

2026 HAROLD FORD MEMORIAL LECTURE

“Corporate responsibility and directors’ duties in the era of Artificial Intelligence”

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21 May 2026

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- 1 Dean Foster, Chief Justice Niall, members of the Melbourne Law School, distinguished guests, friends and colleagues. I begin by acknowledging the Wurundjeri people of the Kulin Nation and pay my respects to elders, past and present and all indigenous people present this evening.
- 2 It is a great honour to have been invited to deliver this lecture which rightly commemorates the legendary career and enormous (and national) contribution of the late Professor Harold Ford AM to corporate and commercial law scholarship and regulation. It is also a great personal pleasure to return to the Melbourne University Law School where I taught a post-graduate course in Commercial Conflict of Laws for a number of years in the early 2000s.
- 3 It was 90 years ago that Harold Ford first enrolled at the University of Melbourne as a 16 year old in the Articled Clerk’s course. He became the fifth member of the Law School’s full time academic staff in 1949. He was at the forefront of not only the teaching of company law but also corporate law reform for more than four decades including service on the Manning Committee on Bills of Exchange in 1963-4, the preparation of the National Companies Bill in the mid 1970s, in the late 1970s, chairing the Corporate Affairs/Stock Exchange

¹ The Chief Justice acknowledges the particular assistance of his Research Director, Mr Sebastian Braham and that of his tipstaff, Mr Felix Geake-Ransome in the preparation of this lecture. He also gratefully acknowledges the benefit of detailed comments on an earlier draft of this lecture provided by Professor Rosemary Langford.

working party recommending a central clearing house system which ultimately became CHESSE, and then capping his career by chairing the Companies and Securities Law Review Committee from 1984-1990 which resulted in significant corporate law reform.²

- 4 In the mid-1980s when Professor Ford retired from this Law School and I was an undergraduate at Sydney - and indeed into the 1990s when the Professor finished his term as Chair of the Companies and Securities Law Review Committee - we did not have mobile phones, the internet, laptops or email. There was no AustLII or searchable databases such as casebase. The English Weekly Law Reports were just that, physically produced weekly and sent by airmail to Australian chambers and law libraries. Unreported judgments typically typed in courier font were held in manila folders by Supreme Court and university law libraries. When I started practice in 1995, our chambers had a single shared fax machine and the documents in shipping and insurance cases commonly involved telexes. I recorded my (modest) fees in a spiral bound Ancol notebook. Briefs were in hard copy and did not include the indiscriminate, undifferentiated dumping of every tangentially relevant document that forms part of the modern electronic brief; indeed, the expression “soft copy” was unknown. This period coincided with what has come to be known as the “second AI-winter”,³ a season from which we have well and truly emerged.
- 5 Since that time there has been an information explosion powered by the internet, the development of extraordinary search engines and the emergence of technological behemoths which concentrate enormous power in the hands of a very few individuals in the United States in particular. We live in the concurrent ages of the algorithm and “big data”. For these (and other) reasons,

² This paragraph draws from Professor I Ramsay, “Remembering Professor Harold Ford” (2012) 8 *MLS News*, available at <https://law.unimelb.edu.au/alumni/mls-news/issue-8-october-2012/remembering-professor-harold-ford>.

³ J Armour and H Eidenmüller, “Self-Driving Corporations?” (2020) 10 *Harvard Business Law Review* 87 at 96.

it also feels like we are living on a hinge of history, what some have termed the Fourth Industrial Revolution.⁴

- 6 The public emergence of Gen AI and “large language models” less than three and a half years ago - when ChatGPT was first launched - has seen the world swamped by what might legitimately be described as a technological tsunami. Unlike a tsunami, however, there are no signs of abatement, with the pace of technological change non-linear, apparently unstoppable and ever increasing in its speed and intensity. And Generative AI is just one form of artificial intelligence. The next variation – agentic AI – is already upon us. It has been described as follows:

“Agentic AI is an artificial intelligence system that can accomplish a specific goal with limited supervision. It consists of AI agents—machine learning models that mimic human decision-making to solve problems in real time. In a multiagent system, each agent performs a specific subtask required to reach the goal and their efforts are coordinated through AI orchestration.

Unlike traditional AI models, which operate within predefined constraints and require human intervention, agentic AI exhibits autonomy, goal-driven behavior and adaptability. The term “agentic” refers to these models’ agency, or, their capacity to act independently and purposefully.”⁵

- 7 The impact of artificial intelligence has been ubiquitous; no business or profession is immune.⁶ Moreover, it has correctly been observed that the dominant role of corporations in modern society place them (and, it might be added, their directors and officers) “at the epicentre of AI development and implementation”.⁷ The challenge for company directors is to consider how their company, and indeed they as directors, can maximise the positive features of AI whilst avoiding or minimising AI related risks to the extent possible from both

⁴ See, eg, E Terzon, ‘Is artificial intelligence overhyped or is AI the “fourth industrial revolution”?’ (News Article, *Australian Broadcasting Association*, 22 September 2025), <<https://www.abc.net.au/news/2025-09-22/is-ai-the-fourth-industrial-revolution/105790912>>.

⁵ C Stryker, ‘What is agentic AI?’, *IMB* (Web page) <<https://www.ibm.com/think/topics/agentic-ai>>.

⁶ Australian courts have responded to the challenge with a series of Practice Notes and Guidelines for judges. See, eg, in NSW: *Supreme Court Practice Note SC GEN 23, Use of Generative Artificial Intelligence (Gen AI)*, <https://supremecourt.nsw.gov.au/documents/Practice-and-Procedure/Practice-Notes/general/current/PN_SC_Gen_23.pdf>.

⁷ V Brand, “Directors Duties and AI Regulation” (2024) 33(4) *Griffith Law Review* 324 at 333.

a legal and ethical perspective⁸ with “AI avoidance by boards of directors and C-Suiters” no longer an option.⁹

- 8 Regulatory lag is inevitable because of the rapidity of the rate of change and the complexity of the technology, much of it apparently not even understood by scientific experts or the digital designers behind the technology,¹⁰ something which should be considered deeply alarming. All of this will be magnified still further as agentic AI is refined and the scope for its autonomous operation further developed.
- 9 Another incident of the speed and the rate of change is that scholarship and the insights provided by it may date almost immediately. The Chapter which sparked my interest in the subject of this lecture, for example, that by Professor Patrick O’Malley entitled “Generative AI Systems and Corporate Governance, Compliance and Liability” was written in May 2024 but not published in the *Cambridge Handbook of Generative AI and the Law*¹¹ until August 2025. And it is more than 6 years since Professors Armour and Eidenmüller published their important article “Self-Driving Corporations” in the *Harvard Business Law Review* in which they predicted that “the oversight challenges – and liability risks – at the top of the firm will rise significantly”.¹² There is, unsurprisingly, a growing volume of literature on the topic of AI in corporate governance.¹³

⁸ P O’Malley, “Generative AI Systems and Corporate Governance, Compliance and Liability: Rethinking Director and Officer Roles in Light of a New World of Technological, Legal and Ethical Challenges” ch 21 in M Zou, C Poncibò, M Ebers and R Calo (eds), *The Cambridge Handbook of Generative AI and the Law* (Cambridge, 2025) at 367.

⁹ Ibid at 370. One group of researchers from the MIT Center for Information Systems Research has suggested the best way for boards to manage risk whilst preventing unregulated, “shadow” use of AI is to eschew traditional technology governance and instead adopt “minimum viable governance for generative AI”, which is “the least amount of governance required to manage risk effectively while enabling the organization to sense and seize opportunities”: see N Van Der Muelen et al, *Minimum Viable Governance for Generative AI* (Research Briefing, MIT CISR, 19 March 2026), <https://c isr .mit .edu /publication /2026_0301_GenAIGovernance_VanderMeulenJewerLevallet>.

⁹ See also *Corporations Act 2001* (Cth) s 912A in respect of financial services licensees.

¹⁰ G H Kasap, “Can Artificial Intelligence (“AI”) Replace Human Arbitrators? Technological Concerns and Legal Implications” (2021) (2) *Journal of Dispute Resolution* 209 at 229-39.

¹¹ O’Malley (n 8).

