filings by plaintiff firms in Australia in 2026 and beyond.

At a high level, evolving regulatory focus and policy developments – both internationally and in Australia – may influence areas of future class action risk. In the Australian context, foreshadowed legislative reform following the Australian Competition and Consumer Commission's Digital Platform Services Inquiry, may be an area where funders and claimant firms look more closely for opportunities.

Global litigation funding dynamics are influencing where class actions are brought

Global dynamics in litigation funding are also expected to influence the Australian class actions market in 2026 and beyond.

Litigation funding markets are increasingly global, with capital allocated across jurisdictions to balance risk and returns. The global funding market is projected to grow significantly over the coming years. The US market remains robust, and while the UK's 2023 *PACCAR* decision raised concerns about the enforceability of litigation funding agreements in that jurisdiction, the UK Government has recently announced plans to effectively reverse that decision through legislative reform.

Against this backdrop, a series of important Australian court decisions in 2025/26 may increase Australia's appeal as a destination for global litigation funding. This includes:

- the finding in *Kain v R&B Investments* that common fund orders are available at the time of settlement or judgment (and rejecting the concept of a 'Solicitor CFO'); and
- confirmation of the availability of soft class closure orders in *Lendlease v Pallas*.

The High Court of Australia is also expected to resolve key questions of causation and loss relevant to shareholder class actions this year. If these developments draw greater funding capacity into the Australian market, particularly as funders rebalance global exposure, Australian defendants should expect to see more, better resourced class action claims in this jurisdiction.

Strategic implications for boards managing class action risk

Class action risk in Australia is increasingly shaped by forces beyond Australia's borders. Claims proven overseas, regulatory activity abroad, and evolving global funding dynamics are all likely to influence the types of proceedings commenced locally.

For businesses, boards and senior decision-makers, monitoring overseas developments is therefore critical to anticipating class action exposure and managing litigation risk before it crystallises into Australian proceedings.

07

Supply chain due diligence: compliance, risk and governance in an evolving regulatory landscape

By **Dr Phoebe Wynn-Pope**, Head of Responsible Business and ESG, **Kate Gill-Herdman**, Partner and **Rosie Syme**, Partner and **Georgia Smith**, Associate

Key insight

Supply chain due diligence is evolving from a voluntary process into multi-functional compliance obligations. As overlapping regulatory regimes impose distinct and increasingly prescriptive requirements, organisations must ensure their due diligence frameworks can meet multiple legal obligations simultaneously, without sacrificing effectiveness or creating additional exposure.

Supply chain due diligence on environmental and social issues is no longer a voluntary exercise in corporate responsibility. It is fast becoming a core legal and governance requirement, shaped by complex and overlapping regulatory frameworks and reinforced by growing expectations around corporate accountability on a global scale. For boards, executives and in-house counsel, the challenge is no longer simply a matter of compliance, but ensuring that due diligence is efficient and effective across its multiple different purposes.

Increasingly, those purposes are not aligned. Due diligence systems must operate across a range of legal and regulatory regimes – from modern slavery and illegal logging to climate disclosure and broader corporate accountability – each with distinct requirements and enforcement settings. This creates a structural challenge: designing a single program capable of meeting overlapping obligations, while remaining robust under scrutiny and adaptable as the regulatory landscape continues to evolve.

In Australia, the regulatory landscape relevant to supply chain due diligence is substantial and continues to evolve. The *Modern Slavery Act 2018* (Cth) requires large businesses with annual consolidated revenue of at least A$100 million to report on how they identify and address modern slavery risks in their operations and supply chains, with human rights due diligence used as the primary mechanism to support those obligations. An independent statutory review completed in 2023 recommended strengthening the Act, and the Government is currently consulting on the introduction of mandatory due diligence requirements and civil penalties, among other changes.

Other regimes impose more significant obligations. The *Illegal Logging Prohibition Act 2012* (Cth) requires importers of raw timber and regulated timber products to undertake due diligence, with significant reforms in 2025 introducing strict liability offences and expanded enforcement powers. At the same time, mandatory climate-related financial disclosure obligations require companies to report on scope 3 (supply chain) emissions. Such disclosures require information that is gained through supply chain due diligence.

More broadly, corporate and consumer laws, including directors' duties, are increasingly being used to hold companies to account for their voluntary sustainability commitments and for meeting standards of diligence that are reasonable having regard to known risks.

Internationally, the trajectory is clear. Transparency regimes, mandatory human rights due diligence laws, and customs and import bans are expanding across jurisdictions, including in Asia and Europe. These developments are not confined to those markets – European joint venture counterparties, customers and supply chain participants will, as a practical necessity, pass their own regulatory

obligations on to Australian companies. Import restrictions and other prohibitions linked to environmental and human rights standards create a further layer of exposure, with Australian businesses at risk of being locked out of key markets if they cannot demonstrate adequate due diligence.

Taken together, each of these drivers underscore the increasing importance of effective supply chain due diligence. However, they also highlight a more fundamental challenge: a one-size-fits-all approach to due diligence will not achieve compliance across the board, and is unlikely to satisfy the range of overlapping and evolving regulatory requirements now in play.

Designing effective supply chain due diligence systems

Effective supply chain due diligence is not a single process but is best understood as an integrated system operating across three stages.

The first stage is understanding. This involves identifying and mapping legal obligations to the organisation's operations, documenting and embedding the necessary policies and procedures, and ensuring that the relevant people are trained. Critically, this mapping exercise should identify the points of intersection between different regulatory regimes. For example, modern slavery and illegal logging may engage the same supplier relationships, meaning well-designed supplier engagement or audit processes may be able to collect the required information simultaneously, subject to specific regulatory requirements. This stage is underpinned by clear governance architecture, including board-level oversight, management accountability and defined escalation pathways to ensure that identified risks reach the right level of the organisation for decision-making.

The second stage is implementation. This involves actively identifying and assessing risks across the supply chain, integrating findings into company processes and taking appropriate action to ensure regulatory compliance and to prevent or mitigate adverse impacts. It also requires maintaining contemporaneous records to demonstrate legal compliance in practice. Accessible grievance mechanisms are a key component as they provide an avenue for remedy while also functioning as an effective risk management tool by providing early warning of emerging risks and a diagnostic tool for assessing the effectiveness of due diligence processes.

The third stage is continuous improvement. This requires tracking the effectiveness of measures through qualitative and quantitative indicators, monitoring shifts in regulatory obligations and policy guidance, and proactively identifying opportunities to improve. Maintaining ongoing engagement with stakeholders is also critical. In this context, effective due diligence cannot be a "set and forget" exercise – it must evolve alongside the regulatory environment to ensure continued compliance.

> "The regulatory landscape relevant to supply chain due diligence is substantial and continues to evolve.

Contracting as both a tool and a source of risk in supply chain due diligence

Supplier contracts are an important tool to support due diligence and legal compliance. They can provide enforceable mechanisms for gathering information, establish audit and verification rights, create leverage to facilitate actions that mitigate adverse human rights and environmental impacts, and cascade compliance expectations through the supply chain. However, contracts are not a compliance strategy in their own right. Statutory obligations are generally non-delegable: each regime imposes duties directly on the regulated entity, and a supplier cannot be relied on to discharge those duties. In practice, regulators assess what the entity actually did, not merely what its contracts said.

At the same time, the degree of control exercised through supplier contracts can itself become a source of legal exposure. In *Mangku & Ors v Dyson Technology Ltd & Ors*, 24 migrant workers employed by third-party Malaysian suppliers commenced proceedings in the UK against Dyson and its subsidiaries, alleging forced labour and trafficking. The claimants argued that Dyson exercised a high degree of control over working and living conditions at its suppliers' factories through its contractual arrangements and policies, and that its monitoring and auditing processes were defective and ineffectively enforced. The case survived a jurisdictional challenge and was ultimately settled in February 2026.

The case highlights an evolving risk. Contracts that grant significant oversight and control of supplier operations can support compliance with human rights and environmental standards. However, where that control is not exercised in practice when risks become known, it may also strengthen the argument that the company bears responsibility for harms it sought to prevent in its supply chain.

Implications for boards and senior decision-makers

Inadequate supply chain due diligence can expose organisations to material reputational, legal and commercial risk. These risks are not theoretical. The *Illegal Logging Prohibition Act 2012* (Cth) imposes strict liability offences on importers on a per-importation basis, with potential exposure to civil penalties and forfeiture orders. International forced labour bans prohibit goods being sold in particular markets if due diligence has not been undertaken to establish that a product has not been made with forced labour.

Operationalising supply chain due diligence

For supply chain due diligence to be effective in practice, organisations should consider the following steps:

Align due diligence systems to legal obligations. Map each regulatory requirement – whether modern slavery, illegal logging, climate reporting or otherwise – to specific processes, data inputs and governance structures, rather than relying on a single generic program.

Establish clear governance architecture. Implement board level oversight, clear management accountability and defined escalation pathways to ensure that identified risks are assessed and addressed at the appropriate level of the organisation.

Use contracts as an enabling tool. Leverage supplier contracts to operationalise information gathering, audit rights and remediation, while recognising that statutory obligations cannot be delegated.

Embed continuous improvement. Track the effectiveness of due diligence measures, monitor regulatory change and build in mechanisms to adapt systems as requirements evolve.

Ensure board level assurance over due diligence systems. Directors should be satisfied not only that systems exist, but that they are implemented in practice, are effective, and subject to ongoing review.

These are access-to-market risks that require active board oversight. Directors must take reasonable steps to satisfy themselves that the organisation has adequate systems in place to discharge its legal obligations, and that the disclosures it makes – whether in modern slavery statements, sustainability reporting or otherwise – are accurate and defensible.

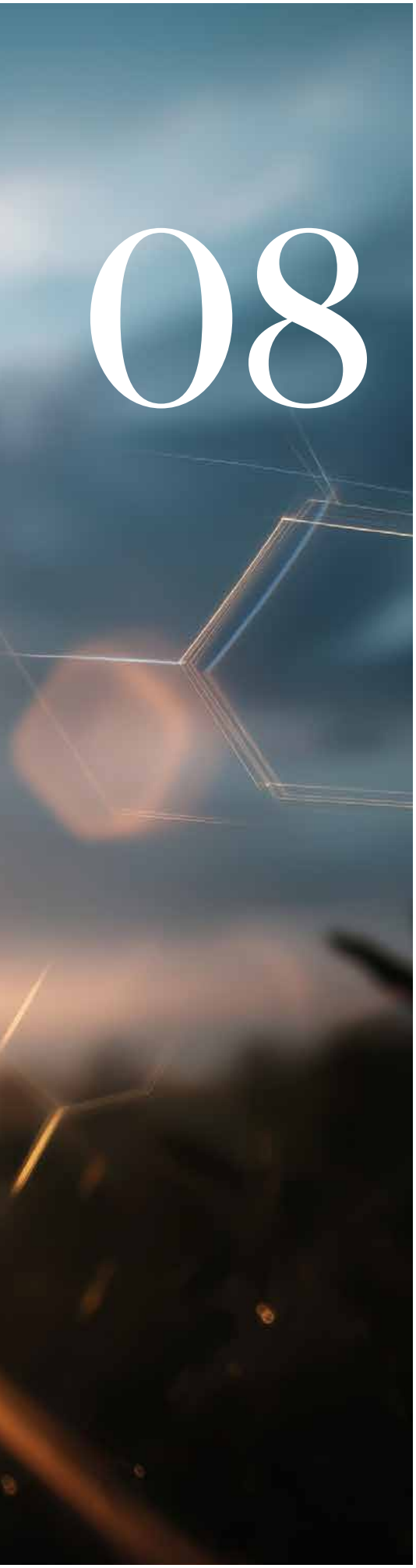
This requires more than high-level review of policies. Directors should ensure the board is provided with sufficient information to understand the organisation's approach to supply chain due diligence in practice, including how risks are identified, escalated and addressed. They should also consider whether that practice is consistent with how it is described in the organisation's public reporting and stated commitments.

Ultimately, the focus for boards is not whether due diligence processes exist, but whether they are effective in practice and capable of withstanding regulatory and stakeholder scrutiny.

Designing due diligence systems that withstand scrutiny

The commercial incentive to simplify supply chain due diligence is strong and, in many respects, sensible. However, prioritising efficiency risks undermining the system's core purpose: ensuring legal compliance. As domestic and global reforms continue to move towards more prescriptive requirements, the margin for error is narrowing.

For boards and decision-makers, the question is no longer whether a due diligence program exists, but whether it is designed to meet the specific legal obligations the business faces – today and as they evolve – and whether it will withstand regulatory and stakeholder scrutiny when tested.



