Bird & Bird

Riding the wave

Peak issues in Australian law

October 2024

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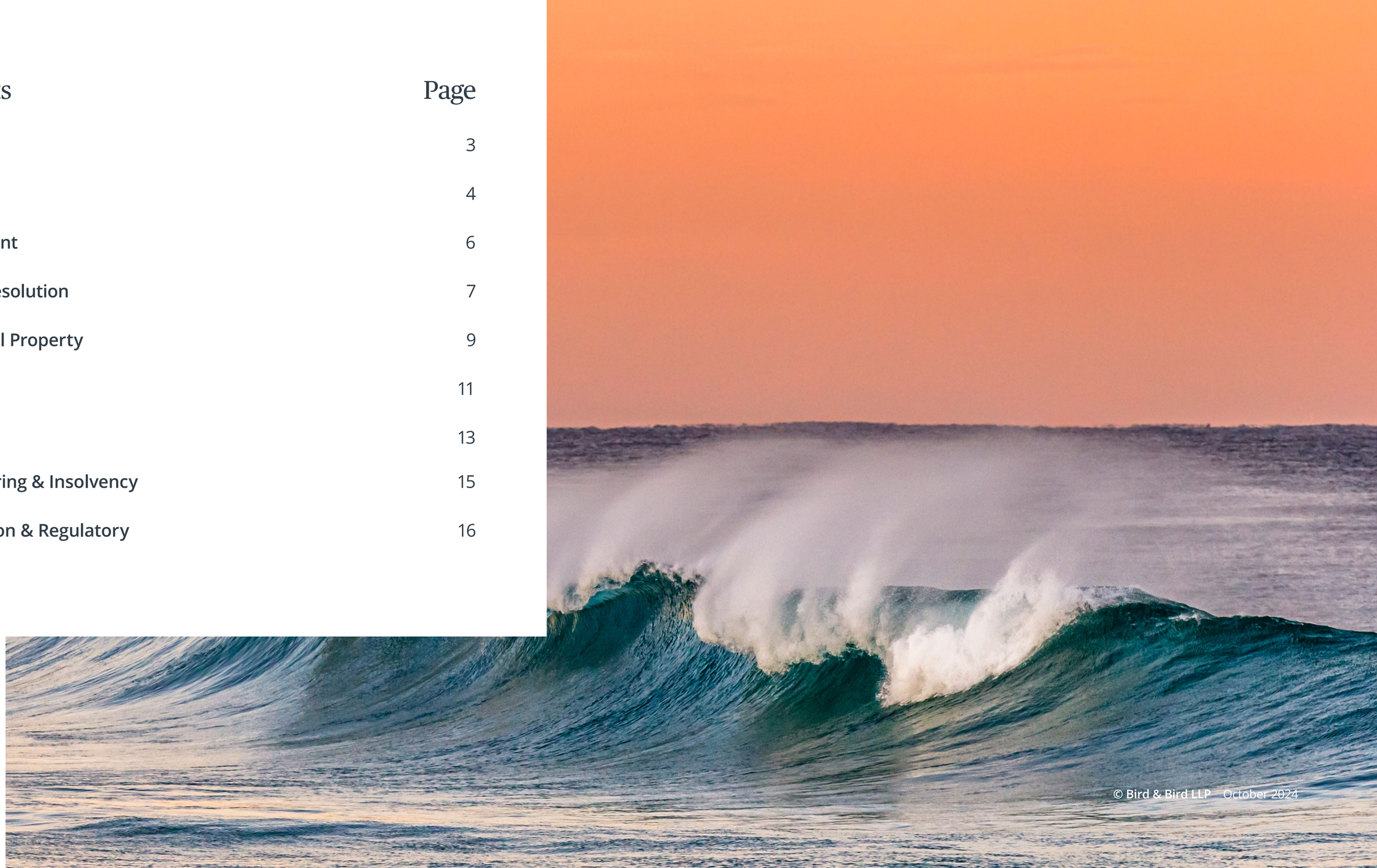

Foreword

As we navigate the dynamic legal landscape of Australia, it is crucial to stay informed about the latest developments and emerging trends. This second edition of Riding the Wave provides a comprehensive overview of the current legal issues and key trends that are shaping the Australian legal environment.

In this edition, our Corporate team delves into significant changes to Australia's foreign investment framework, explores the evolving landscape of payments reform and financial services compliance, and examine the implications of mandatory climate reporting. Our Employment team also addresses the growing importance of the right to disconnect, the distinction between employees and independent contractors, and the "same job, same pay" reforms. Our Property team outlines the issue arising from the rapid adoption of AI models and the related creation of a paradox in data centres' energy consumption.

Our market-leading Dispute Resolution team explores how cybercrime and data disputes continue to pose challenges, in addition to reforms to the model defamation provisions and ASIC's willingness to test the limits of regulatory reach in the crypto space. We also highlight the impact of the EU Artificial Intelligence Act, the rise of copycats, and the intersection of copyright, AI, and deepfakes.

In this Olympic year, our Sports Law team dissects gender diversity in sport, anti-doping, and safeguarding as critical areas of focus, alongside proposed changes to broadcasting regulation to support free-to-air television providers.

This document highlights the need to navigate these complex issues effectively. If you need assistance diving deeper into any of the legal, regulatory and policy themes or issues that this edition explores (or indeed in other legal areas), I encourage you to contact us. We look forward to working with you.