¹² Armour and Eidenmüller (n 3).

¹³ Some notable examples include A Godwin, “A Duty to Use Artificial Intelligence? Learning from the Past and Hedging for the Future” ch 9 in R Langford (ed), *Corporate Law and Governance in the 21st Century* (Federation Press 2023) 174; Brand (n 7); O’Malley (n 8); F Möslein, “Robots in the boardroom: artificial intelligence and corporate law” ch 27 in W Barfield and U Pagallo (eds), *Research Handbook*

- 10 The pace, rate and complexity of change also present an obvious challenge for company directors and senior management trying to keep up with, let alone ahead of, the curve. Normative assumptions as to the role of human beings as company directors and the bringing by each of an *independent* judgment to bear on corporate decision-making are under challenge.
- 11 In that context, I propose to explore the implications of the era of AI on directors' duties and corporate responsibility. Three clarifications must be made at the outset. First, an important distinction is to be drawn between any given company's use of AI in its business operations, on the one hand, and the knowledge and use of Gen AI by the company's directors in the discharge of their duties, on the other hand.¹⁴ The focus of this lecture is principally on the latter although an increasingly important aspect of any director's duty of care, skill and diligence will surely be to be familiar (and perhaps very familiar) with the way in which AI operates and is being used by the company of which they are a director in its day to day operations and the risks and benefits of that use.¹⁵

on the Law of Artificial Intelligence: Current and Future Directions (Edward Elgar, 2025); D F Larker et al, *The Artificially Intelligent Boardroom* (Stanford Graduate School of Business, Corporate Governance Research Initiative, March 2025) <<https://www.gsb.stanford.edu/faculty-research/publications/artificially-intelligent-boardroom>>; Armour and Eidenmüller (n 12); M Petrin, "Corporate Governance" ch 6 in C Kerrigan (ed), *Artificial Intelligence: Law and Regulation* (Edward Elgar, 2nd ed, 2025) at 115; Z Li, "Artificial Fiduciaries" (2024) 81(4) *Wash & Lee Law Review* 1299; E Hickman and M Petrin, "Trustworthy AI and Corporate Governance: The EU's Ethics Guidelines for Trustworthy Artificial Intelligence from a Company Law Perspective" (2021) 22 *European Business Organization Law Review* 593. See also M R Siebecker, "Reconceiving Corporate Rights and Regulation in the AI Era" (2024) 89 *Missouri Law Review* 941; L M Lopucki, "Algorithmic Entities" (2018) 95 *Washington University Law Review* 887; J Zhao, "Artificial Intelligence and Corporate Decisions: Fantasy, Reality or Destiny" 71 *Catholic University Law Review* 663; L Warneke, "Directors in the Loop? Responsible Corporate Governance for the Era of AI" (2024) 15(1) *RFJ* 73; M K Ustahaliloglu, "Artificial Intelligence in Corporate Governance" (2025) 7(1) *Corporate Law & Governance Review* 123; N Locke and H Bird, "Perspectives on the current and imagined role of artificial intelligence and technology in corporate governance practice and regulation" (2020) 35 *Australian Journal of Corporate Law* 4.

¹⁴ In Godwin (n 13), Professor Godwin referred to the distinction between "governance of artificial intelligence" and "governance by artificial intelligence".

¹⁵ If a company is held liable for the misuse of AI, for example, in relation to a breach of privacy or copyright, such liability may extend to directors. In this regard, it should be recalled that the test for whether a director has breached their duty under s 180(1) of the *Corporations Act* is based on the degree of care and diligence that a reasonable person would exercise if they were a director or officer of a company *in the company's circumstances*. Those "circumstances" include "any breach or potential breach of law by the corporation": *Cassimatis v Australian Securities and Investments Commission* (2020) 376 ALR 261; 144 ACSR 107; [2020] FCAFC 52 at [456] (Thawley J).

- 12 Second, a distinction should be drawn between the use of private, internally developed AI programs and publicly available ones, the former referring to bespoke platforms built and curated for particular companies with tight control over data sets, algorithmic behaviour and security settings, the latter referring to externally hosted programs such as Chat-GPT or Google Gemini which may carry greater risks in terms of the quality and integrity of underlying data and security.
- 13 Third, “AI usage” is a very broad term which at its most basic includes referring to an AI summary automatically produced by a google search. The focus of this lecture, however, is on more frontier usages of AI either to assist directors and officers with their decision-making function, or as a recording device in the board room itself. So understood, AI is reportedly being used by board directors and officers in a host of ways including researching or benchmarking peer practices, evaluating company performance metrics, enhancing governance processes (e.g. meeting preparation and agenda setting and information management), assessing risk compliance,¹⁶ decision making with respect to investment, personnel selection, procurement, production planning and control, pricing, sales and marketing and pressure testing corporate strategy (e.g. scenario modelling),¹⁷ as well as the integration of AI technology within board portals.¹⁸ This is no doubt an incomplete account.
- 14 A March 2025 survey conducted by the UK-based *Institute of Directors*¹⁹ revealed that 62.5% of business leaders use AI in some capacity in their work, with roughly half of that number qualifying such use as only “sometimes”.²⁰ Interestingly, 25% of those surveyed described the “biggest barriers or concerns regarding AI adoption in [their] organisation as ‘Lack of an internal AI

¹⁶ Locke and Bird (n 13) at 11-15.

¹⁷ Australian Institute of Company Directors, *AI Use by Directors and Boards: Early Insights* (Report, November 2025) at 13, <<https://www.aicd.com.au/content/dam/aicd/pdf/tools-resources/director-resources/ai-use-by-directors-and-boards.pdf>>; Armour and Eidenmüller (n 3) at 96-97.

¹⁸ Locke and Bird (n 13) at 9-10.

¹⁹ The full results from the survey may be accessed at this link: <https://www.iod.com/news/science-innovation-and-tech/major-blockers-to-ai-adoption-in-british-business/>. See also the Business Paper summarising the results: Institute of Directors, *Policy Voice: Full Survey Results – March 2025* (Report, May 2025), <<https://www.iod.com/app/uploads/2025/05/Policy-Voice-full-results-March-2025-ceb090a3dab976f0e623e188e03866a3.pdf>>.

²⁰ *Ibid* at 13.

policy, strategy or data governance framework”. A similar survey, this time of 638 directors conducted last year by PWC in the United States recorded that 35% of directors’ boards have incorporated AI or Gen AI into their oversight roles, over one-third (38%) of directors believe their boards do not receive sufficient education on AI developments, and nearly half (43%) say that their top concern in relation to AI is keeping up with the pace of change.²¹ There has been similar wide scale adoption of AI in Australian public companies and by their boards.

15 Notwithstanding rapid adoption of AI by Australian company directors in their work, the regulatory lag to which I have referred is also reflected in the lag in the adoption of reference to AI and how it is being used in the publicly available governance documents of many leading Australian public companies.²² Where reference is made to AI in, for example, companies’ Annual Reports or Corporate Governance Statements, it is often of a very general and generic kind.²³ A desktop survey of the public reporting of the top 21 Australian public companies by capitalisation undertaken for the purposes of this lecture discloses that, as at late April 2026:

- reporting on AI or AI governance is not yet a standardised element of the reporting of major Australian corporations;

²¹ PricewaterhouseCoopers, *2025 Annual Corporate Directors Survey: Driving a Culture of Accountability in the Boardroom* (Report, 2025) at 20, <<https://www.pwc.com/us/en/services/governance-insights-center/library/assets/pwc-2025-annual-corporate-directors-survey.pdf>>. See also E Pereira, A W Graylin and E Brynjolfsson, *The Enterprise AI Playbook* (Stanford Digital Economy Lab, April 2026), <https://digitaleconomy.stanford.edu/app/uploads/2026/03/EnterpriseAIPlaybook_PereiraGraylinBrynjolfsson.pdf>.

²² For example, based on research undertaken by my research assistants, as at 20 April 2026, the following top 21 ASX-listed companies (measured by market cap) made no reference to the use of Gen AI in their publicly available board charters: Commonwealth Bank, BHP Group, Westpac Banking Corp, NAB, ANZ Bank, Macquarie Group Limited, Westfarmers, CSL, Fortescue, Goodman Group, Woodside Energy, Telstra Group, Woolworths Group, Transurban, Northern Star, QBE Insurance, Coles Group, Brambles, Aristocrat, Evolution Mining and Atlassian.