08

How armed conflict is redefining dispute risk for global business

By **Nastasja Suhadolnik**, Head of Arbitration, **Dr Phoebe Wynn-Pope**, Head of Responsible Business and ESG, **Jo Feldman**, Head of Trade and **Caroline Marshall**, Partner

Key insight

Armed conflict is no longer a geographically contained operational risk. Its legal effects now propagate through sanctions regimes, supply chains and contracts, transforming routine commercial decisions into complex dispute exposure – often for businesses far removed from the conflict itself.

Armed conflict is no longer a distant or episodic consideration for global business. Recent events – from Russia's invasion of Ukraine to ongoing wars in the Middle East and persistent conflict across parts of Africa and Asia – have exposed how quickly geopolitical instability can intrude into ordinary commercial decision-making. For Australian and international businesses alike, conflict now operates as a systemic risk, reshaping the legal, contractual and regulatory environments in which businesses operate.

The legal consequences extend well beyond the conflict zone. Sanctions regimes proliferate, supply chains fracture, contractual performance is contested, and investments are disrupted or impaired – often with little warning. For boards and senior decision-makers, the challenge is not just about managing geopolitical exposure, but understanding how armed conflict is transforming dispute risk itself – and how quickly conventional commercial relationships can harden into complex, multi-jurisdictional legal disputes.

For much of the post-Cold War era, armed conflict could be treated as a geographically confined risk, largely relevant to businesses operating or investing in the affected region, and manageable through standard contractual protections and political risk insurance. That assumption no longer holds. Today's deeply interconnected supply chains mean that conflict in one jurisdiction can cascade legal, commercial and regulatory risks rapidly across borders, disrupting production, transport and the financing of goods and services in ways that many contracts do not anticipate. The Ukraine conflict illustrates this shift – its effects were not limited to parties with direct exposure to the Russian or Ukrainian markets but were amplified globally through sanctions regimes across the European Union, the United States, the United Kingdom and Australia, and heightened scrutiny of counterparties, intermediaries and logistics providers.

Conflicts in the Middle East provide a further illustration of how rapidly regional instability can translate into global commercial and legal risk. Attacks on commercial shipping in the Red Sea, and disruption to passage through the Strait of Hormuz have introduced acute uncertainty into maritime trade routes, insurance markets and regional investment. The effects are not confined to businesses with direct exposure to the region. Disruption to this critical corridor has exposed the vulnerability of global supply chains for energy and industrial inputs, amplifying price volatility, increasing counterparty risk and accelerating disputes across downstream contracts and financing arrangements.

The effects of armed conflict now reverberate throughout the global economy, generating secondary and tertiary consequences that extend well beyond the initial disruption. Volatility in energy markets, supply constraints and rising costs place pressure on commercial arrangements and

financing structures, increasing the likelihood of contractual disputes, renegotiation and enforcement challenges. These cascading effects underscore that the economic consequences of armed conflict are neither linear nor containable, and that legal risk often emerges downstream, rather than at the point of disruption.

Australia's regulatory and compliance landscape has evolved in parallel. Greater reliance on domestic policy responses to global shocks, combined with the expansion and enforcement of Australia's autonomous sanctions regime – aligned but not identical to European and US regimes – has materially increased compliance complexity for Australian businesses. Taken together, these developments mean that conflict-related risk has become a mainstream source of legal and dispute risk across a wide range of sectors and supply chains.

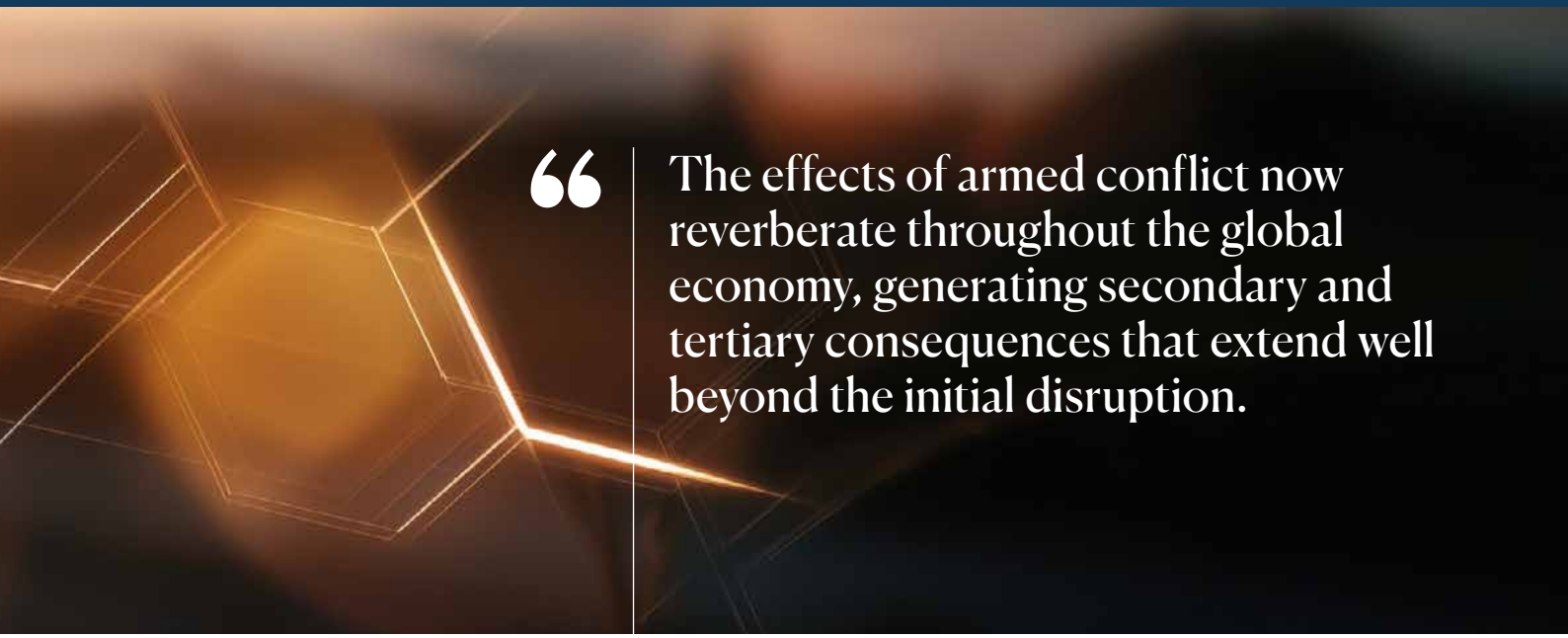
Conflict, contract performance and dispute risk

Armed conflict disrupts the performance of commercial contracts, often transforming operational disruption into legal dispute. When performance is affected by conflict-related events, several key doctrines and contractual mechanisms come into sharp focus, particularly where parties disagree about whether non-performance is excused, or provides a basis for terminating the agreement.

Force majeure clauses are typically the first point of engagement. These clauses, which excuse or suspend performance upon the occurrence of specified events beyond a party's reasonable control, vary enormously in their drafting.

A well-drafted force majeure clause will clearly define the triggering events (including armed conflict, war, sanctions and government action), specify the obligations of the affected party (including notice requirements and a duty to mitigate), and address whether the clause merely suspends performance or excuses it entirely. Recent arbitral and judicial decisions arising from the Ukraine conflict have underscored the importance of precision. Tribunals have scrutinised whether the invoking party can demonstrate a genuine causal link between the conflict or related sanctions and its inability to perform, rather than a mere increase in cost or delay. The lesson for businesses is clear – generic or boilerplate force majeure clauses often may not provide the protection that parties expect, and careful review of existing contract terms is essential.

Frustration of contract provides a further, but limited, avenue of relief. While the common law doctrine can discharge parties from their obligations where performance has become impossible or radically different from what was contemplated, the threshold for establishing frustration remains high. Courts have consistently required that the supervening event render performance truly impossible or fundamentally different, not merely more onerous or expensive. Unlike a well-drafted force majeure clause, frustration is an all-or-nothing remedy: it brings the contract to an end rather than suspending obligations, offering little flexibility and significant commercial risk. For businesses operating in conflict-affected environments, reliance on frustration alone is therefore an uncertain strategy.



> The effects of armed conflict now reverberate throughout the global economy, generating secondary and tertiary consequences that extend well beyond the initial disruption.

Beyond force majeure and frustration, other contractual mechanisms may come into play. Parties should also consider **material adverse change and hardship clauses**, which may provide mechanisms for renegotiation or adjustment where conflict fundamentally alters the economic balance of a contract. Change in law provisions, price adjustment mechanisms and termination for convenience rights can all become relevant in this context, depending on the terms of the particular agreement.

A critical and often underappreciated dimension is **sanctions risk**. Sanctions may render contractual performance unlawful, even where the conflict does not directly prevent it. This intersection between sanctions law and contractual performance frequently gives rise to disputes over whether sanctions compliance genuinely excuses non-performance or has been invoked opportunistically to escape an unfavourable bargain. In practice, sanctions considerations – particularly where the parties disagree on whether sanctions compliance is a legitimate basis for non-performance – are a recurring source of dispute.

Sanctions, illegality and disputes risk

Sanctions regimes have proliferated dramatically in recent years, and their pace of change during active conflict is without precedent. Following Russia's invasion of Ukraine, the European Union, the United States, the United Kingdom and Australia each imposed successive rounds of sanctions targeting individuals, entities, sectors and financial flows. More recently, the reimposition of Iran sanctions through UN snapback mechanisms and the expansion of designations associated with terrorist organisations have added further layers of complexity. The landscape is dynamic – new designations, de-listings and interpretive guidance are issued frequently, often with immediate effect.

At the same time, supply shortages and constrained sourcing have led businesses to apply for a higher number of sanctions permits to authorise transactions with sanctioned nexuses that would otherwise be prohibited. These pressures are particularly acute following the conflict in Iran, where critical materials or goods cannot easily be sourced from suppliers with no sanctions exposure, embedding sanctions risk directly into supply chain and contracting decisions.

For businesses, this environment demands a proactive and continuous approach to sanctions compliance. Robust screening of counterparties, beneficial owners, intermediaries and supply chain participants is essential, as is the capacity to respond quickly to new designations. Compliance frameworks must be regularly reviewed and operationalised, and staff at all levels must be trained to recognise sanctions risks.

The consequences of getting it wrong are severe. Sanctions breaches can give rise to criminal liability, reputational damage, and the loss of banking and insurance relationships. In a disputes context, sanctions non-compliance can jeopardise a party's ability to enforce contractual rights or arbitral awards. Recent cases illustrate how sanctions issues frequently move from compliance concern to a central dispute battleground, with parties contesting not only whether sanctions apply, but whether they have been invoked legitimately or opportunistically. Businesses should therefore treat sanctions compliance as not just a discrete regulatory function, but rather an integral part of dispute risk management.

Investment treaty protection

For businesses with investments exposed to conflict-affected states, international investment treaties can provide an important, but often under-appreciated, layer of legal protection. Bilateral and multilateral investment treaties typically guarantee foreign investors minimum standards of treatment, breach of which may give rise to claims against host states before international arbitral tribunals.

Armed conflict may give rise to **direct or indirect expropriation** of foreign-owned assets, whether through outright seizure or destruction of assets, or through regulatory measures that deprive an investment of its value. Investment treaties generally require that expropriation be accompanied by prompt, adequate and effective compensation, and disputes frequently arise over whether conflict-related measures cross that threshold. In practice, uncertainty often centres on the cumulative impact of state action and the appropriate standard of compensation.

The fair and equitable treatment standard is also frequently engaged. Investors may allege treaty breaches where host state conduct during or following armed conflict involves a failure to provide physical security for investments, arbitrary changes to the regulatory framework, or denial of justice in domestic courts. Tribunals have considered the extent to which the exigencies of armed conflict affect the host state's obligations, but have generally held that conflict does not relieve a state of its duty to act in good faith and in accordance with the rule of law.

At the same time, many investment treaties contain exceptions or derogation clauses that permit states to depart from their treaty obligations in times of armed conflict or national emergency. The scope and limits of these exceptions are the subject of developing jurisprudence, with tribunals increasingly called upon to assess whether invocations of such clauses are genuine in their purpose, justified and proportionate.

For boards and senior decision-makers, the key point is that investment treaty protections shape not only potential remedies, but dispute dynamics. Understanding treaty coverage – and its limits – is therefore critical to assessing sovereign risk exposure, and should be factored into investment structuring decisions from the outset.

War crimes, complicity and escalating dispute risk

Where there is armed conflict, international humanitarian law (**IHL**) becomes directly relevant to businesses operating in or near the affected territories. IHL can create legal exposure in several ways. Businesses that supply goods, technology or services that are used by a party to the conflict in the commission of IHL violations may face liability under the domestic law of multiple jurisdictions including Australia.

Risk also arises where business infrastructure such as factories, data centres or logistics networks – may be characterised as dual use, potentially rendering them legitimate military targets under the principle of distinction and placing employees and contractors at risk.