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Corporate

Issue 1: Changes to Australia's Foreign Investment Framework

Significant reform to strengthen and streamline Australia's foreign investment framework have been announced. These changes aim to deliver a risk-based, faster, and more transparent assessment of foreign investment proposals.

Key changes include enhanced scrutiny of:

- foreign investment proposals in critical and sensitive sectors, such as critical infrastructure, critical minerals, and technology; and
- tax arrangements which pose a risk to revenue.

To streamline the current, often lengthy (and expensive) foreign investment process, it is proposed that Treasury adopt a new risk-based approach aiming to process 50% of investment proposals within the 30-day statutory decision period. Coupled with new measures to refund application fees for unsuccessful competitive bids and new exemptions for low-risk transactions, it is hoped that these reforms will result in greater transparency and efficiency for investors engaging in what are viewed to be lower risk industries. However, this risk-based approach also signals increased scrutiny for investments in critical and sensitive sectors.

Issue 2: Payments Reform and Financial Services Compliance

The Reserve Bank of Australia is set to undergo significant changes with the modernisation of its regulatory powers. These reforms aim to update the *Payment Systems (Regulation) Act 1998* (Cth), expanding the definitions of 'payment system' and 'participant' to include new market entrants and to ensure the regulatory framework addresses emerging payment systems. A comprehensive review of retail payments legislation was also flagged to be their next area of focus.

While this modernisation process continues, the regulatory environment for emerging financial services remains a murky space, with businesses having to apply outdated legislation to modern technologies. But the recent judgment in *ASIC v Web3 Ventures Pty Ltd [2024] FCA 578* could provide some comfort. The Federal Court concluded that, although Web3 Ventures contravened a civil penalty provision in the *Corporations Act 2001* (Cth), in that case it would be appropriate to grant Web3 Ventures relief from pecuniary penalties. Factors considered by the Federal Court in granting relief include a determination that Web3 Ventures had taken competent legal advice and had genuinely concluded that there was no identified risk of it breaching the law. Similar relief may be available to Boards navigating other uncertain regulatory environments that are the subject of ongoing reforms.

Issue 3: New mandatory climate reporting regime in Australia: Long-awaited Climate Disclosure Bill passes House of Representatives

The *Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024* (Cth) (**Bill**) has now been introduced to the Senate for consideration. It aims to align Australia's disclosure standards with the International Sustainability Standards Board requirements.

If passed, the Bill will establish a mandatory climate-related financial disclosure regime with 3 "tiers" of obligations (**Disclosure Regime**). Membership in each tier for a financial year will be determined by the value of an entity's consolidated revenue, the value of an entity's consolidated gross assets, and the number of its employees. The Disclosure Regime is proposed to be phased in from 2025 to 2028, requiring entities to prepare Sustainability Reports detailing climate-related financial risks and opportunities. These reports must be audited from 2030 and must be lodged with ASIC (with exemptions for certain entities and provisions for commercially sensitive information). If the Bill is passed, further details about the Disclosure Regime and the content of Sustainability Reports will have to be made public soon.

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Employment

Issue 1: The right to disconnect

Australian employees now enjoy a 'right to disconnect'. This gives employees the right to refuse to monitor, read or respond to contact or attempted contact from employers or third parties if that contact is outside of their ordinary working hours, unless such refusal is unreasonable in all the circumstances.

Employers managing global workforces are, over the coming months, likely to grapple with how to reconcile this new right with business needs, particularly where the nature of their business requires frequent collaboration between employees across multiple time zones.

Over the coming months, it is also likely that the extent to which employees can legitimately exercise this new right will be tested in litigation.

Issue 2: The distinction between employees and independent contractors

In a number of decisions in recent years, the High Court has reinforced the primacy of the contract entered into between parties as, in most cases, being determinative of whether an individual has been engaged as an employee or contractor.

Recent law reforms have changed that position, returning the focus to the practical reality of the relationship between a worker and the company who engages them to perform work, and increasing the risk of employee-contractor misclassification.

Where the consequences of misclassifying a contractor as an employee can be commercially problematic, including in the context of a claim for payment of employee entitlements, this issue will be front of mind for employers in reviewing the adequacy of their contractual arrangements.

Issue 3: 'Same Job, Same Pay' reforms to Australia's labour hire framework

Recent reforms to the *Fair Work Act 2009* (Cth) have granted the Fair Work Commission powers to order that labour hire workers engaged by a host company must receive the same pay as the host company's employees whose employment is covered by an enterprise agreement.

Businesses who operate in the labour hire industry or who, in the course of carrying on business, supply a worker or workers to perform work for another person will, over the coming months, need to carefully consider the risk of a 'same job, same pay' order being made in relation to their labour hire arrangements.

This is likely to require employers to engage in a complex legal and mathematical analysis to determine the full pay that a labour hire worker would be entitled to receive, if a regulated labour hire arrangement order is made.

It is also likely to give rise to an increasing raft of disputes between labour hire organisations, employees and trade unions about whether such an order *should* be made in all the relevant circumstances.

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Dispute Resolution

Issue 1: Cybercrime and Data disputes

Cybercrime and data disputes have continued to feature prominently in Australian disputes landscape with the recent MediSecure, Medibank and Optus data breaches, amongst others.