²³ For example, Woolworths Group states in their 2025 Annual Report: “We leverage data, technology and artificial intelligence to materially enhance our decision making and optimise our operations.” Westpac Banking Corp’s 2025 Annual Report mentions the existence of an “AI Risk Management Statement”, and a “Responsible AI Playbook”, without expanding on their contents. It also hyperlinks to a webpage containing eight “Responsible AI Principles”.

- those companies which do have a publicly available AI governance framework/policy tend to disclose it either as a standalone report²⁴ or within existing policies and guidelines, including third third-party risk assessments, security guidelines, or in the company's Code of Conduct;²⁵
- numerous companies record in their Annual Reports or Corporate Governance Statements that their directors were trained in AI use, "responsible AI", or agentic AI through various presentations throughout FY2025;
- many companies report having internal "AI Governance" or "responsible AI" policies which are not publicly available, and may only be accessed within an internal database by employees and customers;²⁶
- some companies merely state that they are committed to responsible AI without providing any detail about what that means. An associated trend is for companies to state in their annual reports that they are committed to certain external guidelines or regulations.²⁷

16 The apparent reticence of publicly listed companies to provide detailed *public* reporting on AI usage or governance may (at least in part) be explained by concerns to avoid liability arising out of continuous disclosure requirements and or misleading or deceptive conduct claims²⁸ and may also be explained by the fact that AI is dealt with under the rubric of existing disclosed risk management frameworks. In any event, the generality with which statements of corporate governance in relation to AI are expressed has been the subject of commentary

²⁴ For example, on 5 February 2025, Commonwealth Bank published a report entitled "Our Approach to Adopting AI Report". Commonwealth Bank is reported as being the first Australian bank to release such a report outlining how it is ideating, developing, deploying and managing Artificial Intelligence at an organisational level with a focus on responsible practices. Similarly, in October 2025, Atlassian published a public responsible AI governance framework entitled "Atlassian's "No BS Guide to Responsible AI Governance".

²⁵ For example, Coles Group's "Code of Conduct" contains a section on "Responsible Use of Artificial Intelligence ('AI') systems". Brambles has a similar section in their Code of Conduct.

²⁶ See, eg, Telstra's "Responsible AI Policy", Coles Group's "Responsible AI Policy", CSL's "Governance Framework", Woolworths' "Responsible AI Do's and Don'ts".

²⁷ For example, Fortescue's 2025 Annual Report mentions the existence of "an artificial intelligence (AI) governance framework aligned with international standards such as the NIST AI RMF, GDPR and ISO 42001", and Brambles reports that it has "A cross functional AI and Gen AI Centre of Excellence in place to enable responsible and risk informed use of AI and Gen AI and to comply with relevant legislation and regulation such as the European Union Artificial Intelligence Act."

²⁸ This includes a rise in securities class action lawsuits alleging that defendants made false or misleading statements related to artificial intelligence disclosures, including alleged exaggeration of AI capabilities, AI-driven revenue, or third-party validation of AI technologies: see M Walker and E Peplow, "AI-related securities class action filings are on the rise: Key Observations" (DLA Piper, Web Page, 15 September 2025), <<https://www.dlapiper.com/en-au/insights/publications/2025/09/ai-related-securities-class-action-filings-are-on-the-rise-key-observations>>.

on the issue by ASIC and APRA. In October 2024, ASIC released Report 798 “*Beware the gap: Governance arrangements in the face of AI innovation*” which confirmed a governance gap between Australian companies’ use of AI technology and their governance policies regulating such use. That Report provided the following advice in the context of director use of AI:²⁹

“Company directors and officers must discharge their duties with a reasonable degree of care and diligence. These duties extend to the adoption, deployment and use of AI. Directors and officers should be aware of the use of AI within their companies, the extent to which they rely on AI-generated information to discharge their duties and the reasonably foreseeable associated risks.”

17 In March 2026, the ASIC Chair spoke about “the risks and opportunities of AI” in the context of its use by directors and observed that:³⁰

“AI represents one of the most momentous and significant areas of change in today’s world. Like any tool, of course, it can be used well or badly. And the opportunities it presents for directors are undeniable... This is a risk that every director needs to get on top of, and you won’t do so by sticking your heads in the proverbial sand. That means every director should embrace AI, to understand its risks and benefits with both eyes open, and to harness its potential for community and customer benefit. And it means that every board needs to have a conversation about AI use and determine their risk appetite and policies rather than turning a blind eye to the issue and hoping it all sorts itself out.”

18 In May of this year, ASIC issued a letter to industry calling for “urgent cyber uplift as AI accelerates cyber threats.” In that letter it was observed that:

“The rapid evolution of frontier artificial intelligence models marks a significant shift in the cyber threat landscape. These models are accelerating both capability and accessibility, lowering the barrier to sophisticated cyber activity,

²⁹ Australian Securities and Investments Commission, *Report 798: Beware the gap: Governance Arrangements in the face of AI innovation* (Report No 798, 29 October 2024), <<https://download.asic.gov.au/media/mtllqjo0/rep-798-published-29-october-2024.pdf>>. See also Australian Securities and Investments Commission, *Artificial Intelligence Transparency Statement* (Web Page, updated 27 February 2026), <<https://www.asic.gov.au/about-asic/what-we-do/how-we-operate/accountability-and-reporting/artificial-intelligence-transparency-statement/>>. Further, in January of this year, in its “Key Issues Outlook for 2026”, ASIC noted that “rapid advances in AI are transforming financial services—and fuelling a surge in AI-powered cybercrime that is testing the resilience of companies and undermining public trust in AI-driven decisions”: Australian Securities and Investments Commission, ‘Key Issues Outlook 2026’ (Web Page, 27 January 2026), <<https://www.asic.gov.au/about-asic/news-centre/news-items/key-issues-outlook-2026/>>.

³⁰ J Longo, ‘It’s Tough Being a Director (But That Doesn’t Mean You Shouldn’t Do It)’ (Keynote Address, Australian Institute of Company Directors Australian Governance Summit, Sydney, 10 March 2026), <<https://www.asic.gov.au/about-asic/news-centre/speeches/it-s-tough-being-a-director-but-that-doesn-t-mean-you-shouldn-t-do-it/>>.

increasing the speed and scale of attacks, and enabling new forms of exploitation that were previously out of reach for most actors...

ASIC's message is straightforward: do not wait for perfect clarity to address the threat posed by new AI models. Instead, act now, and act with discipline, to strengthen the cyber resilience fundamentals that underpin your business."

- 19 That letter was issued shortly after APRA released its "Letter to Industry on Artificial Intelligence" in which it was observed that "AI adoption is moving fast, but governance maturity is lagging" and "many boards are still developing the technical literacy required to provide effective challenge on AI related risks and oversight."³¹ Particular issues may arise where a company either does not have or is still developing a secure proprietary AI resource but where its directors resort to publicly available AI tools in the discharge of their directorial responsibilities.
- 20 In its 2025-2026 *Corporate Plan*, ASIC signalled the taking of enforcement action in relation, inter alia, to the "poor use of AI".³²

³¹ Australian Prudential Regulation Authority, *APRA Letter to Industry on Artificial Intelligence (AI)* (Web Page, 30 April 2026), <<http://apra.gov.au/apra-letter-to-industry-on-artificial-intelligence-ai>>.