Businesses operating under contracts or alongside state actors, particularly in sectors such as security, logistics and infrastructure, may find themselves inadvertently drawn into conflict dynamics. In such situations, commercial activities may contribute to violations of IHL. When this occurs, liability can extend beyond the corporation to directors and senior officers who knew, or ought reasonably to have known of the relevant risks and failed to act.

For boards and senior decision makers, the significance of these risks lies not only in potential criminal exposure, but in how allegations can escalate into regulatory investigation, civil claims, sanctions designations and reputational harm. In conflict affected areas, IHL considerations form a material component of legal and reputational risk that requires active oversight.

Managing conflict-driven dispute risk

Armed conflict is no longer a remote or exceptional risk for most businesses. Recent events have demonstrated how quickly geopolitical disruption can transform an otherwise stable commercial relationship into a complex, multi-jurisdictional legal dispute, often through indirect pathways such as sanctions, supply chain interruption or regulatory action.

For boards and senior decision-makers, the implication is clear: conflict-related dispute risk must be anticipated rather than addressed reactively. Proactive legal planning – including contract drafting, investment structuring, sanctions integration, due diligence and dispute resolution strategy – is essential to effective risk management in a volatile global environment.

Businesses that take these steps early are better positioned to assess their exposure and develop tailored strategies for the challenges that lie ahead.

Managing conflict-related dispute risk: immediate focus areas

Rather than waiting for disputes to emerge, businesses can materially reduce conflict-related legal exposure through targeted upfront actions:

- **Contract settings:** Review force majeure, sanctions, governing law and dispute resolution clauses for conflict exposure. Ensure thresholds, notice requirements and termination consequences are clear and workable in fast-moving situations.
- **Supply chain visibility:** Map exposure to conflict-affected and high-risk regions, identify single points of failure, and maintain contingency options for sourcing, logistics and financing.
- **Investment structuring:** Assess whether existing investments benefit from treaty protection and factor investment treaty coverage into structuring decisions for higher-risk jurisdictions.
- **Sanctions integration:** Treat sanctions compliance as part of dispute risk management, with continuous screening of counterparties and supply chains and the ability to respond quickly to new designations and regulatory change.
- **IHL awareness:** For operations connected to conflict-affected environments, ensure a clear understanding of international humanitarian law risks, including potential complicity exposure for companies and senior officers.
- **Insurance review:** Test whether political risk, trade credit and business interruption insurance remains fit for purpose,and address any gaps before disruption occurs.

Markets, capital and deal strategy

09

Australia's new merger control regime: early insights and implications for dealmakers

By **Mark McCowan**, Head of Competition and **Ian Reynolds**, Partner

Key insight

Australia's new merger control regime reflects a series of conservative design choices that are expanding ACCC oversight of dealmaking and creating new regulatory risks reshaping how deal risk is managed in practice. Those settings are driving broad capture and increased process friction, shifting the central challenge for dealmakers from identifying transactions that raise substantive competition concern to navigating uncertainty around notifiability, timing and execution.

Australia's new merger control regime has now been in effect for close to six months. While still early, and a range of teething problems will be worked through in time, there are early learnings from the operation of the new regime that are instructive for Australian and international dealmakers.

A key overarching observation is that a range of cautious policy decisions in the design of the new merger regime have resulted in a regime that is highly conservative by international standards and, in some respects, over-engineered for the Australian economy. Influenced in part by the Australian Competition and Consumer Commission (**ACCC**)'s underlying policy concern that it was not being voluntarily notified of a range of problematic deals, the new regime features low monetary thresholds, a thin jurisdictional nexus, detailed and prescriptive information requirements, a minimum review period, and a post-approval waiting period before closing cannot occur.

In totality, these features are driving substantial over-capture of deals that raise no real prospect of a competition concern and are causing substantial process friction. Particularly for cross-border deals with minimal connection to Australia, the result is often that the ACCC is one of the few global filing requirements and, in some circumstances, the 'long pole'.

Within the constraints of this conservative design, however, the ACCC has generally adopted a pragmatic approach – seeking to resolve and clarify emerging procedural issues and approving unproblematic transactions well within the statutory time limits.

Early experiences with the new regime highlight a number of key practical learnings and structural features that are likely to persist and shape deal execution.

Notifiability assessment can be highly complex

The drafting of the new regime leaves open numerous areas of ambiguity that often complicate notifiability assessments. These matters range from the 'connected entities' of the parties whose Australian revenues must be aggregated to determine notifiability, to when parties are regarded as 'associates' in assessing control, to the application of numerous vaguely defined exceptions.

ACCC guidance on these issues is sparse and its decisions on waivers and notifications are typically brief and non-specific, contributing little to the development of a body of precedent to guide future notifiability assessments. In addition, the ACCC often takes a highly cautious approach to providing practical guidance in informal pre-filing discussions.

The residual uncertainty results in not infrequent differences of opinion among counterparties and instances of deals being notified on an overly conservative and risk-averse basis. A provision that automatically voids transactions that are not notified (but should have been) is also contributing to that conservatism.

Taken together, this uncertainty encourages a risk-averse approach to notification, contributing to the broader pattern of over-capture under the regime.

The jurisdictional nexus requirement is wafer thin

Under the new regime, the jurisdictional nexus for an acquisition to be notifiable in Australia is that the shares or assets are 'connected with' Australia, which is satisfied where a relevant entity or business is 'carrying on business' in Australia. Case law from other statutory contexts establishes the 'carry on business' test as a low threshold that can be met even where the target does not generate any revenue or have a physical presence, assets or employees in Australia.

In the pharmaceutical sector, for example, there have been multiple deals notified to the ACCC only on the basis that the target has undertaken or plans to undertake a clinical trial in Australia, notwithstanding that it generates no Australian revenue and has no physical presence in the jurisdiction. Similar issues are arising regularly in technology deals, where many offshore businesses without a local presence will nevertheless have some Australian subscribers or users that can be argued to constitute a sufficient jurisdictional nexus.

In practice, this is resulting in transactions being notified with tenuous connections to Australia.

Large number of acquisitions being reviewed by the ACCC

Low and uncertain monetary thresholds, a thin jurisdictional nexus, and the automatic voiding of non-notified transactions are together driving a large number of notifications under the new regime. At the current run rate, the ACCC is likely to receive around 700 notifications this year – roughly double the 10-year average under the old regime and substantially above Treasury's expectation of 300-500 notifications.

The notification waiver process is evolving but shows promise

The notification waiver process, under which the ACCC can more quickly approve unproblematic transactions, is being used more extensively than initially expected. Treasury anticipated 50 applications in the first six months of 2026 (approximately eight per month), but the ACCC is to date receiving an average of one application per day. As of May 2026, notification waiver applications account for around 60% of all applications to the ACCC, indicating the extent of the over-capture of benign transactions.

The ACCC's decision-making on waivers has so far been prompt and well within the 25 business day (**BD**) maximum, with waivers being granted in 13 BDs on average and, in some cases, as few as four BDs. This offers a substantial time saving compared to a typical 6-10 week phase one clearance for notifications (which includes a pre-notification process, minimum three-week review, and a two-week post-clearance waiting period). However, the ACCC's decision-making approach on waivers has at times been inconsistent, and in some transactions has departed from its own guidance, resulting in the waiver rejection rate being higher (at around 8%) than would be expected in a more established process.

While the waiver process will likely settle into more predictable patterns over time, it currently requires a nuanced judgment call as to whether the potential time and cost saving compared to notification is worth the risk of wasted time and cost in an unsuccessful waiver process before being required to notify.

> **Early experiences with the new regime highlight key practical learnings and structural features that are likely to shape deal execution.**

Pre-notification is generally working well

Pre-notification engagement is a feature of the new regime that is not subject to any statutory time limits. We have seen varying degrees of prenotification engagement so far, from very simple processes lasting a few days to multi-week processes, and even compulsory notices seeking information and documents and limited market consultations.

While there are risks of the ACCC seeking to subvert statutory time limits by conducting substantive investigation and analysis during pre-notification, this does not, to date, appear to be occurring. Generally, pre-notification engagement has been effective in ventilating key issues and refining the ACCC's information requirements prior to starting the short six-week statutory clock on a first-phase review. However, this front-loading of engagement has practical implications for transaction planning. Dealmakers and decision-makers should allow for an additional 1-4 weeks before most deals are able to get 'on file', in addition to the statutory timelines.

Property-specific exceptions are leaving significant gaps

The property sector is one of the only sectors to have secured industry-specific exceptions in the new regime. However, even with a range of exceptions, property-related deals continue to account for a significant proportion of total notifications. Approximately 15% of ACCC filings to date (including both waivers and notifications) have related to property deals, often where the transaction extends beyond real estate assets to include shares or other business interests.

Implications of Australia's new merger control regime for dealmakers

Taken together, these early indicators suggest that the new regime is operating in a way that prioritises caution over efficiency, with conservative design settings driving both an expansion in scope and a material increase in process friction.

For dealmakers and decision-makers, the immediate implication is clear: transaction planning increasingly needs to account for greater uncertainty around notifiability, a broader jurisdictional reach, more burdensome and invasive information requirements, and often longer timelines.

10

Joint venture exits in Australia: where execution risk is shifting in sale processes

By **Alexandra Feros**, Partner, **Timothy Bunker**, Partner, **Sandy Mak**, Head of Corporate and **Mark Wilks**, Head of Commercial Litigation

Key insight

Joint venture exit risk is no longer determined primarily by formal exit rights, but by whether the underlying confidentiality, information access and governance frameworks can operate effectively in a live sale process. Where they cannot, transaction outcomes – including price, timing and even viability – become materially exposed.

At the outset of any joint venture, participants focus on a familiar universe of contractual exit mechanisms – pre-emptive rights, put and call options, drag and tag along rights, affiliate transfers, IPO or trade sale exits and associated valuation regimes. While these provisions remain important, they do not fully capture where execution risk in a sale process sits.

Recent disputes, including the high-profile proceedings involving Dexus and the other investors in Melbourne Airport, illustrate the potential impact of confidentiality and information access frameworks. While these provisions are effective in a 'business as usual' environment, they can become points of friction in a live sale process. Investors should stress-test these regimes upfront, to ensure they can support a controlled and executable exit when a participant's commercial objectives have changed.

Confidentiality provisions: the challenge of strict compliance

The Melbourne Airport dispute underscores the significant consequences of failing to comply strictly with a contractual confidentiality regime when conducting a sale process. It also highlights that confidentiality is not a static contractual obligation, but a constraint that must be actively managed in the context of a live transaction.

There can be an inherent tension between the joint venture's interest in preserving the confidentiality of joint venture information and an exiting participant's desire to run a successful third-party sale process. Confidentiality regimes will typically accommodate disclosure to bona fide third-party potential purchasers, but provide limited guidance as to how that disclosure is to be practically implemented. For example, there may be a contractual requirement for an exiting participant to enter into a non-disclosure agreement (**NDA**) with a purchaser in a form to be "reasonably agreed" between the participants, or for that NDA to provide protection "to the same degree" as the joint venture's own confidentiality restrictions, with enforceability by all participants.

These concepts can be difficult to apply in practice, particularly where participants are unlikely to have a commercial desire to agree the form of that NDA in detail at the time of joint venture establishment. The consequence is that key aspects of the disclosure framework may need to be negotiated at a point in time when the participants' commercial interests have diverged.

The position becomes more complex in 'look through' investments involving multiple layers of ownership, where separate confidentiality regimes may apply and do not necessarily align. In that context, managing disclosure becomes less a question of strict compliance with a single regime, and more an exercise in navigating overlapping – and potentially inconsistent – information controls.

Against that backdrop, the challenge for an exiting participant is to manage the sale process in a way that is both effective and compliant, including remaining transparent with fellow participants as to the proposed approach to disclosure and the protections to be put in place. As Justice Hammerschlag observed in the Melbourne Airport proceedings, "An inadvertent disclosure is one thing. A deliberate or reckless one which is subsequently wholly or partially concealed, is another."

Information access rights: control and purpose in a live sale process

In an incorporated joint venture, securing board representation is a significant focus at the point of entry. In addition to voting powers, director information access rights are broad and useful for investment monitoring in a 'business as usual' context. Shareholders' agreements will often also acknowledge that directors may share information with their nominating shareholders. However, those nominees remain subject to their directors' duties to the joint venture company.

Where a nominating shareholder is undertaking a sale process, the position of their board appointee can become strained. In the context of information access, directors must carefully consider the purpose for which information is obtained and how it is used to ensure they are continuing to comply with their duties to the joint venture company. Routine information flows may become constrained, requiring clear delineation between information obtained and used in a governance capacity, and information sought for the purposes of a third-party transaction. Shareholders will need to consider alternative contractual pathways to obtain information for use in a sale process, rather than relying on director-level access.