2024 has seen the realisation of regulatory risks for entities the subject of data breaches. In particular, the Australian Communications and Media Authority (ACMA) and the Australian Information Commissioner (AIC) have commenced civil penalty proceedings against Optus and Medibank, respectively, alleging failures on the part of each entity from taking the appropriate steps to protect the confidential and personal information of its customers.

Should the ACMA and AIC be successful in obtaining civil penalties, these proceedings will serve as an important bellwether for businesses looking at quantifying the regulatory risk that follows from cyber incidents.

Concurrently, class action litigation remains on foot against Medibank and Optus large scale data breaches occurring in 2022. We expect the determination of novel issues such as the application of various common law causes of action in a data breach context and the interpretation of various provisions of Australian privacy laws will impact on the direction of data breach litigation going forward.

See more on Australian data privacy disputes here.

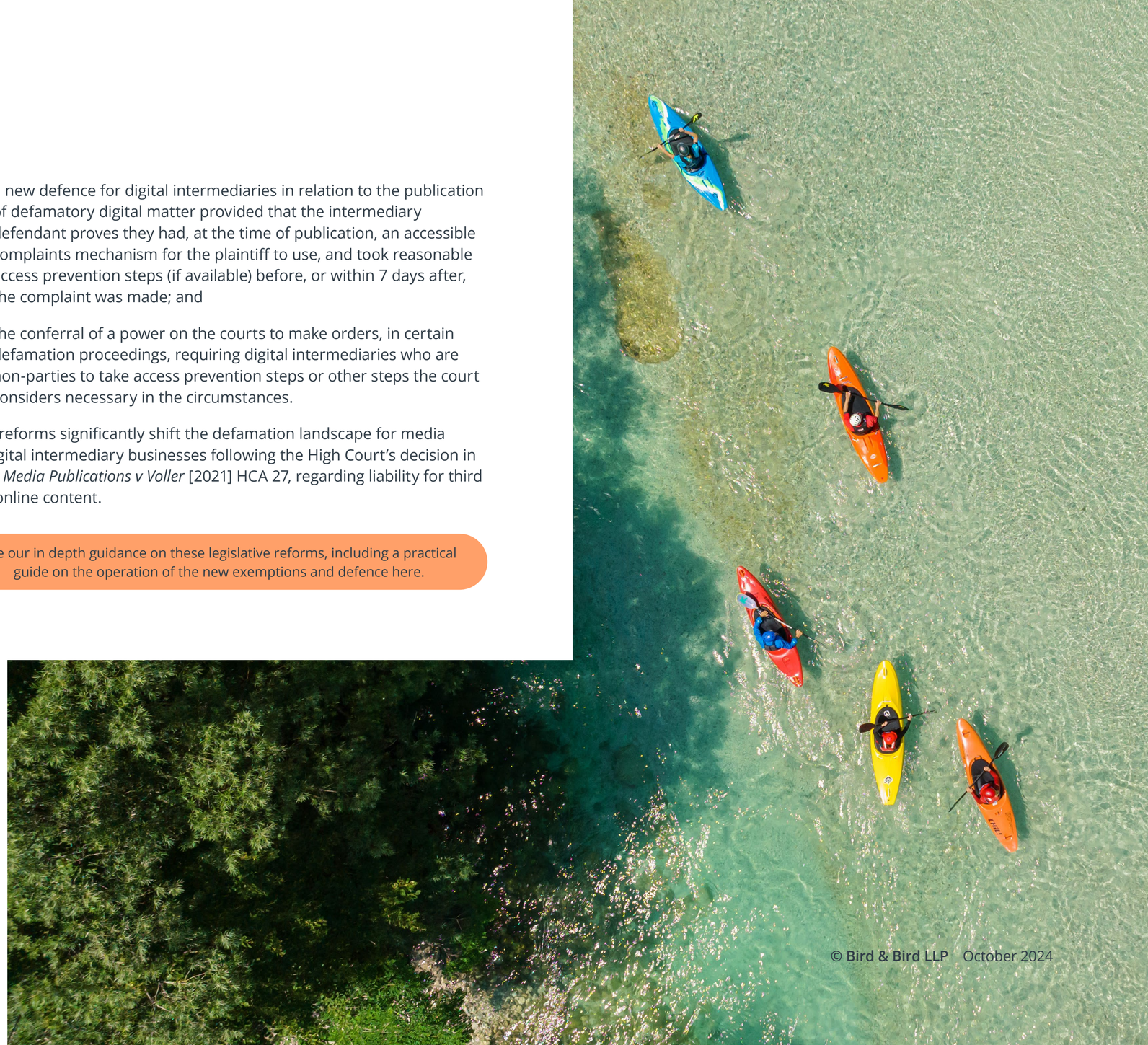
Issue 2: Defamation

On 1 July 2024, reforms to the model defamation provisions came into force including, but not limited to:

1. conditional exemptions from liability for certain digital intermediaries for the publication of third-party defamatory content;
2. a new defence for digital intermediaries in relation to the publication of defamatory digital matter provided that the intermediary defendant proves they had, at the time of publication, an accessible complaints mechanism for the plaintiff to use, and took reasonable access prevention steps (if available) before, or within 7 days after, the complaint was made; and
3. the conferral of a power on the courts to make orders, in certain defamation proceedings, requiring digital intermediaries who are non-parties to take access prevention steps or other steps the court considers necessary in the circumstances.