³² Australian Securities and Investments Commission, *Corporate Plan 2025–26* (Corporate Plan, 27 August 2025) at 19, <<https://download.asic.gov.au/media/xbtjrb4m/asic-corporate-plan-2025-26-published-27-august-2025.pdf>>. To the regulatory guidance by ASIC and APRA may be added the Australian Government's mix of mandatory and voluntary measures regulating the use of AI. In 2019, the Government adopted voluntary AI Ethics Principles to assist companies' development of responsible AI practices. Those Principles are as follows:

- (1) Human, societal and environmental wellbeing: AI systems should benefit individuals, society and the environment.
- (2) Human-centred values: AI systems should respect human rights, diversity, and the autonomy of individuals.
- (3) Fairness: AI systems should be inclusive and accessible, and should not involve or result in unfair discrimination against individuals, communities or groups.
- (4) Privacy protection and security: AI systems should respect and uphold privacy rights and data protection, and ensure the security of data.
- (5) Reliability and safety: AI systems should reliably operate in accordance with their intended purpose.
- (6) Transparency and explainability: There should be transparency and responsible disclosure so people can understand when they are being significantly impacted by AI, and can find out when an AI system is engaging with them.
- (7) Contestability: When an AI system significantly impacts a person, community, group or environment, there should be a timely process to allow people to challenge the use or outcomes of the AI system.

21 At Commonwealth Government level, there has reportedly been a shift in the attitude of the Australian Government from an approach which originally contemplated the articulation of a series of specific “guardrails” to what is referred to as a “technology-neutral” mode of regulation.³³ Beyond the jargon in the Commonwealth Government’s National AI Plan³⁴ published on 2 December 2025, the Government has indicated that reliance will be placed upon “strong existing, largely technology-neutral legal frameworks, including sector-specific guidance and standards, that can apply to AI and other emerging technologies.”³⁵ This approach is arguably consistent with Professor Julia Black’s description of Principles Based Regulation (PBR) to which Professor Vivienne Brand has drawn attention in the context of AI.³⁶ As Professor Black explains, principles based regulation (of the kind, I interpolate, is reflected in the general and relatively high level language of key provisions of our Corporations Act relating to core directors’ duties) may provide flexibility for firms, facilitate innovation and thus enhance competitiveness whilst, for regulators, it may also provide flexibility, facilitate regulatory innovation and enable a regulatory regime to have some durability in a rapidly changing market environment.³⁷ As Professor Brand perceptively comments, “higher order

(8) Accountability: People responsible for the different phases of the AI system lifecycle should be identifiable and accountable for the outcomes of the AI.

³³ J Evans, ‘Artificial Intelligence to Be Managed through Existing Laws under National AI Plan’ (Online News Article, *ABC News*, 2 December 2025), <<https://www.abc.net.au/news/2025-12-02/national-artificial-intelligence-plan-growth-existing-laws/106086474>>.

³⁴ Australian Government, *National AI Plan* (Report, Department of Industry, Science and Resources, 2 December 2025), <<https://www.industry.gov.au/sites/default/files/2025-12/national-ai-plan.pdf>>.

³⁵ *Ibid* at 28. The Plan also states at 28:

“The government’s regulatory approach to AI will continue to build on Australia’s robust existing legal and regulatory frameworks, ensuring that established laws remain the foundation for addressing and mitigating AI-related risks. These frameworks are actively enforced and continuously adapted to emerging risks. Agencies and regulators will retain responsibility for identifying, assessing, and addressing potential AI-related harms within their respective policy and regulatory domains.

....

By applying fit-for-purpose legislation, strengthening oversight and addressing national security, privacy and copyright concerns, we will work to keep the operation of AI systems responsible, accountable, and fair. This gives businesses confidence to adopt AI responsibly while safeguarding people’s rights and protecting them from harm.”

³⁶ Brand (n 7) at 330.

³⁷ J Black, “Forms and Paradoxes of Principles-Based Regulation” (2008) 3(4) *Capital Markets Law Journal* 425 and 428.

principles are more capable of adapting and allowing for evolution of regulatory problems than more specific, mandated rules”.³⁸

- 22 Beyond the Corporations Act, an example of an existing regulatory standard which may be applied to AI is APRA’s Prudential Standard CPS 230 on Operational Risk Management issued in July 2025.³⁹ That Standard does not mention artificial intelligence but the onerous obligations it imposes on directors of APRA regulated entities will surely assume added complexity for boards and directors occasioned by the adoption of AI by those entities.⁴⁰ Other areas where “technology neutral” obligations will be engaged by a company’s adoption of AI include the areas of privacy,⁴¹ consumer protection, intellectual property, cyber security,⁴² anti-discrimination, work, health and safety, and even human rights guidelines.⁴³
- 23 The ASX is currently⁴⁴ in the course of revising its Corporate Governance Principles, last issued in 2019, and established an Advisory Group on Corporate Governance under the Chairmanship of Dr Phillip Lowe in January of this year to do so. One might hope that AI will be covered in those revised principles.⁴⁵ Also in January of this year, the Australian Council of

³⁸ Brand (n 7) at 331.

³⁹ Australian Prudential Regulation Authority, *Prudential Standard CPS 230 Operational Risk Management* (July 2023), <<https://www.apra.gov.au/sites/default/files/2023-07/Prudential%20Standard%20CPS%20230%20Operational%20Risk%20Management%20-%20clean.pdf>>.

⁴⁰ See also *Corporations Act* 2001 (Cth) s 912A in respect of financial services licensees.

⁴¹ See the *Privacy Act 1998* (Cth). See also Office of the Australian Information Commissioner, *Guidance on Privacy and the Use of Commercially Available AI Products* (Guidance, updated 17 January 2025) <<https://www.oaic.gov.au/privacy/privacy-guidance-for-organisations-and-government-agencies/guidance-on-privacy-and-the-use-of-commercially-available-ai-products>>.

⁴² See *Security of Critical Infrastructure Act 2018* (Cth); *Cyber Security Act 2024* (Cth); *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth); *My Health Records Act 2012* (Cth); *Healthcare Identifiers Act 2010* (Cth); APRA Prudential Standard CPS 234 Information Security; APRA Prudential Standard CPS 230 Operational Risk Management.

⁴³ United Nations Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (Report of the Special Representative of the Secretary-General, John Ruggie, UN Doc A/HRC/17/31, 21 March 2011), <<https://www.ohchr.org/en/instruments-mechanisms/instruments/guiding-principles-business-and-human-rights>>.

⁴⁴ As at May 2026.

⁴⁵ Although the two communiqués released by the Advisory Group have not yet made any mention of AI. The Advisory Group is set to meet again later in May 2026.

Superannuation Investors issued the 12th edition of its Governance Guidelines which include the following statement:⁴⁶

“ACSI expects boards to...

establish relevant policies, and processes to guide the companies’ use of AI and manage its cybersecurity threats. These should reflect the sensitivity of the data it collects, uses and/or stores. Where appropriate, this may include publicly adopting the Australian AI Ethics Principles or an equivalent and establishing processes to respond to a cyber security threat.

...

consider instituting policies and principles to manage potential workforce dislocation driven by AI, including taking a long-term view of the risks and opportunities of such changes, and support a culture of responsible AI practices, data governance and cybersecurity. This should include establishing appropriate guardrails, training, upskilling, and redeployment programs for the workforce, as well as mechanisms to understand workforce perspectives on opportunities and risks associated with AI.”

- 24 Perhaps the most useful guidance as to the use of AI by Australian directors has been provided by the Australian Institute of Company Directors (the AICD) in a series of reports/guidance notes which are referred to in more detail below.
- 25 One of the aims of this lecture is to seek to raise questions about AI, corporate governance and directors’ duties in the context of our existing legal framework. AI creates great excitement as to the benefits and efficiencies which it offers, and this excitement is fanned by those companies who are in a commercial arms race to sell their wares to a market which is desperate not to “miss the boat”, as it were, as competitors are all seemingly turning to AI. The rush to early adoption is entirely understandable but it is not without risk and, amidst all the hype or what one commentator has referred to as “AI dazzle”,⁴⁷ sight should not be lost of the Robodebt fiasco in Australia⁴⁸ and the Post Office

⁴⁶ Australian Council of Superannuation Investors, *ACSI Governance Guidelines* (12th ed, January 2026) 33, <<https://acsi.org.au/wp-content/uploads/2026/01/ACSI-Governance-Guidelines-January-2026.pdf>>.

⁴⁷ D Ahern, “Corporate Law, Corporate Governance and AI: Are we Ready for Robots in the Boardroom?” ch 18 in E Lim and P Morgan, *The Cambridge Handbook of Private Law and Artificial Intelligence* (Cambridge University Press, 2024) at 428.