In an unincorporated joint venture, participants will typically have broad contractual rights to access joint venture information. However, those rights should be considered alongside any applicable confidentiality regime and should not be treated as a means of circumventing on-disclosure restrictions. A right to access information does not carry with it an unfettered right to on-disclose to third parties, and governance mechanisms – such as management committees – may control the terms on which disclosure occurs. In that sense, information access rights do not operate in isolation, but form part of a broader framework governing how information can be controlled and deployed in the context of a potential exit.

The duty of good faith: competing obligations

Australian courts have recognised that a duty of good faith and cooperation may be implied into joint venture agreements, and in some cases it may be expressly provided for as a contractual obligation.

In a sale process, that duty can create an inherent tension. A selling participant is seeking to maximise value for its own investors, including by disclosing the information necessary to run an effective sale process. At the same time, that participant must avoid acting inconsistently with its duty of good faith, which extends beyond compliance with specific contractual terms and can encompass a broader obligation to act honestly and engage transparently with its co-venturers about the approach to disclosure.

This tension also creates practical difficulties for non-selling participants, and for the board of an incorporated joint venture, when deciding whether to pursue a selling participant for any alleged breach of confidentiality. Enforcement decisions must be taken in a context where ongoing relationships, transaction dynamics and overlapping duties are all in play.

Default regimes: triggers and execution risk

If there is a breach of confidentiality by a selling participant, the question will be whether this triggers the joint venture's default regime. In some contractual regimes, a breach of confidentiality is expressly identified as a material or irremediable default, attracting severe consequences including compulsory transfer of the defaulting participant's interest. In others, this may require a more nuanced assessment of the materiality of a particular breach of confidentiality and the loss suffered.

There may also be flow-on uncertainties in the joint venture agreement, even where the default regime is triggered. For example, if compensation is payable, how is that to be valued in the context of a confidentiality breach? If a mandatory sale is the consequence, does that regime clearly supersede other agreed exit pathways?

These issues can have practical implications in the context of a sale process, particularly where the consequences of breach are uncertain or contested. It is therefore important at the outset of a joint venture for participants to construct a default regime that is fit for purpose in the context of a confidentiality breach, and capable of operating effectively where a transaction is underway.

Joint venture exits: aligning contractual frameworks with transaction reality

Traditional exit mechanisms remain a necessary foundation of joint venture arrangements. However, they are no longer where the primary execution risk sits. Rather, the ability to deliver a successful exit increasingly depends on whether confidentiality, information access and governance frameworks can operate effectively when tested in the context of a live sale process.

Exit planning must therefore extend beyond transfer mechanics and valuation to include a more holistic consideration of how information will be controlled, disclosed and governed where participants' commercial objectives have diverged. This includes consideration of who will have the benefit of, and the ability to enforce, any confidentiality protections imposed on third-party recipients – particularly after the departing participant has exited and may have limited continuing interest in enforcement. The focus for investors is therefore not only on securing exit rights, but on ensuring that the broader contractual and governance framework can support a controlled and executable sale process when required.

> **It is important at the outset of a joint venture for participants to construct a default regime that is fit for purpose in the context of a confidentiality breach.**

11

The evolving role of fund financing in private credit

By **Cameron Cheetham**, Head of Restructuring, Insolvency and Special Situations, **Craig Ensor**, Partner, **Andrew Daidone**, Partner and **Becci Cartoon**, Special Counsel

Key insight

The sustained growth of fund financing in private credit is strengthening the relationship between banks and private credit participants as the market continues to scale.

Private credit has moved decisively from a post-GFC niche to a core component of the financing landscape across Australia and the Asia Pacific region. Global private credit assets under management have expanded rapidly over the past decade, and Australia now represents one of the most established and sophisticated private credit markets in the region, supported by strong institutional participation and sustained demand for alternative sources of capital.

As the market has scaled, the structures that sit alongside it have also evolved. One notable development is the increasing use of fund level financing, including warehouse and net asset value (NAV) style facilities, which are becoming a more permanent feature of private credit fund structures in the Australian market.

This is less a discrete shift than part of a broader trajectory: a maturing market in which capital structures, monitoring frameworks and stakeholder dynamics continue to evolve in response to growth and increasing complexity.

The rise of fund financing in private credit markets

With private credit assets under management in Australia standing at approximately A$234 billion in 2025 (or approximately 15% of all corporate non-institutional grade lending in the Australian market) and a compounded annual growth rate of approximately 21% between 2015 and 2025, the growth of private credit is both remarkable and well documented.

Perhaps less documented is the pivotal role played by banks in providing capital in the form of warehouse and NAV style facilities to private credit players. These facilities allow private credit funds to borrow against the value of their underlying loan portfolios (while securing those underlying loan assets in favour of their bank lender). While the terms and structures involved still to a large extent remain highly tailored to the relevant fund, they are being deployed with greater frequency as fund managers seek to enhance capital efficiency, manage liquidity and optimise portfolio construction over time.

This marks a clear shift from four or five years ago, where facilities of this nature were seldom utilised in private credit in Australia (with a caveat to that being larger fund managers or those fund managers operating an Australian arm of an international fund). Today, structuring funds to accommodate fund-level leverage is a key consideration for the majority of private credit fund managers in the market.

Notwithstanding this increased adoption, the amount of leverage utilised in Australian private credit remains relatively conservative by international standards. The Australian Securities and Investments Commission (**ASIC**) Report 814 noted that the use of leverage as part of private credit investment in Australia tends to sit in the range of 0-1x, compared to 0.5-2x in the US market (being a measure of the proportion of investment into private credit that is debt funded versus equity funded). While these are necessarily high-level metrics and do not isolate fund-level warehouse/NAV style lending, they nonetheless provide a useful indication as to the quantum of debt that private credit fund managers are using to fund their balance sheets.

These figures are also relatively conservative when comparing against Australian authorised deposit-taking institutions, which typically fund in excess of 90% of their balance sheets with debt (deposits and wholesale funding), with regulatory capital (equity) in the order of 5-10% of total exposures.

How fund financing is influencing the relationship between banks and private credit players

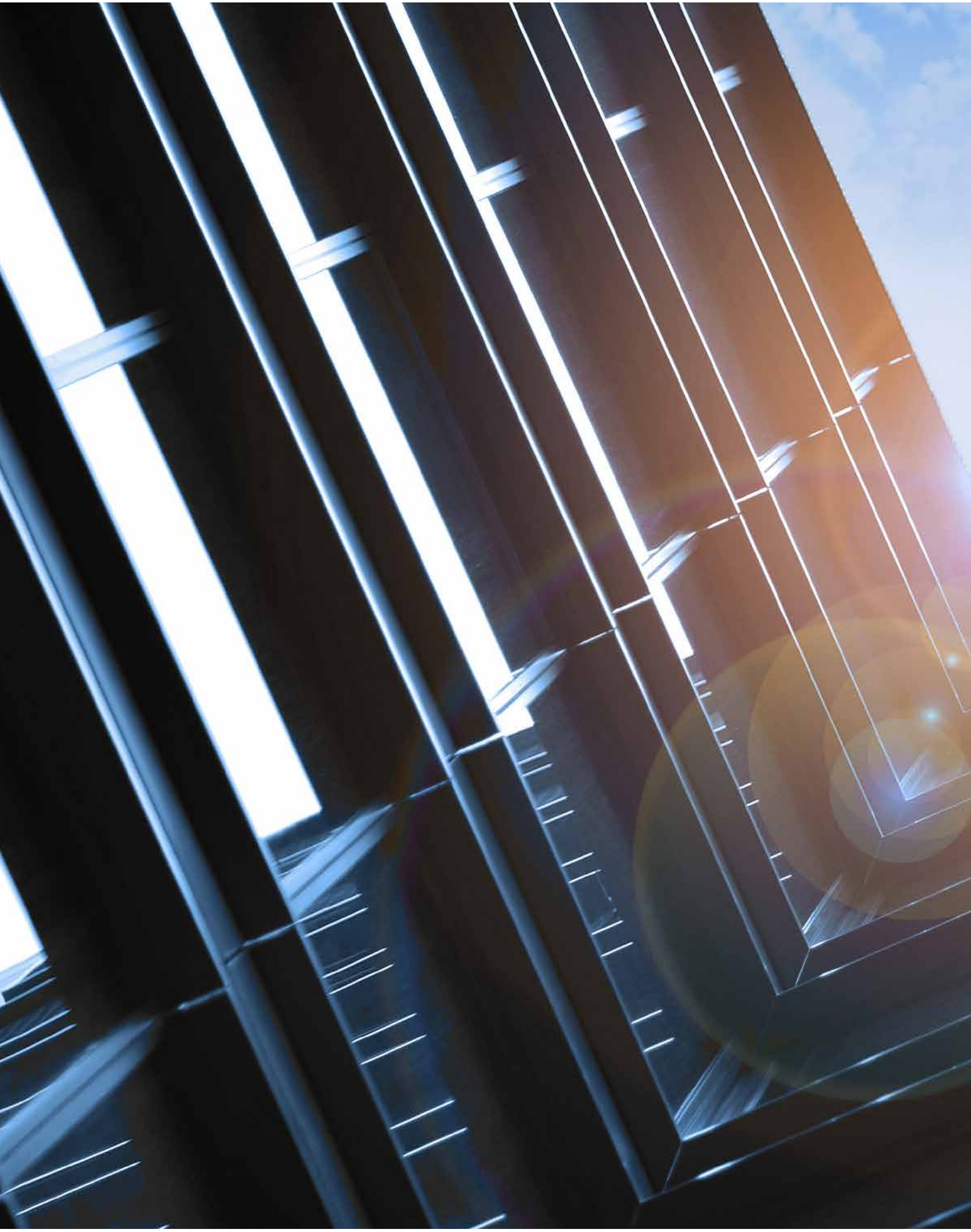
At its core, the provision by a bank of a warehouse or NAV facility to a private credit fund represents a significant short- to medium-term investment, and as such is accompanied by a thorough negotiation and due diligence process.

Key negotiation points typically include how the borrowing base is valued (that is, the underlying loans) and whether that valuation is undertaken in the ordinary course by the private credit fund borrower or its back leverage provider, the ability to "look through" to underlying property (in the case of real estate private credit funds in particular), the level of ongoing reporting required by the back leverage provider on individual loan assets or underlying properties, and any requirements for the private credit fund borrower to obtain consent from their back leverage provider before making material decisions at an underlying asset level.

The process for approving assets coming into the borrowing base (and the degree of back leverage lender oversight), together with the timing of approvals and funding at the warehouse or NAV facility level, are also important structuring considerations. These require close coordination between the back leverage provider and private credit fund borrower to ensure the financing meets the fund's operational requirements while fitting within the institutional parameters of the bank's credit process.

One consequence of this working relationship is the introduction of an additional layer of oversight of the underlying loan portfolio. In some cases, this may lead to greater loan book discipline, and at a minimum, provides enhanced visibility over the underlying asset pool.

In this context, the continued development of fund financing structures reflects a broader evolution of the private credit market. As the market deepens, participants are refining how capital is structured, deployed and monitored, reflecting both increased scale and a more complex operating environment.



12

Social and affordable housing: from funding ambition to delivery reality

By **David Ellenby,** Partner,
Natalie Bryant, Partner and
Rommel Harding-Farrenberg, Partner

Key insight

Australia's social and affordable housing agenda is no longer constrained by policy intent alone – it is increasingly defined by how capital, risk and delivery are structured across the system. While funding has expanded, it remains finite, and will not, on its own, sustain delivery at the scale required. The central challenge is whether the system is configured to deploy that capital effectively, or whether structural barriers will continue to constrain supply.

The federal government has embarked on what is arguably the most ambitious program of social and affordable housing investment in a generation. The centrepieces are the National Housing Accord and the Housing Australia Future Fund (**HAFF**). The Accord targets 1.2 million new homes by mid-2029, including 20,000 affordable dwellings, while the $10 billion HAFF provides grants and concessional finance to support a further 40,000 social and affordable homes through Housing Australia. Further, Housing Australia offers senior debt facilities via the Affordable Housing Bond Aggregator. Together, these measures represent a material expansion in both the scale and structure of Commonwealth involvement in housing delivery.

Despite this, substantial barriers continue to constrain outcomes. While funding has increased materially, it remains finite and insufficient on its own to meet the scale of housing need. Longstanding challenges – including tax and planning settings, fragmented approval processes and the limited uptake of advanced construction methods – are now interacting with a deeper structural issue: a system in which capital may be concentrated, but control, capability and risk are unevenly distributed across governments, providers and investors. In that context, the question is not only whether sufficient funding has been committed, but whether the current delivery model can translate finite investment into sustained housing supply.

Much of the current policy conversation continues to treat social and affordable housing as a question of inputs – how much capital is committed, how quickly approvals can be processed, or how construction costs can be contained. While these factors remain relevant, they do not, on their own, fully explain why delivery continues to lag ambition.