These reforms significantly shift the defamation landscape for media and digital intermediary businesses following the High Court's decision in *Fairfax Media Publications v Voller* [2021] HCA 27, regarding liability for third party online content.

See our in depth guidance on these legislative reforms, including a practical guide on the operation of the new exemptions and defence here.



Issue 3: Crypto litigation

In 2023, ASIC listed *"misconduct involving high risk products including crypto assets"* as an enforcement priority. ASIC has shown its bite to go with its bark in 2024, pursuing two crypto-related pecuniary penalty proceedings to judgment and now appeal in the Federal Court.

In *Australian Securities Investment Commission v Web3 Ventures Pty Ltd* [2024] FCA 64, ASIC was successful in alleging that one of two crypto products were 'managed investments schemes' subject to corporate regulation. ASIC continues to show its proactive exercise of its regulatory powers, having appealed this decision to seek the imposition of a pecuniary penalty against the Respondent.

In *Australian Securities and Investments Commission v Finder Wallet Pty Ltd* [2024] FCA 228, ASIC was unsuccessful in its allegation that the cryptocurrency product in question was a debenture subject to corporate regulation. However, ASIC has sought appeal of this decision alleging that the Court ought to have found the relevant product was in fact a debenture.

These proceedings demonstrate ASIC's willingness to test the limits of regulatory reach in the crypto space. We recommend businesses operating in the crypto space pay close attention to developments in these proceedings and other enforcement action, to understand the kinds of crypto products and services that are the subject of corporate regulation.

See more on these crypto decision from our subject matter experts here.

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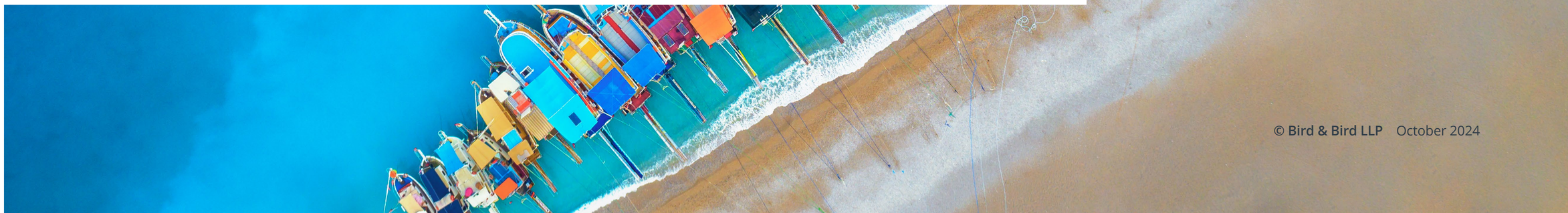

Intellectual Property

Issue 1: EU Artificial Intelligence Act - Australia's next move?

In March 2024, the European Parliament approved the EU Artificial Intelligence (AI) Act. It is the world's first legislation that classifies and regulates AI applications according to potential societal risks, i.e.:

- prohibited or unacceptable risks covering AI applications that deploy manipulative or deceptive techniques or exploits human vulnerabilities (social scoring systems and manipulative AI).
- high risk AU covering systems that pose significant risks to human health, safety, or fundamental rights; and
- general purpose AI which are equipped with human-like cognitive abilities (chatbots and deepfakes).

This Act has far-reaching implications for Australia. Firstly, it applies to all businesses operating in the AI-space in Europe. This includes Australian AI businesses that interact with the European markets. Secondly, while there are no specific law regulating the use of AI in Australia, the EU AI Act potentially sets a global norm. It is likely that Australia may follow suit.

At the moment, the Australian government is reviewing the approach to AI governance and has released the "Safe and Responsible AI in Australia Discussion Paper". A Senate Committee has also been established to inquire into the opportunities and impacts arising out of the uptake of AI technologies in Australia.

As this area is constantly developing, it is important for Australian businesses utilising AI to regularly audit their AI tools for compliance with privacy and security regulations and to review their obligations under the EU AI Act.

Issue 2: The rise of copycats

Imitation is not always the greatest form of flattery. The increasing popularity of "dupe" products – be it cosmetics, apparel or furniture – significantly impacts the intellectual property rights of original brand owners and creators in various ways. These imitation products often toe the line between homage and blatant trade mark, copyright and design right infringement by replicating a well-known brand's get up, product design, logo and/or product name. This practice undermines the reputation of the original brand owner and potentially results in misleading consumers who may believe that they are purchasing goods of the same quality or which have the same characteristics as the original product.

With the rise of dupe brands, there are increasing reports that these companies go through great lengths to ensure that their products fall just short of infringing the intellectual property rights of original brand owners – making it difficult for original brand owners to take enforcement action against the companies that are creating and selling these dupe products. To mitigate these risks, we suggest that original brand owners should consider proactive strategies such as:

- broadening the scope of their trade mark filings to include products names and shape marks such as distinctive packaging;
- filing design applications to protect product designs such as cosmetic packaging with unique applicator features or design features; and
- implementing a market monitoring program that is able to quickly identify new dupe products to allow the original brand owner to take speedy enforcement action against the dupe brand.

Issue 3: Clash between copyright, AI and deepfakes

AI continues to have an increasingly important role for businesses, particularly in quickly generating images and text that would otherwise need to be produced by human authors. The use of AI to produce this content represents a significant opportunity for businesses to achieve cost savings and to quickly capitalise on emerging trends.