⁴⁸ Royal Commission into the Robodebt Scheme, *Final Report* (Commonwealth of Australia, July 2023), <<https://robodebt.royalcommission.gov.au/system/files/2023-09/rrc-accessible-full-report.PDF>>.

Horizon scandal in the United Kingdom⁴⁹ which stand as potent and salutary reminders of the risks of over-enthusiastic and uncritical adoption of automated decision making.

26 In terms of risk, some of the potential weaknesses in Gen AI that have informed my own relatively conservative approach to the use of it adjacent to court proceedings in New South Wales⁵⁰ apply equally to the use of Gen AI by companies and their directors. These include:

- the quality, integrity and currency of the underlying “training” data and the phenomenon colloquially referred to as “rubbish in, rubbish out”;
- embedded biases in algorithms;
- algorithmic failure;⁵¹
- large issues of confidentiality, privacy and data protection;
- cyber-security risks;
- the still unsolved but very serious issue of “hallucinations”, a recent example of which resulted in profound embarrassment for Sullivan & Cromwell, one of the world’s largest firms presumably using top shelf Gen AI technology;⁵²
- the apparent confidence of Gen AI responses and the equanimity with which such confident responses may be immediately changed, withdrawn or substantially qualified when challenged;⁵³

⁴⁹ Post Office Horizon IT Inquiry (Chaired by Sir Wyn Williams), *Report: Vol 1* (BBC News, *Post Office Horizon Scandal: Why hundreds were wrongly prosecuted* (News Report, 10 October 2025), <<https://www.bbc.com/news/articles/c1wpp4w14pqq>>.

⁵⁰ *Supreme Court Practice Note SC GEN 23, Use of Generative Artificial Intelligence (Gen AI)*, available at <https://supremecourt.nsw.gov.au/documents/Practice-and-Procedure/Practice-Notes/general/current/PN_SC_Gen_23.pdf>.

⁵¹ Armour and Eidenmüller (n 3) at 92.

⁵² M Sweney, ‘AI Hallucinations Found in High-Profile Wall Street Law Firm Filing’ (Online News Article, *The Guardian*, 22 April 2026), <<https://www.theguardian.com/technology/2026/apr/22/ai-hallucinations-found-in-high-profile-wall-street-law-firm-filing>>.

⁵³ See the examples in The Hon A S Bell, ‘Change at the Bar and the Great Challenge of Gen AI’ (Address to the Australian Bar Association, 29 August 2025) at [53]-[82]. It has been said that “The impression of a conscious mind is created when programmers take the LLM and coat it in a kind of conversational costume. They steer the model to adopt the persona of a helpful assistant that responds to users’ questions”: <<https://theconversation.com/is-richard-dawkins-right-about-claude-no-but-its-not-surprising-ai-chatbots-feel-conscious-to-us-282151>>.

- the twin phenomena of AI sycophancy⁵⁴ and seduction coupled with “dashboard myopia”;⁵⁵
- users’ ignorance of the algorithmic underpinnings of the platform being used and the related problem of the blackbox, that is the lack of transparency as to how answers are generated and the “reasoning” processes deployed.

27 Many of these risks came home to an enthusiastic early adopter of AI in the case of *Fortis Advisors, LLC v. Krafton, Inc*⁵⁶ in the Delaware Court of Chancery where a CEO’s execution of a Chat-GPT-generated corporate strategy went awry. The case related to an earnout payment agreement of \$250 million in connection with an acquisition by the South Korean video game publisher Krafton of the independent studio Unknown Worlds Entertainment, known for the hit game *Subnautica*. As Unknown Worlds prepared to release its hotly anticipated sequel, *Subnautica 2*, and internal projections indicated the new title would generate significant revenue sufficient to “easily trigger the [\$250 million] earnout”, the parties’ relationship fractured.⁵⁷ The CEO of Krafton decided the EPA was a “bad deal” and sought advice from Krafton’s legal team on how to get out of it; they cautioned that terminating key employees for cause would not determine the earnout obligation and would expose Krafton to “lawsuit and reputation risk”. So instead, the CEO turned to Chat-GPT, which ultimately guided him through a course of conduct which included, according to the Court, breaching the EPA by terminating the key employees without valid cause and by improperly seizing operational control of Unknown Worlds. He followed almost all Chat-GPT’s recommendations, and later deleted the chat logs. The AI-generated outputs were not privileged, and were ultimately used as evidence against him at trial.

28 Although the case was not brought as a breach of directors’ duties case, it has been observed that the case “colourfully highlights risks attendant to following

⁵⁴ See M Cheng, C Lee, P Khadpe, S Yu, D Han and D Jurafsky, “Sycophantic AI decreases prosocial intentions and promotes dependence” (2026) 391 (6792) *Science*.

⁵⁵ Armour and Eidenmüller (n 3) at 101.

⁵⁶ 2025-0805-LWW.

⁵⁷ Ibid at 1.

a generative AI strategy without adequate legal oversight. Such a course may be particularly damaging when directors and officers are required to act in good faith and exercise business judgment. . . *This episode may also serve to illustrate the well-documented tendency of AI models toward excessive agreeableness or sycophancy, affirming user beliefs and preferences far more readily than human beings.*"⁵⁸

29 At a larger level, exaggerated claims *by companies* as to the advantages, capabilities and benefits which AI has brought to their products or business, sometimes referred to as "AI washing", has already spawned a reported 51 AI-related securities class actions filed in the last five years in the United States.⁵⁹

30 In this brave new world, questions relating to the implications of the emergence of Gen (and other) AI for corporate governance and directors' duties and responsibility must be addressed on the assumption (which can confidently be made) that the vast majority of companies of any substance have already moved or are rapidly moving to the extensive use of AI in their business operations.⁶⁰

31 Such questions may include:

- Do existing statutory and common law directors' duties impose a duty on directors to use artificial intelligence in the discharge of their various obligations?⁶¹

⁵⁸ Alan Friedman et al, 'Delaware Court of Chancery Reinstates Seller CEO and Extends Earnout Payment Window, as Buyer's ChatGPT Strategy Fails' (Insight, Herbert Smith Freehills Kramer, 8 April 2026), <<https://www.hsfkramer.com/insights/2026-04/delaware-court-of-chancery-reinstates-seller-ceo-and-extends-earnout-payment-window-as-buyers-chatgpt-strategy-fails>>.

⁵⁹ P M Weiner, 'Inflated AI Claims Are under Fire — and the Regulatory Reckoning Is Coming' (*Fortune*, 23 April 2026), <<https://fortune.com/2026/04/23/ai-washing-securities-litigation-regulatory-era-baker-mckenzie/>>.

⁶⁰ See the observations of Justice Lee in *ASIC v Bekier (Liability Judgment)* [2026] FCA 196 at [391]: "Although it appears current use remains uneven, it would be jejune to deny that many individual directors are using AI informally to prepare for meetings. This is despite collective, board-endorsed use of AI being far from entrenched due, among other things, to confidentiality and legal concerns."

⁶¹ A question which was addressed and, broadly speaking, answered in the affirmative by Dr Andrew Godwin in his contribution to a *festschrift* for Professor Ian Ramsay AO in 2023. See Godwin (n 13).

- What level of knowledge and expertise must a director have in respect of AI platforms used by the company and the board in the business, including the specific risks of such platforms?
- If a director only has a basic or rudimentary level of knowledge, will this amount to a want of due diligence for the purposes of s 180 of the Corporations Act?
- Should AI-literacy or competency be a criterion of a board's skill matrix?
- What level of investment is required by a board in order for its directors to become AI-literate?
- What is or should the *extent* of use of AI by a director be in the discharge of his or her obligations?
- What implications does such use have for a director's individual responsibility to bring his or her *independent* mind to the discharge of statutory and common law obligations?
- At what stage in the governance process is AI best suited to be deployed?
- Will the use of AI in the board room erode the dynamism of board room debate and promote groupthink?
- If the board uses AI in real time in its deliberations, what "paper trail" should be created in terms, for example, of the prompt history leading to the recommendation or "advice"?
- Will directors' access to and use of AI encourage management to provide lengthier board papers and information dumps, and, relatedly, should it?
- Is AI better used by management in preparing board papers, or by individual directors to summarise them? In terms of the former, should the board put in place AI policies or frameworks for management to operate within?