Instead, these constraints reflect a system in which responsibility for funding, planning, delivery and long-term ownership is distributed across multiple actors, each operating within different regulatory, commercial and political settings. The result is a set of interrelated pressure points – fragmentation of control, misaligned risk allocation, delivery system constraints and limited capital formation – that shape who participates, how projects are structured, and whether housing is delivered at scale.

Fragmentation of control: capital, planning and delivery

At a system level, a central constraint is the fragmentation of control across funding, planning and delivery. While the National Planning Reform Blueprint establishes shared targets and signals a move toward greater alignment, implementation across jurisdictions remains uneven. Differences in planning settings, approval pathways and funding processes continue to introduce friction into project delivery, limiting consistency and scalability.

At a structural level, the current model reflects a fragmented regulatory architecture, with planning, delivery and provider regulation governed through a patchwork of federal and state and territory regimes. One response would be to move toward nationally consistent settings, using Commonwealth funding to drive alignment in planning definitions, approval pathways and affordability requirements.

More coordinated settings – including harmonised planning standards, streamlined funding processes and clearer delineation of responsibilities – would reduce this friction. However, incremental alignment may not be sufficient at the scale now contemplated.

> “At a system level, a central constraint is the fragmentation of control across funding, planning and delivery.

Misaligned risk allocation: the system relies on those least able to absorb risk

A central constraint on the delivery of social and affordable housing at scale is not just the amount of capital available, but how risk is allocated across the system. While public funding has expanded materially, the underlying economics of social and affordable housing remain challenging. Rental income – whether linked to household income or set below market – is typically insufficient to cover operating and financing costs without subsidy. The HAFF is designed to bridge this gap through grants, concessional finance and availability payments, but it does not fully resolve how risk is distributed.

In practice, a disproportionate share of development and operating risk sits with community housing providers (CHPs), and to a lesser extent, developers. While CHPs benefit from greater funding certainty under current models, they remain exposed to delivery, financing and long-term asset performance risks. This exposure is shaped by the structure of the capital stack, which typically relies on senior debt and subordinated or mezzanine funding with equity-like returns, rather than conventional equity – reflecting the fact that most CHPs operate as companies limited by guarantee. At the same time, institutional investors – including superannuation funds – have largely positioned themselves in more senior parts of the capital stack, limiting exposure to the first-loss risk that often sits with CHPs or subordinated impact investors. This creates a structural imbalance: risk is concentrated with those least able to absorb it, while capital remains relatively protected and selectively deployed.

For institutional investors, this positioning reflects both the relatively low return profile of the asset class and fiduciary constraints on allocating capital to investments that are sub-market without appropriate government support. While interest is growing, institutional capital has yet to play a material role in social and affordable housing at scale.

These dynamics are reinforced by an increasingly challenging feasibility environment. Elevated construction costs, constrained financing conditions and macroeconomic uncertainty have materially reduced project viability, increasing reliance on government-backed funding structures such as the HAFF. Access to development finance (other than through Housing Australia) is tightening, and in the absence of conventional equity, many projects remain marginal without sustained public support.

This challenge is compounded by the structure of some funding mechanisms. Government programs, including the HAFF, can adopt highly risk-averse settings, imposing requirements (including in respect of limiting returns to subordinated debt providers) and obligations that add time, cost and complexity without necessarily improving outcomes. These settings can also constrain participation or delay delivery, particularly where risk is transferred without a corresponding shift in capability or return.

The constraint is therefore not only a question of capital, but how risk and return are structured across the system. Where risk is misaligned – or concentrated with those least able to absorb it – capital alone is unlikely to translate into delivery at scale. Without a more balanced and deliberate allocation, funding risks are increased diminishing returns and ultimately inhibiting supply by placing obligations on parts of the development chain that are not equipped to absorb them.

Delivery system constraints: scale is constrained by how housing is delivered

At an operational level, even where projects are aligned and funded, delivery is constrained by the structure and capacity of the planning and construction system. While policy settings and funding commitments have expanded, the mechanisms through which housing is planned, approved and constructed remain slow, fragmented and difficult to scale.

The planning system continues to act as a primary bottleneck. Complex approval pathways, inconsistent zoning frameworks and lengthy assessment timeframes introduce delay and uncertainty, increasing both development costs and execution risk. Although recent reform efforts seek to streamline processes and improve consistency across jurisdictions, outcomes remain uneven, limiting the ability to replicate and scale projects across different markets.

These constraints are compounded by structural challenges within the construction sector. Productivity has stagnated over a prolonged period, labour shortages remain acute, and financial stress across the industry has reduced capacity and increased delivery risk. In this environment, even well-structured projects can struggle to progress efficiently through the delivery pipeline.

At the same time, the adoption of modern construction methods remains limited. Prefabrication, modular construction and other offsite techniques have the potential to improve speed, cost certainty and scalability, but uptake in Australia has been slow for a variety of reasons. The persistence of traditional, site-based construction methods continues to constrain the system's ability to respond to sustained increases in housing demand.

The result is a delivery system that is not fully configured for scale. Without improvement in how housing is planned, approved and constructed, increased funding and policy alignment may not translate into materially higher levels of supply.

Scaling social and affordable housing: strategic priorities

The sector is now shifting from policy ambition to the practical realities of delivery at scale. This transition brings into focus a set of structural challenges that are unlikely to be resolved easily or through incremental change alone.

The observations below highlight areas where sustained attention, coordination and, in some cases, more ambitious reform may be required.

Progress across these areas will depend not only on policy settings, but also on how participants across the system respond to shared constraints and evolving expectations.

Government can review tax and financial incentives and streamline approval processes.

Developers can build dedicated capability in government procurement, CHP partnerships and delivery at scale, while actively positioning for public-sector pipelines and land opportunities.

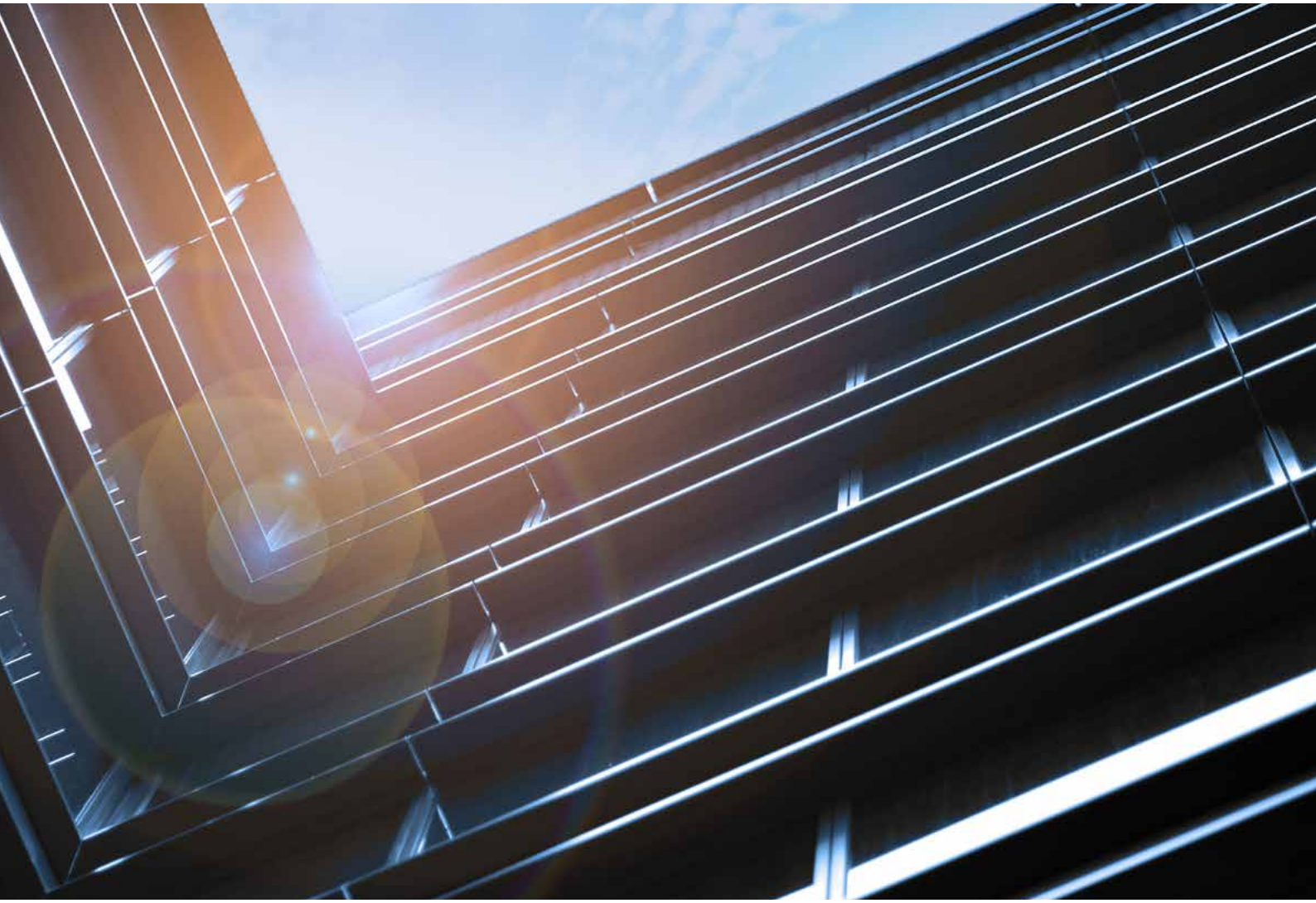
CHPs can strengthen governance and investment to take on larger, more complex projects, and pursue partnerships to diversify delivery and manage risk.

Institutional investors can treat affordable housing as a strategic allocation, building internal capability and engaging on the design of financing and incentive frameworks.

Builders and contractors can invest in scalable delivery models – including modular construction and design standardisation – to support cost certainty and pipeline execution.

Limited capital formation: the system does not convert savings into scaled housing investment

A further constraint on the delivery of social and affordable housing lies in how capital is formed and mobilised within the system. While public funding has expanded and institutional capital is substantial, the current architecture has not translated these inputs into sustained, scalable investment. Australia's existing funding model relies predominantly on grants, concessional finance and government-backed debt. Mechanisms such as the HAFF and the Affordable Housing Bond Aggregator have improved access to lower-cost financing, but continue to mobilise debt rather than equity. As noted above, given the typical capital structures used by CHPs, investment is primarily channelled through debt and quasi equity instruments rather than conventional equity participation. As a result, institutional investors do not typically take direct exposure to development risk or long-term ownership in the sector, limiting both participation and scale.



International experience demonstrates that tax and financing settings can play a more direct role in mobilising capital into affordable housing. In the United States, tax credit mechanisms have supported sustained private equity investment, while in parts of Europe long-term, low-cost loan systems and dedicated funding streams have underpinned more stable and countercyclical delivery. While the specific models differ, a common feature is the alignment of investor incentives with long-term housing outcomes.

Australia's settings do not yet consistently operate in this way. There is no clear equivalent mechanism that consistently channels large-scale domestic capital – including superannuation savings – into social and affordable housing with an appropriate balance of risk and return. Instead, capital formation remains dependent on periodic government funding and project-specific financing structures, limiting continuity and scale.

The result is a system in which funding is present, but capital is not structured to support sustained delivery. Without mechanisms that better align incentives, mobilise equity and provide long-term funding certainty, capital is likely to remain constrained in its ability to support housing delivery at scale.

The expansion of funding marks a critical shift in Australia's approach to social and affordable housing. The central challenge, however, is no longer financial commitment alone. With capital finite and demand continuing to grow, the question is whether the system through which that capital is deployed – spanning governance, risk allocation, delivery capacity and capital formation – can promote and sustain housing delivery at scale.

Infrastructure, energy and the investment transition

13

Powering the energy transition: bankability in the age of data infrastructure

By **Bree Miechel**, Partner, **Franka Cheung**, Partner, **Adam Stapledon**, Head of Banking and Finance, **Matthew Muir**, Deputy Head of Projects, **James Abbott**, Partner and **Callum Strike**, Partner

Key insight

A key constraining factor for Australia's energy transition is the need to convert increasingly complex and interdependent market, regulatory and infrastructure signals into bankable project structures which deliver internationally competitive returns – and to do so at scale and speed.

Australia's energy investment landscape is entering a period of structural change. Against the backdrop of decarbonisation imperatives and the scheduled closure of ageing coal-fired power stations, a surge in electricity demand from hyperscale data centres is reshaping both the scale and nature of investment required.

Together, these pressures create both extraordinary opportunity and acute challenge. The question for boards, in-house legal teams and project sponsors is whether projects can be structured in a way that attracts private capital in a system where market design, regulatory settings and infrastructure capacity are continuing to evolve in response to this accelerated demand.