However, there is a risk that the use of generative AI (particularly models that can be trained on substantial volumes of copyright works without the rightsholder's consent) could inadvertently reproduce a substantial part of existing copyright materials and expose businesses to the risk of copyright infringement. In addition to copyright law, the use of deepfakes that manipulate digital content (for example, a video that suggests that a celebrity endorses a certain product) could also breach the Australian Consumer Law, or result in defamation claims, where the content misleads consumers or causes reputational harm.

Unlike other jurisdictions, such as the EU, Australian law does not currently recognise an exception to copyright infringement for text and data mining.

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Property

Issue 1: Utilities as a service

Utilities-as-a-Service (**UaaS**) allows companies to manage energy needs and meet sustainability targets. Companies that transition to a service-based model can move from owning and maintaining energy infrastructure to paying for the energy services they consume. UaaS allows companies to reduce capital expenditure and pass on operational risks to an external service provider, who is responsible for the design, construction, and maintenance of the energy systems.

UaaS supports energy efficiency and sustainability efforts, which are critical for businesses aiming to meet environmental, social, and governance (**ESG**) targets. UaaS is appealing for companies seeking to reduce carbon emissions and energy consumption, as the service provider can guarantee access to clean energy sources, such as on-site renewable energy generation, and ensure reliable energy supply.

The advantage of UaaS models include:

- flexibility for companies to align energy consumption with their specific needs;
- tailored service contracts which allow companies to optimise their energy use, implement cost-saving measures, and track performance metrics related to energy savings, emissions reductions, and system availability;
- an alternative to power purchase agreements (**PPAs**) including growing greenwashing concerns relating to PPAs and PPAs ability to address the reduction of on-site utility consumption and carbon emissions;
- encouraging or requiring energy efficiency;
- assisting companies to meet its own or lenders, insurers or customers ESG related requirements;
- long-term contractual arrangements which allow businesses to benefit from consistent service costs, even in times of market volatility and mitigate supply risks;
- maturing global markets with increased solutions including a wider range of technology options, delivery partners, dedicated funding and insurance products; and
- as the demand for UaaS solutions grows, particularly in response to regulatory pressures and corporate sustainability commitments, early adopters are likely to gain a competitive advantage by securing favourable terms and access to limited technology and service capacity.

Bird & Bird can assist clients with all aspects of the UaaS model, from drafting contracts to navigating property and compliance issues. We have helped major corporations implement UaaS solutions for energy recovery, renewable energy generation, and waste-to-energy projects across multiple jurisdictions.

Issue 2: Mandatory Climate Disclosure Regime

Australia will introduce mandatory climate-related financial disclosure reporting requirements from 1 January 2025. The new regime will be phased in over several years across three groups of entities and will bring Australia in line with other jurisdictions, including the EU, UK, New Zealand and Japan.

Under the regime, entities which prepare annual financial reports under Chapter 2M of the Corporations Act 2001 (Cth) and meet the thresholds will be required to submit a ‘sustainability report’ as part of their annual financial reports.

Affected entities that are parties to leases in Australia will need to assess how they will manage data, resources and documentation to meet the reporting requirements. This may involve amending existing template documents and, if necessary, negotiating amendments to existing leases to facilitate access to the required information to ensure an affected entity can meet its reporting requirements.

Although green clauses in leases are currently more the exception than the norm in Australia, their inclusion will be instrumental in ensuring compliance with the reporting requirements.

These green lease clauses should define the parties responsibilities regarding:

- access to data on lease-related emissions to measure emissions;
- reporting standards to ensure affected entities have the necessary information to meet financial reporting requirements;
- the frequency and minimum content of reports from landlords; and
- independent verification of reports through for example third party audits.

Issue 3: Data Centres. Energy Efficiency and AI

Australia's data centre market is rapidly evolving, with Sydney emerging as a leading hub in the APAC region offering a cost-effective alternative to other competing locations in APAC. Sydney is Australia's dominant data centre market with over 65% of the nation's total operation IT capacity and development pipeline. The current operational power capacity of Sydney facilities average 18MW, with data centres under construction averaging 34MW. Recent announcements indicate this will increase further, with expansions bringing capacity to 63MW.

AI's rapid adoption is creating a paradox in energy consumption. While AI offers efficiency and automation, it also demands significant power. AI applications require substantial computing power and storage capacity, driving the need for state-of-the-art data centre infrastructure.

The Australian Federal Government has identified as AI as a critical technology in the national interest and is working to develop and adopt AI regulations and practices. Australia's AI market is anticipated to grow by 28.55% by 2030, driving further expansion in the size and capacity of data centres.

Electricity demand in data centres is mainly from two processes, computing accounting and cooling requirements, to achieve stable processing efficiency, which each account for approximately 40% of electricity demand of a data centre. The remaining 20% comes from other associated IT equipment.

The International Energy Agency predicts that global electricity demand from AI, data centres, and crypto currencies could increase by as much as 75% by 2026, roughly equivalent to adding at least one Sweden or at most one Germany. In Australia, Morgan Stanley expects data centre energy demand to rise from 5% of total national electricity generation to as much as 8-15% by 2030.