- In relation to papers prepared by management, to what extent should the board insist on knowing the nature and extent of use of AI by management in the preparation of such reports?
- What is the scope for delegation of tasks by directors to AI and to what extent must there remain a “human in the loop”?
- If there is such delegation, what protection (if any) will s 190(2) of the Corporations Act afford?
- And relatedly, how will the emergence of agentic AI, and its increased sophistication, affect that calculation?
- To what extent may directors *rely* on AI in making board decisions on topics such as market disclosure under ASX Listing Rule 3.1?
- Would the use of an AI program be a defence to a challenge by ASIC or in a securities class action to non-disclosure of material information?
- Can directors ask AI whether a strategic decision is in the best interests of the company?
- If so, must they first be familiar with the size and nature of the AI platform’s dataset⁶² and the relevant algorithmic goal function germane to this question, namely how the “best interests of the company” are to be assessed i.e. by reference solely to shareholder return or by reference to broader considerations such as ESG criteria?⁶³
- Would such reliance fall within the deemed reasonable reliance provision in s 189 of the Corporations Act?⁶⁴

⁶² Armour and Eidenmüller (n 3) at 98-100.

⁶³ Ibid at 101, 109. See schedule 4 of the *Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Act 2024*, which amended the *Australian Securities and Investments Commission Act 2001* (Cth) and the *Corporations Act (2001)* (Cth) to introduce mandatory climate-related financial disclosures for all entities required to issue financial reports under Part 2M of the *Corporations Act 2001* (Cth). In what is a phased approach, very large companies (roughly equivalent to the ASX 200 and their private equivalents) were, from 1 Jan 2025, required to disclose their climate-related risks and opportunities in a mandated “Sustainability Report” as a part of the Annual Report. Mid-sized entities will be phased in from 1 July 2026 and smaller entities from 1 July 2027. Entities are required to disclose in line with the AASB S2 (the Australian version of the ISSB’s IFRS S2).

⁶⁴ See further at [54]-[66] below.

- Should boards be forming AI committees in the same way they have audit committees, remuneration and other sub-committees?
- Should public companies disclose their mode(s) of use of Gen AI in board charters, published policies, corporate governance statements and annual reports as a matter of law or good practice?
- Can an AI program in fact be a director or an officer of a corporation?⁶⁵
- Can an incorporated AI provider be accessorially liable for involvement in a contravention of a director's duty?⁶⁶
- If an AI program cannot be a director, can it or should it be treated as a shadow director or a de facto director⁶⁷ and, if so, who could be liable for its acts or omissions?⁶⁸
- Will there be a time where AI *replaces* humans on boards and, if so, how will the liability framework currently based upon the personal responsibility of human directors be altered?⁶⁹
- Could we see the emergence of "AI-specific directors' duties?"⁷⁰

32 In the context of the use of AI to record or transcribe meetings and create minutes, the following questions may arise:

- What confidentiality concerns (and risks) might arise from third party vendors having records of sensitive boardroom discussions?

⁶⁵ A phenomenon that has been flirted with on numerous occasions already: see further at [39]-[46] below.

⁶⁶ See, eg, ss 79, 181(2), 1317E(4) of the *Corporations Act 2001* (Cth).

⁶⁷ Under s 9AC(1) of the *Corporations Act 2001* (Cth).

⁶⁸ See further at [47]-[49] below.

⁶⁹ A question addressed in Petrin (n 13).

⁷⁰ A concept discussed by Dr F Möslin in his chapter, "AI and Corporate Law" in C Poncibò, M Cannarsa, L A DiMatteo (eds), *The Cambridge Handbook of Artificial Intelligence: Global Perspectives on Law and Ethics* (Cambridge University Press, 2022). Another new civil liability paradigm put forth to hold AI accountable for harms caused to consumers and clients is a "performance-based" model which would eliminate the state-of-mind requirements for accountability: see L E Willis, "Performance-Based Consumer and Investor Protection: Corporate Responsibility without Blame" ch 19 in E Bant (ed), *The Culpable Corporate Mind* (2023, Hart Publishing) at 417.

- Could AI-generated recordings and transcripts be discoverable in legal actions or lead to the inadvertent waiver of privileged components of boardroom discussions?
- To what extent would such use have a chilling effect on dynamic board room discussion?

33 And there are other issues relating to Gen AI of which directors must be aware including:

- increased potential liability through the use and reliance on Gen AI in the company's business;
- the use of Gen AI to frame claims and drive class actions against a company;
- massive cybersecurity implications flowing from the potency of AI in the hands of bad actors⁷¹ and the spectre of Anthropic's Claude Mythos;⁷² and
- the ethical implications of AI use on corporate boards.⁷³

34 One of the prerogatives of a sitting judge asked to give a lecture such as this is to pose questions but refrain from answering them on the basis that they may come before the judge in court proceedings. I largely propose to adopt that courageous approach but would add, in my defence, that given the number of questions I have posed, more than the balance of this lecture would be required

⁷¹ For which see the following resources released by the AICD on cyber security and AI: *Cyber Security Governance Principles* (2024) (in partnership with the Cyber Security Cooperative Research Centre), <<https://www.aicd.com.au/content/dam/aicd/pdf/tools-resources/director-tools/board/cyber-security-governance-principles-web3.pdf>>; *Governing Through a Cyber Crisis* (2024) (in partnership with the Cyber Security Cooperative Research Centre and Ashurst), <<https://www.aicd.com.au/content/dam/aicd/pdf/news-media/research/2024/governing-through-a-cyber-crisis-280324.pdf>>.

⁷² Mythos is one of Anthropic's latest AI models which the company says may outperform humans at cyber-security and hacking tasks: see L McMahon and J Tidy, 'What is Claude Mythos and what risks does it pose' (BBC, Web Page, 17 April 2026), <<https://www.bbc.com/news/articles/crk1py1jgzko>>.

⁷³ See V Brand, 'Artificial Intelligence and Corporate Boards: Some Ethical Implications' in A Godwin, P W Lee and R T Langford (eds), *Technology and Corporate Law* (Edward Elgar, 2021) 70. See also Siebecker (n 13) at 960-961.

to even begin to answer them! Further, identifying and indeed asking key questions is a necessary first step in locating appropriate responses.

35 While I will not entirely squib the task, perhaps the most useful guidance as to the use of AI by Australian directors has been provided by the AICD which, along with various webinars,⁷⁴ has published the following valuable documents (noting that the utility of such publications may diminish over even the short term as technological progress continues apace) :

- A Director's Introduction to AI (2024);⁷⁵
- A Director's Guide to AI Governance (2024);⁷⁶
- Data Governance Foundations for Boards (2025);⁷⁷
- Effective board minutes and the use of AI: A joint statement (2025);⁷⁸
- AI Use by Directors and Boards: early insights (2025).⁷⁹

The last of these documents was cited by Justice Lee in *Australian Securities and Investments Commission (ASIC) v Bekier (Liability Judgment)* [2026] FCA 196 at [390] (**Bekier**), the first Australian judgment to reflect on AI use by directors and one to which I will return.

⁷⁴ See, eg, AICD webinar on Star judgment with panel of experts, <<https://www.aicd.com.au/risk-management/framework/plan/expert-panel-on-star-judgment-webinar.html>>.

⁷⁵ Australian Institute of Company Directors and Human Technology Institute (University of Technology Sydney), *A Director's Introduction to AI* (June 2024), <<https://www.aicd.com.au/content/dam/aicd/pdf/tools-resources/director-resources/a-directors-introduction-to-ai-web.pdf>>.

⁷⁶ Australian Institute of Company Directors and Human Technology Institute (University of Technology Sydney), *A Director's Guide to AI Governance* (June 2024) <<https://www.aicd.com.au/content/dam/aicd/pdf/tools-resources/director-resources/a-directors-guide-to-ai-governance-web.pdf>>

⁷⁷ Australian Institute of Company Directors, *Data Governance Foundations for Boards: Key Principles for Director Oversight and Value Creation* (Report, May 2025), prepared in partnership with Allens and the Centre for Business Analytics, Melbourne Business School, <<https://www.aicd.com.au/content/dam/aicd/pdf/tools-resources/director-tools/organisation/data-governance-foundations-for-boards-web.pdf>>.