For the first time in decades, electricity consumption across the National Electricity Market (**NEM**) is rising sharply. The immediate catalyst is the rapid buildout of AI and cloud computing infrastructure, which has positioned Australia as one of the most attractive global destinations for data centre investment. Between 2023 and 2025, announced investment intentions exceeded $100 billion in aggregate, reflecting both the scale and immediacy of this demand shift.

This trajectory is expected to accelerate. Present consumption of approximately 4 TWh per year – around 2% of NEM load – is projected by the Australian Energy Market Operator (**AEMO**) to increase to 21.4 TWh by 2034-35 as installed data centre capacity expands materially. Meeting that demand without placing upward pressure on household electricity prices will require substantial network augmentation, together with additional generation and firming capacity, including several gigawatts of new renewables and battery storage.

The significance of this shift lies not only in the scale of new demand, but in its nature. Data centres introduce continuous, high-intensity load profiles that require reliable, firmed and increasingly low-emissions supply, accelerating demand ahead of system and infrastructure capacity and reinforcing that the central challenge is not demand, but the ability to deliver bankable projects that address delivery, regulation and infrastructure constraints.

Project bankability: cost pressures, delivery and connection constraints

The scale of energy infrastructure investment required to meet decarbonisation targets, electrification demand and system reliability needs is unprecedented. Yet the capital expenditure required to deliver projects at that scale is actively undermining their commercial viability. Strong demand signals have not automatically translated into bankable energy projects. The constraint is not always the availability of capital per se, but rather the ability to structure projects whose economics survive the compounding effect of rising construction costs, extended delivery timelines and an increasingly uncertain connection environment.

Construction costs for renewable generation and storage have risen materially. Equipment bottlenecks – particularly for transformers, switchgear, inverters and synchronous condensers, all subject to global supply constraints – have driven unit costs upward at a pace that erodes project margins and challenges base-case financial models. Skilled labour shortages and the technical complexity of integrating new assets with legacy grid infrastructure compound these pressures. Geopolitical disruption has reinforced the trajectory. Supply chain pressures that emerged during the COVID-19 pandemic have been further compounded by renewed volatility in global energy and shipping markets, contributing to extended lead times, cost escalation and increased reluctance from contractors to accept fixed-price risk. The cumulative effect is that the CAPEX envelope for a given project has expanded well beyond the assumptions on which original investment cases were predicated, narrowing debt service coverage ratios, reducing equity returns and, in some cases, rendering projects uncommercial at prevailing offtake prices.

For project sponsors, this has direct implications for contracting strategy. Historically, financiers expressed a preference for single-package, fixed-price, date-certain EPC contracts with clear performance guarantees. As the cost premium demanded by contractors for single-point accountability has increased – itself a reflection of the same supply-side pressures – sophisticated developers have accepted disaggregation as a pragmatic response to preserve the economics of delivery. While bankability challenges remain under multi-contract structures – interface risk, program coordination complexity, and the absence of a single point of recourse – financiers have broadly adapted to this approach. However, disaggregation does not eliminate CAPEX pressure, it redistributes it across a more complex contractual matrix and introduces gap risks that must be managed through careful program design and sponsor capability.

These challenges are compounded further by the increasing deployment of hybrid technologies, each with its own contracting considerations, performance metrics and residual risk allocation.

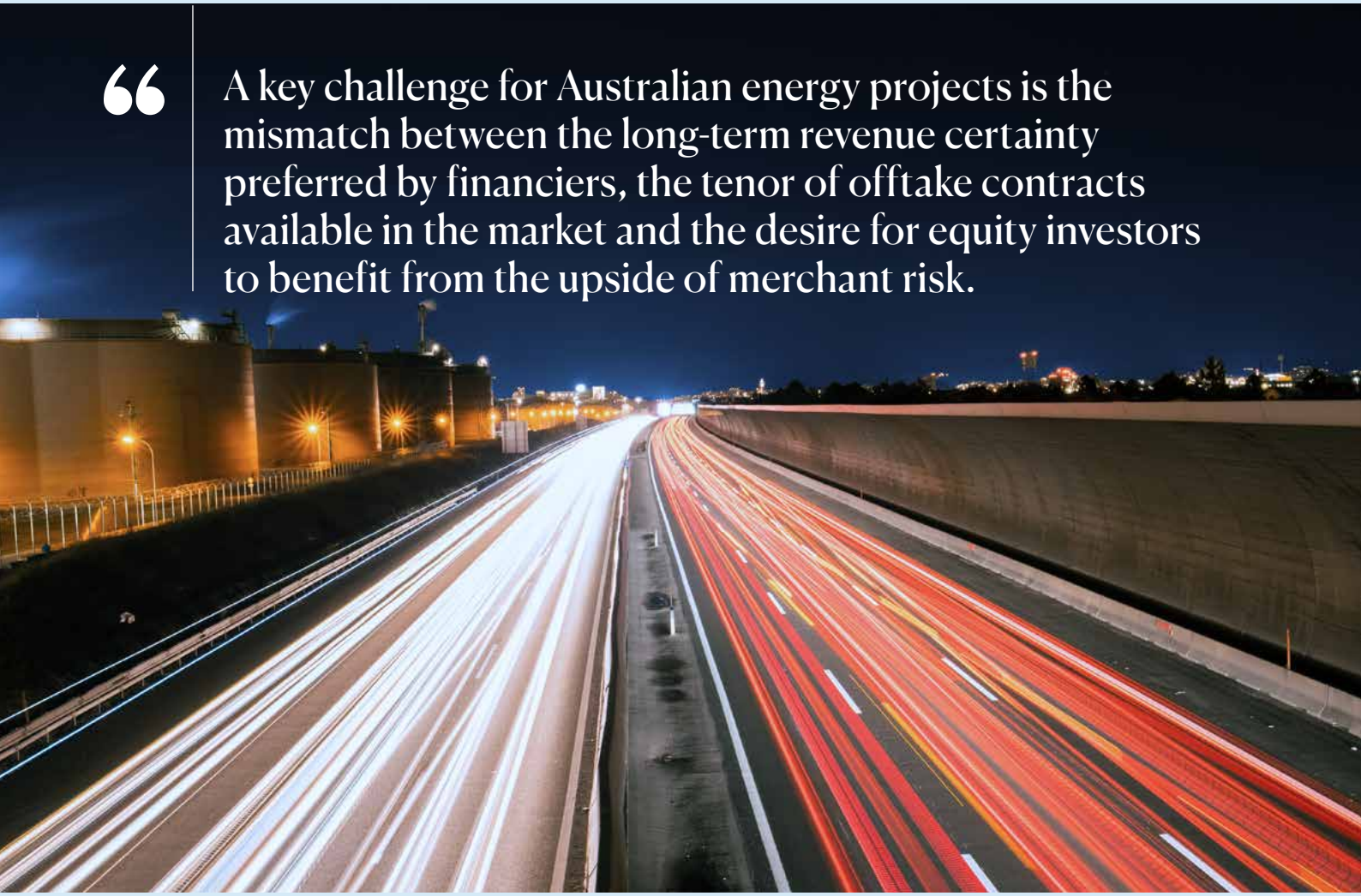
Connection and system integration risk has emerged as a particularly acute constraint on project viability. Queue congestion, uncertainty around marginal loss factors, and the cost and timing of network augmentation all directly affect whether a project can achieve the revenue profile needed to service its capital structure. The issue operates on both sides of the meter: beyond the grid constraints impacting connection timing and subsequent dispatch – including curtailment risk that directly diminishes revenue certainty for renewable capacity – the ability of new load requiring additional generation capacity to connect is itself being constrained. The significant increase in connection requests by data centres in Western Sydney illustrates the point. At the scale of investment now contemplated, these connection constraints do not merely delay projects; they fundamentally alter the CAPEX-to-revenue calculus on which bankability depends.

Revenue models: offtake, pricing and risk allocation

A key challenge for Australian energy projects is the mismatch between the long-term revenue certainty preferred by financiers, the tenor of offtake contracts available in the market and the desire for equity investors to benefit from the upside of merchant risk. This 'tenor gap' remains a central challenge for project proponents seeking to convert strong demand signals into financeable projects.

Battery energy storage systems in particular rely on multiple revenue streams – energy arbitrage, frequency control ancillary services, capacity payments, network support and tolling – several of which remain exposed to wholesale price volatility and merchant revenue risk as new capacity enters the system. While the market response to this challenge has been a diversification of offtake structures (virtual tolls, revenue floor and revenue sharing arrangements), they are often for shorter tenors than the physical tolling agreements, which were the dominant bankability model for utility-scale NEM battery contracts before 2023. The delivery of new and hybrid power plants has also produced increasingly complex offtake models.

> A key challenge for Australian energy projects is the mismatch between the long-term revenue certainty preferred by financiers, the tenor of offtake contracts available in the market and the desire for equity investors to benefit from the upside of merchant risk.



Government underwriting mechanisms have sought to address the issue posed by the tenor gap. Capacity Investment Scheme Agreements (**CISAs**), NSW Long Term Energy Service Agreements (**LTESAs**) and Firming Energy Revenue Mechanism Agreements (**FERMAs**) each provide forms of downside revenue protection that enhance debt serviceability and partially de-risk the revenue profile over the medium term. While these frameworks reflect an increasingly sophisticated allocation of risk between the public and private sectors, they may not always be sufficient, in isolation, to support a final investment decision. The protection they offer is typically limited in duration, scope or quantum.

The interdependence of energy projects and their offtake counterparties compounds the challenge. Co-location of load and generation – particularly data centres paired with batteries and renewables – is an emerging trend aligned with the global 'build-your-own-power' (**BYOP**) model, designed to mitigate grid constraints and accelerate project delivery. This drives project on project risk, which can be compounded given development timelines for generation and storage assets are typically longer than those for data centre facilities, creating a timing mismatch between load certainty and energy supply delivery.

At the same time, the broader regulatory environment in which these mechanisms operate continues to evolve at pace, with new market mechanisms proposed, underwriting terms refined and connection frameworks updated across jurisdictions. Each iteration requires assumptions to be revisited, financial models updated and contractual arrangements adjusted – reinforcing the need for a more structural market design solution capable of bridging the tenor gap at scale.

While government is actively seeking to support the energy transition on one hand, proposed changes to taxation settings risk undermining that effort on the other. The proposed shift in effective capital gains tax rates (which can be from 0% to 30%) may have a chilling effect on international capital inflows into renewables and energy transition investments in Australia as foreign pension funds and sovereign wealth funds assess capital allocation on a global basis.

ESEM and evolving offtake models

One consequential market design reform seeking to bridge the tenor gap is the proposed Electricity Services Entry Mechanism (**ESEM**), recommended by the Independent Expert Panel in its December 2025 final report on NEM wholesale market settings. Every NEM jurisdiction bar Queensland has endorsed the proposal in principle, with implementation pathways agreed in March 2026 and industry-led co-design of standardised contracts now underway.

Under the proposed model, a central buyer would award revenue-support contracts (structured as contracts for difference) covering years 8 to 15 of a project's operation, then on-sell that contracted position into the wholesale market to improve liquidity. It is here that data centre operators may be required to purchase medium tenor contracts covering their energy requirements.

The market recognises the ESEM's potential, yet it also illustrates a broader dynamic: projects that commenced development under the Capacity Investment Scheme (**CIS**) framework must now plan for a successor mechanism whose final design is still being co-developed. Each transition between frameworks requires market participants to absorb new contract forms, pricing methodologies and allocation mechanisms. The challenge is therefore one of timing and alignment, rather than appetite for reform, with investors seeking sufficient lead time and design certainty to support long-dated commitments.

Taken together, these developments point to a market that is actively evolving to address the revenue and contracting challenges underpinning project bankability. The critical task is not the absence of mechanisms, but the coordination of these emerging frameworks in a way that supports timely and efficient financial close.

Evolving market design: data centre and energy investment alignment

The Commonwealth has moved swiftly to articulate expectations for the development of data centres and AI infrastructure. In March 2026, the Department of Industry, Science and Resources released formal guidance built around five pillars: national interest, contribution to the energy transition, sustainable and efficient water use, workforce development, and research and innovation. The central requirement is that new facilities avoid placing upward pressure on energy prices while making a net positive contribution to decarbonisation.

This guidance was reinforced at the Energy and Climate Change Ministerial Council in May 2026, where there is broad consensus from state and federal ministers that data centre operators should be obliged to fully offset their electricity consumption with new renewable generation or storage – solar, wind, or batteries. The Australian Energy Market Commission (**AEMC**) has been tasked with advising on implementation mechanisms, with design work underway. The ESEM, discussed below, may provide one route to translate data centre consumption obligations into investment in new renewable generation and storage capacity. There is also increasing focus on ensuring that the infrastructure required to connect new data centre load is appropriately funded by proponents, rather than being socialised across the broader consumer base.