To support the Australian Federal Government's net zero goals and improve energy efficiency, the Australian Federal Government is tightening energy efficiency regulations for data centres hosting government departments or agencies. From mid-2025, all data service providers hosting government departments or agencies must achieve a five-star rating from the National Australian Built Environment Rating System (**NABERS**) and use accredited green power from renewable sources.

The Australian Federal Government is considering changes to the existing commercial building disclosure (**CBD**) program, which currently requires commercial office spaces of over 1,000m² to obtain a Building Energy Efficiency Certificate (**BEEC**) before being those spaces are advertised or offered for sale, lease, or sublease.

As part of the ongoing consultation process, the potential expansion of the CBD program, may require data centres to obtain a BEEC and comply with minimum energy performance requirements.

Whether you are a developer, investor, operator, supplier or end-user, you'll benefit from Bird & Bird's unmatched experience of advising a broad range of clients on data centre and smart infrastructure developments.

We'll bring a combination of our construction, real estate, finance and projects expertise and our reputation in the Technology & Communications sector to the lifecycle of your data centre projects.

Given the international nature of the data centre industry, our team works across borders and draws on the knowledge and experience of more than 70 international lawyers across key practices.

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Sport

Issue 1: Proposed changes to the regulation of gambling advertising

In our April edition of Riding The Wave, we raised the possibility of new laws being introduced by the Australian Government to restrict gambling advertising in Australia. This followed the release of a report by the House of Representatives Standing Committee on Social Policy and Legal Affairs (Committee) which recommended 'a phased, comprehensive ban on online gambling advertising' be implemented by 2026.

Since then, the Australian Government has been involved in consultations with a number of stakeholders from the sports and media industry in Australia as it considers its response to the Committee's recommendations. A number of key stakeholders from the industry, including, in particular, sporting codes, major media companies and wagering operators, have been engaged in significant lobbying efforts to persuade the Government not to implement a complete ban on gambling advertising, citing concerns relating to the likely impact of the reforms on their revenue and, in turn, their ability to invest in, and promote, Australian sports. On the other hand, supporters of the Committee's recommendations continue to argue that a complete ban on gambling advertising is the only way to protect those individuals that are experiencing harm from online gambling.

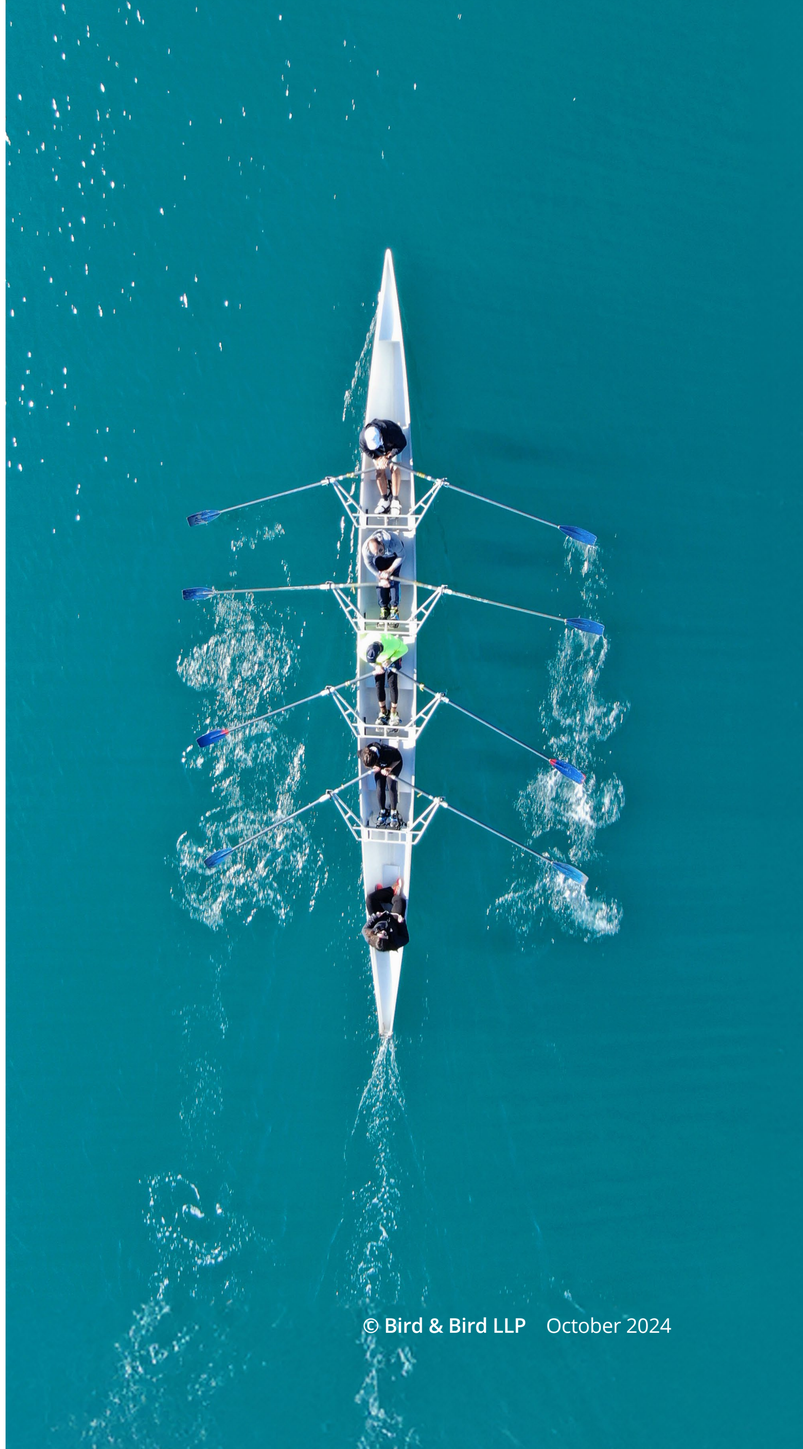
We do not yet know how the Australian Government will respond to the Committee's recommendations, but there are reports that it is considering making changes to gambling advertising laws which fall short of the complete ban on online gambling advertising and which include, for example, limiting gambling advertising to two spots per hour on TV until 10pm, banning gambling advertisements on social media and banning gambling advertisements on TV an hour before, during and after live sporting programs. It has already been 15 months since the Committee published its report, but it looks like we will need to wait longer for the Government's response.