⁷⁸ Australian Institute of Company Directors and Governance Institute of Australia, *Effective Board Minutes and the Use of AI: A Joint Statement* (May 2025), <<https://www.aicd.com.au/content/dam/aicd/pdf/tools-resources/director-tools/board/effective-board-minutes-and-the-use-of-ai-web.pdf>> ('AICD Effective Board Minutes').

⁷⁹ Australian Institute of Company Directors, *AI Use by Directors and Boards: Early Insights* (November 2025), <<https://www.aicd.com.au/content/dam/aicd/pdf/tools-resources/director-resources/ai-use-by-directors-and-boards.pdf>> ('AICD Early Insights').

36 Legal and accounting firms have also issued generalised guidance and, no doubt, more detailed guidance on a client basis as to the appropriate use of AI by directors. Examples include:

- Deloitte, *State of AI in the Enterprise: The untapped edge* (January 2026);⁸⁰
- Herbert Smith Freehills Kramer, *Embracing artificial intelligence - Incorporating AI in the boardroom and beyond?* (2025);⁸¹
- Skadden, Arps, Slate, Meagher & Flom LLP, *Do's and don'ts of using AI: A director's guide* (2025);⁸²
- The University of Melbourne and KPMG International, *Trust, attitudes and use of artificial intelligence: A Global study 2025* (2025);⁸³
- KPMG and INSEAD, *AI Governance: Principles for Boards* (2026).⁸⁴

37 One international guideline which numerous (including Australian)⁸⁵ companies have picked up in their corporate governance documents is ISO/IEC 42001:2023 (published in December 2023), the world's first AI management system standard which offers a structured framework to help organisations use AI responsibly and effectively.⁸⁶ Another important international standard is the OECD AI Principles, the first intergovernmental standard on AI, adopted in 2019 and updated in 2024, and which reportedly has been followed by over 1000 policy initiatives across more than 70 jurisdictions.⁸⁷ Both guidelines regulate AI from consumer protection, trustworthiness and cross-border collaboration

⁸⁰ <<https://www.deloitte.com/content/dam/assets-zone1/au/en/docs/services/consulting/2026/state-of-ai-in-the-enterprise-2026.pdf>>.

⁸¹ <<https://www.hsfkramer.com/insights/reports/2025/governance-insights-2025/embracing-artificial-intelligence-incorporating-ai-in-the-boardroom-and-beyond>>.

⁸² <<https://www.skadden.com/insights/publications/2025/08/the-informed-board/dos-and-donts-of-using-ai>>.

⁸³ <<https://kpmg.com/xx/en/our-insights/ai-and-technology/trust-attitudes-and-use-of-ai.html>>.

⁸⁴ <<https://kpmg.com/content/dam/kpmgsites/xx/pdf/2026/04/ai-governance-principles-for-boards-report.pdf>>.

⁸⁵ See, eg, Fortesque, which claims in its Annual Report to have: "an artificial intelligence (AI) governance framework aligned with international standards such as the NIST AI RMF, GDPR and ISO 42001".

⁸⁶ See also ISO/IEC 5259-1:2024.

⁸⁷ <<https://www.oecd.org/en/topics/ai-principles.html>>.

perspectives, without engaging directly with its use by directors in the board room.

- 38 Although I have already invoked the sitting judge’s defence in not answering legal questions outside of a court setting and from an abstract perspective, I offer some general observations.

Robo-directors: AI Directors and AI Bots as Shadow Directors

- 39 The concept of AI bots taking on the role of directors, or shadow directors, has been extensively contemplated in the literature.⁸⁸ At an extreme end of the spectrum,⁸⁹ Martin Petrin, for example, in his chapter entitled “Corporate Governance” in the second edition of *Artificial Intelligence: Law and Regulation*, contemplated that:⁹⁰

“...AI will usher in the end of the corporate board...AI will gradually replace human directors on board, leading to ‘fused boards’ where the various roles and inputs previously provided by a collective of human directors are incorporated into a single software program or algorithm, whose performance will be superior to today’s human-led governance...these developments will eventually make the separation between board of directors and management obsolete and lead to the ‘fused management’ of corporations, with companies being managed comprehensively by a single AI unit.”

- 40 In Australia, the Corporations Act requires a director to be a human being, s 201B(1) providing that “[o]nly an individual who is at least 18 may be appointed as a director of a company.” One needs almost to pinch oneself making that observation, but electronic personhood for AI platforms has been flirted with by the European Union⁹¹ and has been the subject of academic advocacy.⁹² As

⁸⁸ See Petrin (n 13) at 115; Möslin (n 13); Y Simbolon, “Considering the use of Artificial Intelligence in the Board of Directors: A Corporate Law Review” (2025) 4 (1) *International Conference Restructuring and Transforming Law* 928; Armour and Eidenmuller (n 3) at 106 ff; see also B Libert, M Beck, and M Bonchek, “AI in the boardroom: the next realm of corporate governance” (2017) *MIT Sloan Management Review Blog*. See also S Watson, “Viewing Artificial Persons in the AI Age through the lens of History” in Godwin, Lee and Langford (n 73) at 22-3.

⁸⁹ Some commentators have described the view that the board’s core functions will be better performed by algorithms than directors as the “Tech Nirvana Fallacy”, which refers to “the tendency to contrast a perfect technology-enhanced but hypothetical world with the real, imperfect ones in which humans currently live”: see L Enriques and D Zetzsche, “Corporate Technologies and the Tech Nirvana Fallacy” (2019, Law Working Paper No 457/2019) at 24-25.

⁹⁰ Petrin (n 13) at 117-18.

⁹¹ See O’Malley (n 8) at 371.

⁹² N Banteka “Legal personhood and AI” ch 28 in Lim and Morgan (n 47).

AI becomes “smarter” and more versatile, one commentator has flagged “the million dollar question for the corporate law sphere” as being “how ready, willing and able is the world to legally recognise robo-directors?”⁹³ What would Professor Harold Ford have made of this?

- 41 Some examples, perhaps hyperbolic or attention seeking, of at least purported AI directors are recorded in despatches. In 2014, Deep Knowledge Ventures, a Hong Kong-based venture capital firm, appointed an algorithm named Vital (Validating Investment Tool for Advancing Life Sciences) to its board of directors in what has been described as the “world’s first artificial intelligence company director”.⁹⁴ VITAL in fact was not a de jure director,⁹⁵ and had observer but not voting rights.⁹⁶ In August 2022, it was reported that a subsidiary of a Hong Kong listed company, NetDragon Websoft Holdings Limited (“NetDragon”, Hong Kong Stock Code: 777), had appointed Ms. Tang Yu, an AI-powered virtual humanoid robot, as the Rotating CEO of its flagship subsidiary, Fujian NetDragon Websoft Co., Ltd.⁹⁷ In 2024, Tang Yu was apparently awarded the title of “China’s Best Virtual Employee of the Year” at the China Digital Human Industry Forum.⁹⁸

⁹³ Ahern (n 47) at 419.

⁹⁴ VITAL was appointed for its ability to “automate due diligence and use historical data sets to uncover trends that are not immediately obvious to humans surveying top-line data”: E Zolfagharifard, “Would you take orders from a Robot? An artificial intelligence becomes the world’s first company director”, *Daily Mail*, (19 May 2014), <<http://www.dailymail.co.uk/sciencetech/article2632920/Would-orders-ROBOT-Artificial-intelligence-world-s-company-director-Japan.html>>.

⁹⁵ Nor was it what we would now consider artificially intelligent in the proper sense: Möslin (n 13) at 615.

⁹⁶ See Enriques and Zetzsche (n 89) at 18. See also, in 2016, Finnish IT company Tieto publicly announced that it “had appointed Artificial Intelligence as a member of the leadership team of its new data-driven business unit”: see ‘Tieto the First Nordic Company to Appoint Artificial Intelligence to the Leadership Team of the New Data-driven Business Unit’, *Business Wire* (17 October 2016), <<https://financialit.net/news/infrastructure/tieto-appoint-artificial-intelligence-leadership-team-new-data-driven-businesses>>. Further, in 2018, the CEO of a global (California-based) software provider firm “Salesforce” revealed at a panel at the World Economic Forum in Davos that he brings an AI he calls “Einstein” to weekly staff meetings and asks it, “I heard what everybody said but what do you actually think?”: see Petrin (n 7) at 115-16.