On the technical side, reform of NEM connection standards is also progressing. The AEMC's Package 1 reforms, targeting inverter-based resources, have already commenced, with further changes proposed through Package 2 to address large energy-intensive loads, including data centres and hydrogen electrolysers, through a tiered framework based on load size.

Viewed together, the direction of reform is broadly constructive. Greater clarity around standards, system integration and market signals all serve long-term investor confidence. The practical challenge is that many of these frameworks are still being finalised, creating a transitional environment in which projects must progress alongside evolving regulatory settings and adapt to evolving market expectations from contract counterparties which are underpinned by this transitional landscape. For sponsors, managing tight financing windows, the cost and potential for delay of re-baselining technical and commercial due diligence is non-trivial.

In that context, regulatory reform is both an enabler and a sequencing challenge. While it is strengthening the long-term investment case for energy transition infrastructure, the immediate task for market participants is to navigate this period of design and implementation in a way that maintains momentum toward financial close.

From financial close to delivery: coordinating capital, policy and infrastructure

The current environment accentuates the interdependence of the workstreams required to reach financial close. Planning, offtake, EPC procurement and grid connection must advance in parallel. Disruption in any one of these areas – whether a connection delay, the loss of a key offtake counterparty, or a shift in market design – can cascade through the project, requiring renegotiation of commercial terms that are already finely balanced.

This is where coordination introduces a whole additional level of complexity: project sponsors face fundamental strategic questions around their business case (including, increasingly, whether to orient development toward a data centre offtake) and must formulate their response in conditions where the answer may change before the project reaches a final investment decision. It is difficult to set a durable project strategy when the market is moving as fast as it is. Proponents will also need to grapple with inevitable skills shortages, the protection of supply chains in turbulent times, technological change between design and completion and social license issues. For boards and governance committees, this creates a heightened oversight challenge: the assumptions underpinning investment cases may shift materially between approval and drawdown.

While the policy reforms underway are individually well-directed and, in many cases, necessary, the next phase will depend on consolidation – a move from a period of intensive policy design to a more stable investment environment. This includes embedding ESEM in legislation, resolving the regulatory treatment of key technologies such as battery storage, advancing the AEMC's Package 2 connection framework, and progressing the practical application of renewable energy obligations for large-scale energy users.

Despite the challenges, the underlying investment thesis remains sound. Demand is structural, rather than cyclical, and the policy trajectory – while complex – is broadly supportive. As such, Australia's energy transition continues to provide attractive opportunities for deployment of debt and equity capital by local and international infrastructure investors. Ultimately, the pace of the energy transition will be determined not by the availability of capital, but by the ability to integrate policy, infrastructure and capital structures into bankable projects at scale.

The projects that progress will be those able to navigate cost pressures, revenue complexity and system constraints while maintaining attractive project economics, and translate that into structures capable of achieving financial close within acceptable risk parameters. These are areas where early legal and structuring input can materially reduce execution risk and strengthen the bankability case presented to financiers.

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How planning and environmental reforms are shaping Australia's next wave of priority projects

By **Dr Louise Camenzuli,** Head of Environment and Planning, **Anna White**, Partner, **Rosie Syme**, Partner, **Kirsty Davis**, Partner and **Ashley Rooney**, Associate

Key insight

Planning and environmental reforms are reshaping not just approval pathways, but where decision-making power sits, how legitimacy is earned and how competing policy priorities collide in the delivery of Australia's next wave of priority projects. The central challenge is no longer speed alone, but whether accelerated delivery can be sustained without undermining confidence, coordination and long-term outcomes.

Australia's economic agenda is being pulled in multiple directions at once. Governments are under pressure to accelerate the energy transition, deliver housing at scale, reform federal environmental laws and attract investment in new industries such as AI and data-driven infrastructure.

Each objective is treated as a priority, yet the regulatory systems tasked with delivering them must absorb all these demands simultaneously. The result is an intense period of planning and environmental reform, directed at facilitating 'priority projects', while still aiming to protect public values and participation rights.

What these reforms increasingly reveal is not a simple shift towards deregulation or protection, but a structural recalibration of decision-making. Across jurisdictions, authority is being centralised, assessment pathways selectively streamlined and participation rights reshaped to reduce friction and speed delivery.

At the same time, environmental standards are tightening and expectations around social licence, infrastructure readiness and cumulative impacts are rising – exposing new tensions at the intersection of policy ambition, delivery and legitimacy.

Centralising decision-making for priority projects

A common thread across recent planning and environmental reforms is the continued centralisation of decision-making for priority projects, with States increasingly assuming responsibility for approvals previously determined at a local level.

This shift is being achieved through a combination of sector specific reforms, ad hoc 'call-in' powers and reforms that permit particular developments to proceed 'as of right'. In Queensland, for example, recent reforms have seen the planning controls applicable to battery projects follow the path of wind and solar, with decision-making responsibility shifted away from local government to the State level. A similar shift has occurred in Victoria, where priority projects commonly access the Development Facilitation Program, placing approval authority with the Minister for Planning rather than the local Council. In New South Wales, the establishment of the Investment Delivery Authority reflects the same trajectory, supporting approvals for major projects aligned with State government priorities including renewable energy and energy security projects, and data centres.

This centralisation has been accompanied by a recalibration – rather than an elimination – of the role of local governments. While Councils are increasingly removed from formal decision-making, reforms have sought to recognise their continued importance in representing community interests and shaping local outcomes. In Queensland, recent planning reforms for renewable energy projects now require upfront assessment of social impacts and a community benefit agreement to be reached with the relevant local government before a development application is even lodged. In Victoria, local governments are grappling with how best to deploy their resources and advocate for their communities in circumstances where their experience and local knowledge is unparalleled, but increasingly they are not the decision-maker. In New South Wales, updated five-year housing completion targets assigned to Councils represent a further recalibration, with Councils now expected to plan for growth within parameters set at the State level.

Alongside these structural shifts, governments have introduced increasingly streamlined development and environmental assessment pathways, to varying extents, aimed at simplifying application requirements and reducing assessment timeframes. At the Commonwealth level, reforms to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) will shortly introduce a new 30-day 'streamlined assessment' pathway, together with new bioregional plans under which specified priority actions may proceed in specified development zones without referral or approval. These reforms have been earmarked to prioritise the facilitation of the renewable energy zones and greenfield housing projects across the country. Victoria and New South Wales have also passed reforms through the *Planning Amendment (Better Decisions Made Faster) Act 2026* (Vic) and the *Environmental Planning and Assessment Amendment (Planning System Reforms) Act 2025* (NSW), respectively, which introduced new streamlined fast-track approval pathways for lower risk and less complex proposals, designed to keep up with the demand for new housing projects. In New South Wales, these changes have been complemented by the establishment of a new Housing Delivery Authority and Investment Delivery Authority to fast-track priority developments and a new Development Coordination Authority to centralise State agency advice during the development assessment process.

At the same time, the rights of third parties to be publicly notified of development applications, lodge submissions and access appeal rights, remain in the spotlight and susceptible to change. In Victoria, reforms have restricted third-party appeal rights to those who receive direct notification of

a planning permit application, while federal reforms have significantly limited the availability of reconsideration requests by third parties under the EPBC Act. In New South Wales, proposed changes under the draft statewide Community Participation Plan would further reduce public exhibition requirements for low-impact developments that meet relevant planning controls.

Competing priorities in planning and environmental reform

There is an inherent complexity in, and often between, efforts to facilitate different categories of priority projects. Policy settings designed to accelerate delivery in one area can create friction or unintended consequences in another.

Some of the strongest economic opportunities are those that have the potential to cause environmental harm or slow down the energy transition. At the same time, attracting investment in one State often means competing against other States and Territories, while short term economic measures can give rise to long-term structural challenges, as recent property tax settings in Victoria illustrate. These tensions extend to the State–Federal divide, highlighted by the Queensland Government's recent direction to the Queensland Productivity Commission to undertake a public inquiry into the impacts of Federal Government's environmental reforms, including their economic impacts and implications for major projects.

Compounding these pressures is the risk that facilitation of priority projects moves faster than the provision of essential services and trunk infrastructure, with development approvals potentially preceding the availability of roads, intersections, drainage and other foundational assets.

These tensions are not new. Development facilitation reforms have always involved trade-offs between economic, social and environmental objectives. The ebb and flow of planning and environmental reform is symptomatic of this enduring tension. Equally, we might argue that what we are seeing is less a decisive shift in favour of any single objective, and more an ongoing recalibration as governments attempt to hold multiple, and sometimes conflicting, goals in tension at once.

Following reports of the declining state of the environment in recent years, there has been a re-focusing of policy and regulatory reforms towards environmental objectives. That agenda will now be tested further with heightened political and socio-economic uncertainty driving the critical need for new housing, economic investment and growth.

AI provides a useful case study in how these emerging tensions are likely to play out in practice. From both a technology and property development perspective, AI represents one of the most significant economic opportunities currently facing governments. However, the data centres on which AI depends have substantial energy and water demands, raising difficult questions about how their rapid expansion can be reconciled with decarbonisation efforts and securing a social licence to operate. These issues play out at the practical as well as theoretical level – data centres are increasingly competing with and at times reliant on battery storage and renewable energy generators for access to prime grid-connected land.

The next phase of planning and environmental reform

Looking ahead, it is likely that planning and environmental reform will continue to evolve in response to the competing pressures outlined above.

In the context of AI and the energy transition, we can expect a growing emphasis on integration and co-location, with data centres increasingly paired with Battery Energy Storage Systems and renewable generation. At the same time, data centres are likely to become more fragmented as they become a more common feature of broader commercial developments rather than standalone assets.

For housing projects, facilitation pathways are likely to remain under sustained pressure to keep up with the urgent demand for new projects. Further adjustments to approval, assessment and certification processes can be expected.

More broadly, planning and environment approval processes will remain a central focus of policy attention as governments attempt to strike a balance between protecting public values and attracting economic investment. While planning reforms across the board are seeking to streamline approval processes, environmental regulation is trending in the opposite direction, with stricter standards and stronger scrutiny.

Taken together, this suggests that ongoing planning and environmental regulatory and policy reform will remain the norm – with the real test being whether delivery can be both accelerated and sustained without eroding confidence or legitimacy.

> **Planning and environment approval processes will remain a central focus of policy attention as governments attempt to strike a balance between protecting public values and attracting economic investment.**

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Reframing uranium: energy security and Australia's critical minerals future

By **Tracey Greenaway**, Head of Energy and Natural Resources, **Anthony Lepere**, Partner and **Anna White**, Partner

Key insight

Critical minerals policy is shifting from a focus on export opportunity to a question of national security, energy resilience and regulatory control. As global demand accelerates and nuclear power is repositioned as a strategic energy source, Australia's export-focused and restrictive uranium framework is under increasing pressure.

While critical minerals have long been assessed by reference to trade or export strength, they are now increasingly framed through the lens of security, resilience and regulatory control. Geopolitical volatility, tightening energy transition timelines and the rapid expansion of AI-driven infrastructure have exposed how dependent modern economies are on a narrow set of strategically significant materials.

Uranium is emerging as an important part of this shift. Internationally, it is being repositioned as a strategic asset underpinning energy security, defence capability and long-term industrial resilience. In this context, Australia's approach remains distinctive – shaped by an export-focused framework and restrictions on domestic production and use. As global critical minerals strategies evolve and regulatory and investment pressure increases, the key question is whether the current regulatory framework for uranium should be reframed.

Critical minerals are considered essential to economic and national security, with supply chains that are vulnerable to disruption. In recent years, global competition for critical minerals has intensified, bringing increased regulatory and policy focus to how these materials are defined and managed.[1]

Most major jurisdictions, including the United States, China, the United Kingdom and Australia, have adopted critical minerals lists, and the categorisation as 'critical' can significantly alter a mineral's legal and regulatory treatment. However, the concept of a 'critical mineral' is not uniform across jurisdictions. While the underlying focus – managing supply disruption risk for materials essential to future economies and national security – is broadly shared, national definitions vary according to natural resource endowment, domestic demand and strategic priorities.

In practice, critical mineral designation typically unlocks access to government financial support and may also trigger expedited permitting regimes or priority regulatory treatment. In some jurisdictions, it also enables export licensing requirements or export bans. These tools play an important role in stimulating investment and project development, while shaping export and import outcomes.