Issue 2: Gender diversity in sport, anti-doping, and safeguarding

In our April edition of Riding The Wave, we also flagged gender diversity and other integrity matters as being key topics in sports law for 2024. We noted that the regulation of transgender and gender diverse athletes in Australian sport, the anti-doping system, and safeguarding were all key issues that currently have the firm attention of Australian sports stakeholders as they look to navigate these important (but challenging) issues.

Recent developments have only reinforced the importance of these issues and the challenges they present to sporting organisations:

- Gender diversity in sport was at the centre of a furore at the 2024 Paris Olympic Games, after questions were raised over the eligibility of two boxers, Imane Khelif of Algeria and Lin Yu-Ting of Taiwan, to complete in the female competition category. The two boxers went on to win gold in their respective events, and their cases highlighted on the world stage the complexity of regulating the participation of gender diverse people in sport, including individuals with differences in sex development (DSD). The cases serve as a timely reminder for sporting organisations in Australia of the need for clear, proportionate, and evidence-based eligibility regulations that appropriately facilitate the participation of gender diverse individuals at all levels of their sport.
- In the lead up to the Olympic Games, a tense public dispute erupted between the US Anti-Doping Agency (USADA) and the World Anti-Doping Agency (WADA), after USADA alleged that positive doping tests had been returned by Chinese athletes in the past and covered up. Whilst an independent report subsequently confirmed that WADA had acted properly in the way it handled the cases, the public debate reinforced the need for sports organisations dealing with integrity matters to consider not only the correct outcome in a case, but also the best approach to public disclosure and messaging.



Finally, July 2024 saw the publication of the Weiss Independent Review, which detailed shocking instances of a police officer utilising his connections in sport to groom and abuse young boys. The Tasmanian government has committed to implementing the recommendations made by Regina Weiss, and the report is essential, if very confronting, reading for any sports organisation when it comes to implementing safeguarding measures for all individuals.

Issue 3: Proposed changes to broadcasting regulation to support free-to-air television providers

On 4 July 2024, the Australian Senate passed the Communications Legislation Amendment (Prominence and Anti-Siphoning) Bill 2024 (Cth) (which we discussed in the April edition of Riding The Wave) and, in doing so, introduced a number of reforms to modernise Australia's broadcast regulatory framework by amending the operation of the anti-siphoning regime and introducing a new prominence framework to enhance the visibility of free-to-air (FTA) services on smart TVs and other connected devices. The two key changes are discussed further below.

1. Modernised Anti-Siphoning Regime

Australia's anti-siphoning regime has been in place since 1994 and has, until now, applied only to subscription television broadcasting licensees (as defined under the Broadcasting Services Act 1992 (Cth)), preventing them from acquiring the broadcast rights to sporting events of national significance included on the anti-siphoning list (a Listed Event) unless a free-to-air (FTA) broadcaster (e.g. ABC) or a commercial TV broadcaster (e.g. Channel 9) had acquired a right to televise the Listed Event. The reforms introduce a new category of entity – 'media content service providers' – that will also be subject to the operation of the regime, capturing subscription streaming services (e.g. Netflix and Amazon Prime Video), dedicated sports streaming services (e.g. Kayo Sport and Optus Sport), broadcasting video on demand (BVOD) services (e.g. 9Now and 7Plus) and digital platforms (e.g. Twitter and YouTube), each of which had traditionally fallen outside of the regime. This change is designed to 'level up' the playing field between subscription television broadcasting licensees and online/digital media service providers.

However, the reforms do not amend the operation of the prohibition in relation to the acquisition of BVOD (or other online) rights by these media content service providers. More specifically, whilst a media content service provider is prevented from acquiring a right to provide coverage of a Listed Event until a FTA broadcaster has acquired a right to **televise** the event, a FTA broadcaster does not need to have acquired a right to provide coverage of the relevant event on a **content service** (such as BVOD) before another party can acquire a right. This means that, once a right to televise a Listed Event has been acquired by a FTA broadcaster, there will be relatively unimpeded access to BVOD (or other online) rights by media content service providers and a FTA broadcaster will not receive any preferential treatment in relation to their acquisition of these BVOD or other online services (i.e. non-broadcasting services). For this reason, some have argued that the reforms do not go far enough in ensuring that these important sporting events will remain accessible to all Australians given that many Australians now consume sports via online streaming services, rather than a televised (i.e. aerial) service.