Uranium in Australia: regulatory settings and strategic constraints

Uranium has come into sharper focus in recent months, in part due to the Iran conflict and renewed attention on its potential use in nuclear weapons and national defence capability. More broadly, uranium is attracting sustained international interest as it is increasingly recognised as playing a role in energy transition. In particular, it's been identified as a potentially key source of reliable, virtually greenhouse-gas-free baseload electricity for energy-intensive infrastructure such as data centres. For these reasons, uranium is classified as a critical mineral or treated as strategically important through other policy mechanisms (such as state ownership, stockpiling, export controls, or nuclear fuel security strategies) in a number of key jurisdictions.[2]

In contrast, Australia does not currently treat uranium as a critical mineral or strategic resource in the affirmative sense of actively promoting it for national economic or energy security purposes. This is notable, as Australia holds around one-third of the world's known recoverable uranium resources, making it the single largest resource holder globally.[3] In contrast, Australia acknowledges uranium's strategic distinctiveness and governs it through a dedicated, restrictive policy framework. Currently, uranium mining is permitted only in South Australia and the Northern Territory and nuclear power generation is prohibited. In practice, this means there is no domestic demand for uranium for electricity generation and all production is exported.[4]

1 The global shift towards low-carbon energy systems depends on minerals such as lithium, cobalt, nickel, and rare earth elements for batteries, electric vehicles, wind turbines, and solar panels. AI data centres are becoming one of the most mineral-intensive components of the digital economy, consuming significant quantities of copper, aluminium, and rare earth elements. Defence systems are highly mineral-intensive. Rare earth elements are used in high-performance permanent magnets found in guided missiles, fighter jets, and satellite communications. Antimony is used in night-vision equipment and flame-retardant materials; gallium is used in advanced semiconductors deployed in radar systems and telecommunications; tungsten is used in armour-piercing munitions and jet engines.

2 This includes the United States, Canada, Russia, China, Kazakhstan, France, India and Japan.

3 Australia currently ranks as the world's fourth largest producer and market concentration is high. Kazakhstan, Canada, and Namibia alone account for approximately three-quarters of global uranium mine output.

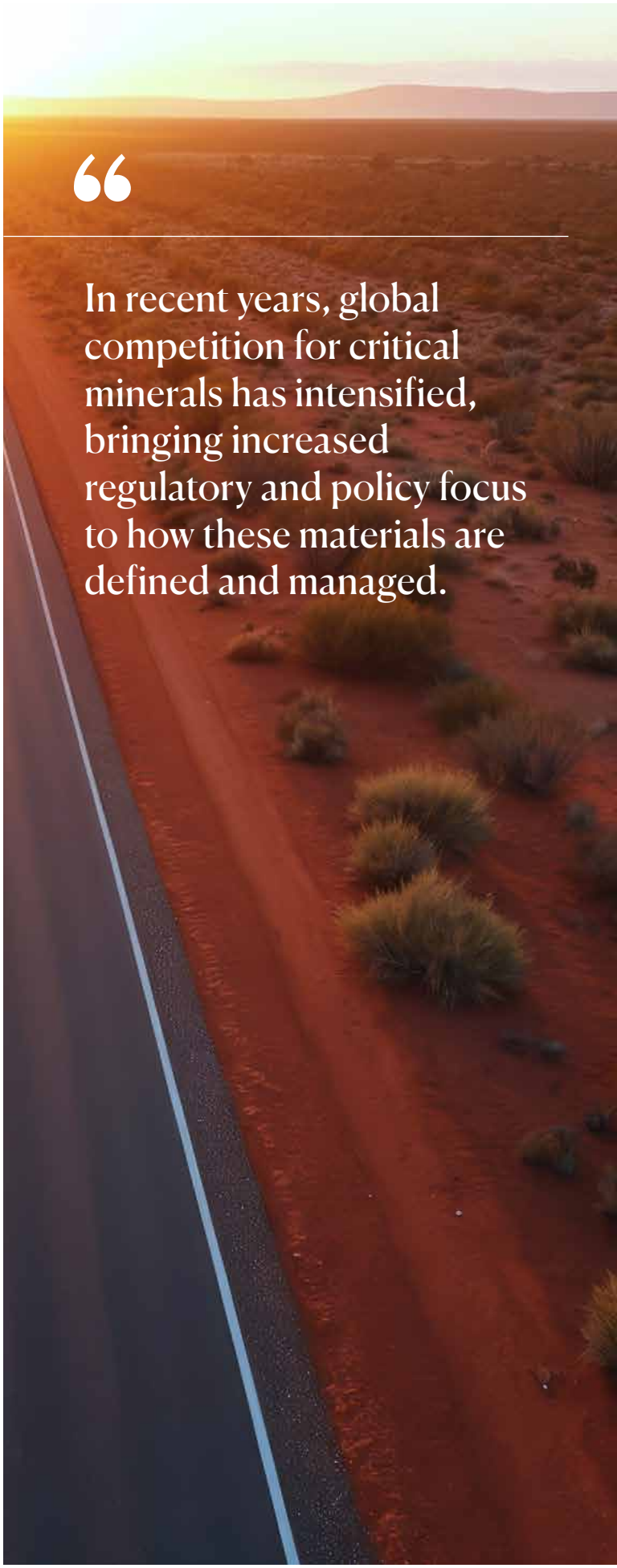
4 Australian uranium can only be sold to countries with which Australia has a nuclear cooperation agreement, and has safeguards agreements with the International Atomic Energy Agency (**IAEA**), including an Additional Protocol.

Critical minerals policy: comparing Australia, the United States and China

In determining how to reshape policy, it is instructive to consider the approach of key jurisdictions. Australia defines a critical mineral as one that is essential to modern technologies, economies, or national security, for which Australia has geological resource potential, which is in demand from strategic international partners, and whose supply chain is at risk of disruption. Reflecting Australia's position as a major producer and exporter of mineral resources, its critical and strategic minerals framework is oriented primarily toward export markets rather than broader supply chain or domestic demand dynamics. As a result, a mineral such as uranium – which is abundant in Australia and has diversified export markets – is less likely to be classified as 'critical', even where other jurisdictions assess the same mineral as critical to their own economies.[5]

Under its Energy Act of 2020, the United States adopts a similar definition, framing a critical mineral as one that is essential to economic or national security, vulnerable to supply chain disruption, and necessary for the manufacture of products whose absence would have significant national security or economic consequences. While the US definition originally excluded 'fuel minerals' including uranium, uranium was added to the US Critical Minerals List in November 2025, reflecting its significance for both electricity generation and national security. Consistent with that shift, the US government has commenced establishing a domestic strategic uranium reserve to support long-term energy security.

China adopts a broader and more integrated approach, framing critical minerals through the concept of 'strategic minerals'. Rather than focusing primarily on import vulnerability, China's approach emphasises maintaining strategic advantage and ensuring self-sufficiency in resources where it faces domestic shortfalls. This strategy extends across the entire supply chain for critical minerals – from mining and processing through to end-use manufacturing – and has supported China's dominant global market position in both mining and refining of critical minerals. Uranium is included on China's 'strategic minerals' list, with domestic resources subject to foreign investment restrictions and export controls.



5 Australia's Critical Minerals List was last updated on 20 February 2024, in line with the Resource Minister's decision of 16 February 2024, and will be reviewed at least every three years.

Australia's energy supply and demand: implications for long-term strategy

Australia's east coast is facing a tightening energy market, with significant risks of gas and electricity shortfalls anticipated in the coming years, alongside continuing price escalation affecting businesses, industry and employment. These pressures have been forecast for some time, including prior to recent events in the Middle East, and as part of the 2025 Gas Market Review, the government is actively considering the introduction of a mandatory domestic gas reservation scheme.

Data centres are highly energy-intensive, making a stable and cost-effective energy supply threshold issue for any project. This demand is also emerging alongside a continuing policy focus on diversifying away from fossil fuels to cleaner sources of power. Against this background it is interesting to note that in 2024-2025 a number of major United States technology companies entered into long-term power purchase agreements, co-location arrangements and direct equity investments with nuclear power operators and small modular nuclear reactor (**SMR**) developers in the United States, seeking access to reliable, baseload, low-emissions electricity for energy-intensive operations.[6]

While nuclear power – particularly through SMRs – continues to raise questions around project costs, regulatory complexity and delivery timelines (with initial dedicated SMR capacity not expected before 2030), there are clear indications that global industry is planning for nuclear as a future supply source. More broadly, nuclear power already forms a significant part of the global energy mix, with over thirty countries generating electricity from nuclear facilities. France, for example, generates approximately 70% of its domestic electricity from nuclear power and exports surplus supply to other countries.

Against this backdrop, Australia's target of sourcing around 82% of electricity from renewable generation is ambitious and internationally distinctive. While renewable energy will undoubtedly play a central and growing role in electricity supply, the potential role of nuclear power within the future energy mix remains an active and important area of industry consideration.

Australia's energy security: strategic policy priorities for critical minerals

Against this background, there are compelling reasons for Australia to consider how the uranium and nuclear energy sectors are regulated over the long term. Recent policy developments in NSW and WA signal early movement toward a more active regulatory posture on uranium and nuclear energy, reflecting broader shifts in how critical minerals are being considered in an energy security context.

Some of these developments, including those triggered by the impacts of the conflict in Iran, signal an evolution in the Government's approach to critical minerals. The Critical Minerals Strategic Reserve, announced on 12 January 2026 (**Strategic Reserve**), and The Export Finance and Insurance Corporation Amendment (Strategic Reserve) Act 2026 (**Strategic Reserve Act**), which came into effect on 1 April 2026, mark a shift toward a more interventionist policy framework. Together, these measures reflect growing recognition that critical minerals policy must address not only export strength, but also domestic supply assurance and resilience.

Under this framework, a $1.2 billion Strategic Reserve will be established to promote investment in critical minerals projects, secure rights to those minerals, and enable on-selling by Government to meet demand from domestic and international buyers.[7]

6 High profile transactions in this period included multiple long term PPAs and strategic partnerships between large technology companies and US nuclear operators, spanning both existing reactor restarts and new capacity. Individual deals ranged from several hundred megawatts to well over 1 GW, with aggregate commitments running into multiple gigawatts. These arrangements include agreements tied to operating plants, as well as forward commitments to emerging technologies such as SMRs and other advanced nuclear projects, alongside a growing pipeline of similar transactions involving SMR developers and broader corporate procurement programs. These PPAs – which are typically long-term (15-25 years), bespoke, and increasingly structured as forward-start agreements tied to reactor construction milestones – signal a fundamental shift in corporate energy procurement strategy, with nuclear moving from a niche sustainability gesture to a core pillar of data centre power sourcing, though significant risks remain around SMR construction cost overruns, regulatory complexity, and the fact that the first dedicated SMR capacity is not expected to be operational before 2030.

7 These are antimony, gallium and rare earth elements which all appear on Australia's Critical Minerals List.

The initial focus of the Strategic Reserve is on promoting a limited set of minerals which are crucial for clean-energy, high-technology manufacturing and defence applications. While a key objective is to strengthen supply chains for Australia's international trading partners such as the United States, Japan, South Korea and Canada, these measures also highlight the importance of domestic availability, particularly in relation to fuel security and minerals critical to economic and national security. The Strategic Reserve Act also further expands Export Finance Australia's functions, including the ability to secure, sell and selectively stockpile fuel, critical minerals and other materials that may be produced domestically or imported, with a focus on addressing import vulnerability alongside export opportunity.

In combination, these developments underscore the importance of ensuring that policy frameworks for strategic national resources support domestic availability as well as export. Taking account of the expected global importance of uranium, particularly in the defence and energy sectors, there is a strong case for applying a similarly structured, long-term approach to uranium.

Uranium as a strategic asset: energy and policy implications for Australia

The growing international focus on uranium as a critical input to both defence capability and energy security, alongside its inclusion on the critical or strategic minerals lists of key global trading partners, are important strategic considerations for Government in determining how uranium and nuclear energy are positioned within Australia's long-term regulatory frameworks.

While significant hurdles remain – not least the need to secure and maintain a social licence – global market developments point to nuclear power playing an expanding role in future energy systems. In that context, there is merit in considering the regulatory, governance and policy settings that would be required to support any future development of the uranium and nuclear sectors in Australia in a safe and efficient way.

Assessing whether uranium should be included in Australia's Critical Minerals List, or otherwise treated as strategically important from a policy perspective, and examining what a credible regulatory roadmap for nuclear energy could involve, are practical steps that, if considered now, could strengthen long-term strategic preparedness.

> There are compelling reasons for Australia to consider how the uranium and nuclear energy sectors are regulated over the long term.

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The hidden infrastructure of AI: navigating ESG risk in Australia's data centre boom

By **Dr Phoebe Wynn-Pope**, Head of Responsible Business and ESG and **Dr Louise Camenzuli**, Head of Environment and Planning

Key insight

As Australia's data centre market accelerates, the infrastructure underpinning AI is rapidly becoming one of the most complex ESG challenges facing businesses today.

In this special episode of Essential ESG, Phoebe Wynn-Pope and Louise Camenzuli explore the intersection of energy demand, water constraints, planning frameworks and social licence – and what it means for organisations investing in, or relying on, this critical infrastructure.

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