2. New Prominence Framework

The establishment of a new 'prominence framework' will impose obligations on manufacturers of regulated connected television devices (e.g. smart TVs) to ensure that those devices carry specific services provided by FTA broadcasters (e.g. ABC, SBS, Channel 7, Channel 9 and Channel 10) and their BVOD services (e.g. ABC iView, SBS On Demand, 7 Plus, 9 Now and 10 Play). They will also be required to comply with certain minimum requirements relating to, for example, the display, location or positioning on the device or primary user interface of these FTA linear and/or BVOD services and the updating of such applications that are installed on the device. These requirements will be set out in separate regulations which are yet to be released. Importantly though, the obligations that apply in relation to regulated television devices under the Act only apply to devices that are manufactured on or after the day that is 18 months after the commencement of the Act, so any device that has been previously supplied, or is supplied, to an Australian consumer will not be subject to these requirements in the meantime.

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Restructuring & Insolvency

Issue 1: General uncertainty: The Impacts of inflation, slowing demand, low productivity and geopolitical unrest amid prolonged higher interest rates

The United States Federal Reserve made a significant decision in September to cut its interest rate by half a percentage point. It has also already flagged a preparedness to introduce further cuts on both sides of the election. Federal reserves in other parts of the world, including across the Asia-Pacific region, have also made similar moves. In contrast, the interest rate position in Australia looks like it will buck the trend for at least the short term. The Reserve Bank is grappling with various paradoxical data points. Despite low productivity, slowing demand and inflation numbers which are now trending in the right direction, the Australian economy has a relatively strong labour market. The overall commercial operating context for business is one of general uncertainty, particularly when geopolitical unrest and the associated pressures on the global supply chain and key commodities are considered.

Issue 2: The private credit boom: risk v. reward

The Australian private credit market is estimated to now cover almost $200 billion in capital. For a while now, life has been good for most established private credit funds. In the past six months, however, there has been growing evidence that certain funds are carrying badly performing loans for extended periods and are reluctant to take corrective action. The lack of regulation and transparency in the sector, including in respect of liquidity requirements, adds to the spectre of potential risk for unsuspecting investors who are often based overseas. Investors would be best served undertaking more robust due diligence into funds and negotiating greater control or reporting mechanisms before committing capital. The major banks have also now realised the extent to which they are losing market share and are therefore leading the charge on calls for greater regulation and scrutiny.

Issue 3: Restructuring & Insolvency Law Reform: An Overly Complex System

Last year the Federal Government's Parliamentary Joint Committee on Corporations and Financial Services released its report into corporate insolvency in Australia. The report, which was the first of its kind in over 30 years, ultimately concluded that Australia's corporate insolvency system was far too complex. The report recommended that separate independent reviews be undertaken in respect of corporate and personal insolvency law and in total made 28 recommendations. The Federal Government welcomed the recommendations but has yet to indicate what precise and substantive next steps it will take. Law reform is desperately needed, and it will be interesting to see whether the Federal Government will take any steps before the next election, in the context of the wider economic challenges faced by businesses and individuals alike.

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Competition & Regulatory

Issue 1: Overhaul of Australia's merger clearance regime

On 10 October 2024, the Government introduced the Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024 (**"Bill"**) into the Australian Parliament. The aim of the Bill is to improve efficiency and transparency by adopting a faster, clearer, and streamlined merger control regime in Australia. The reforms are intended to promote competition and respond to concerns around the highly concentrated nature of some Australian markets.

Currently, Australia's existing merger regime allows companies to voluntarily seek informal clearance from the ACCC or apply for formal merger authorisation. If passed, the Bill will introduce a single mandatory and suspensory merger clearance regime, where acquisitions above certain thresholds require ACCC clearance and cannot be completed without clearance being obtained. Penalties will apply for failing to notify, implementing a deal before receiving clearance (often referred to as 'gun jumping'), and providing false or misleading information. These changes would see Australia's merger regime align more closely with those of international jurisdictions such as the US and EU.

The Bill will increase the ACCC's powers to scrutinise mergers and give the Commission significant control over timeframes. However, the ACCC will arguably be subject to greater oversight by the Australian Competition Tribunal, which is likely to see a number of cases brought to the Tribunal in the early years of the regime. The regime is set to come into effect from 1 January 2026.

Issue 2: Digital Platforms and Access Regimes

As the Digital Platforms Services Inquiry winds to a close after five years, it's time to look ahead to what actions will come out of this. While the Digital Platforms Inquiry was world-leading at the time, other jurisdictions (notably the EU) have led the charge on regulating the sector.

The ACCC's recent submission to the National Competition Policy Review is perhaps instructive on the way forward. It recommends clarifying that digital infrastructure is subject to the national access regime under Part IIIA of the Competition and Consumer Act 2010, and that this regime can apply to "any type of significant infrastructure with natural monopoly characteristics". While the ACCC distinguishes between digital infrastructure and digital platforms, it is clear this would have a significant impact on the platforms themselves.

It is likely that the ACCC and Treasury will take a holistic approach looking not only at Part IIIA but also the introduction of service-specific codes for designated digital platforms, as was previously proposed by the ACCC and agreed in principle by the Government, following the ACCC's 5th Interim Report in the Digital Platform Services Inquiry.

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