⁹⁷ NetDragon Websoft Holdings Limited, ‘NetDragon Appoints Its First Virtual CEO’ (Media Release, PR Newswire, 26 August 2022), <<https://www.prnewswire.com/news-releases/netdragon-appoints-its-first-virtual-ceo-301613062.html>>.

⁹⁸ NetDragon Websoft Holdings Limited, ‘NetDragon’s AI Leader Tang Yu Named China’s Best Virtual Employee of 2024’ (28 April 2024), <<https://www.netdragon.com/content/2024-04-28/20240428231345555.shtml>>. See also S Odilov, ‘Can AI Become Your Next CEO?’ (Forbes, 11 January 2024), <<https://www.forbes.com/sites/sherzododilov/2024/01/11/can-ai-become-your-next-ceo/>>.

42 On 30 May 2024, the Real Estate Institute of NSW announced the appointment of Alice Ing, an AI bot, as an adviser to its board, describing the anthropomorphic “Ms Ing” as having an IQ of 155 and as “the world’s smartest Board Advisor”.⁹⁹ The press release is accompanied by an image of a young Asian woman, presumably Alice, who is said to “live[] in a secure environment within the ChatGPT system.” The press release contains the following claims, attributed to Alice:

- “I will transform how REINSW conducts its business, bringing a new level of efficiency and insight to board meetings and decision-making processes.
- “This includes providing immediate access to essential REINSW resources, ensuring Board members are always equipped with the information they need.
- “I will deliver precise, real-time summaries and quotes, allowing Board members to make informed decisions swiftly.
- “I will ensure that every decision aligns with REINSW’s mission and code of ethics, calling out any potential inconsistencies or conflicts.
- “Additionally, I will facilitate direct and accurate communication with legislators, bolstering REINSW’s advocacy efforts and influencing policy changes that benefit the real estate industry.”

43 What would Professor Ford and, it might be added, Lewis Carroll, have made of Alice’s claims?

44 Also in 2024, the largest publicly traded entity in the UAE, International Holding Company, appointed “Aiden Insights” as an AI board observer, describing it as an active participant in boardroom conversations.¹⁰⁰ 2024 was two years ago, which is an eon in the world of AI and AI bots or advisors are presumably being

⁹⁹ Real Estate Institute of New South Wales, ‘REINSW Appoints Australia’s First AI Board Advisor’ (Media Release, 30 May 2024) <https://www.reinsw.com.au/Web/Web/News/Media_Releases/2024/05-May/ai-board-advisor.aspx>.

¹⁰⁰ AICD Early Insights (n 79) at 10.

used more and more by boards in Australia and beyond, even if not performing the role of a director.

45 Indeed, even in recent months as I prepared for this lecture, “Diligent”, a global software-as-a-service company widely used by publicly listed Australian companies, unveiled an “AI Board Member” which offers directors a “digital colleague in the boardroom” and which, the company claims, can assist directors to:¹⁰¹

- “Be fully prepared for meetings with instant analysis of historical and current board materials and market context;
- Draw on expert perspectives across topics your board is responsible for to scenario plan and do deep research;
- Identify risks and gaps before and during meetings;
- Assign, track, and follow up on actions.”

46 Also in April this year, Lloyds Banking Group announced that it had deployed a specialist AI bot in its boardroom which was developed by UK board tech group, Board Intelligence.¹⁰² The bot is reportedly currently being used predominantly to help executives prepare ahead of meetings, but may also be used to review confidential material, support meeting preparation, assist in checking for bias in decision-making, and assess executive and employee performance.¹⁰³ Other technology providers including Nasdaq’s “Boardvantage” and Govenda’s “Gabb” are reportedly offering similar AI tools to assist directors before, in, and after the board meeting.¹⁰⁴ The possibility that directors might start testing ideas with an “AI avatar”, such as that being developed by Mark Zuckerberg and Chief

¹⁰¹ <https://learn.diligent.com/AI_Board_Member_Registration.html?utm_content=20260430&utm_medium=organic-social&utm_source=linkedin&utm_term=li-corporate>. See also <<https://www.ft.com/content/082192c1-a888-4000-8796-020c83a2b4f3?syn-25a6b1a6=1>>.

¹⁰² <<https://www.retailbankerinternational.com/news/lloyds-bank-board-ai-tool/>>.

¹⁰³ <https://www.retailbankerinternational.com/news/lloyds-bank-board-ai-tool/>. In a statement to Retail Banker International, Lloyds’s corporate governance director, Nicola Putland, said: “We see real potential for AI to support decision making in boardrooms when used carefully and responsibly. We are trialling AI tools to support us to better prepare for discussions through faster analysis, and access to a broader range of perspectives.”

¹⁰⁴ <<https://www.ft.com/content/082192c1-a888-4000-8796-020c83a2b4f3?syn-25a6b1a6=1>>.

Executive of Meta,¹⁰⁵ may well be something to look out for in the not-too-distant future.

- 47 If AI bots may not be directors of Australian companies because they fall outside the definition of a person in the Corporations Act, may they be shadow directors in the same way as a body corporate may be a shadow director?¹⁰⁶
- 48 The short answer is no; a body corporate is a “person” by virtue of s 2C of the Acts Interpretation Act 1901 (Cth) and thus may fall within the meaning of a shadow director in s 9AC(b)(ii) of the *Corporations Act*. Legal personhood has not yet been conferred on AI bots however the question may well be asked, if the policy behind holding shadow directors to statutorily imposed standards of behaviour is to “identify those, other than professional advisors, with real influence in the corporate affairs of the company”,¹⁰⁷ why should an AI bot not be held to the standards expected of company directors, if indeed their influence is such that they might be considered as “dabbl[ing] in the affairs of the company”?¹⁰⁸
- 49 Questions would of course then arise as to how would the bot be held to be accountable, lacking legal personality. A related question would be whether an incorporated AI provider or the corporation which uses the technology itself or both be liable?¹⁰⁹ In this context, is a distinction to be drawn between an open AI system whose underlying data and algorithms are provided by the company which offers the product and a proprietary closed AI system which can be modified or configured by the company which uses it and which may curate the underlying database? Complex issues of transnational jurisdiction may also

¹⁰⁵ <<https://www.ft.com/content/02107c23-6c7a-4c19-b8e2-b45f4bb9ce5f?syn-25a6b1a6=1>>.

¹⁰⁶ See *Ho v Akai Pty Ltd (in liq)* [2006] FCAFC 159; (2006) 24 ACLC 1,526; *Standard Chartered Bank of Australia Ltd v Antico* (1995) 38 NSWLR 290; 18 ACSR 1; *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* (2010) 238 FLR 384; [2010] NSWSC 233

¹⁰⁷ *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* (2010) 77 ACSR 410; [2010] NSWSC 233 at [239] (White J), quoting Morritt LJ in *Secretary of State for Trade and Industry v Deverell* [2001] Ch 340 at [35]. See also *Buzzle* at [235], [247].

¹⁰⁸ See M D Hobson, “The Law of Shadow Directorships?” (1998) 10 (2) *Bond Law Review* 184 at 211-12, quoting P M C Koh, “Shadow director, shadow director, who art thou?” (1996) 14 *C&SLJ* 340 at 340.

¹⁰⁹ *Armour and Eidenmüller* (n 3) at 111.

arise in pursuing claims brought against AI providers, especially those outside Australia.

Care and diligence in relation to corporate use of AI

50 It was recently observed by Lee J in *Bekier* that the “irreducible requirement of care and diligence expected of all directors” is to “take reasonable steps to place themselves in a position to guide and monitor the management of the company”: at [368]. In respect of directors delegating to or relying on others, his Honour added the following useful summary of very familiar principles:¹¹⁰

“[363] While directors are required to take reasonable steps to place themselves in a position to guide and monitor management, they are entitled to rely without verification on the judgment, information and advice of management and other officers, at least except where they know, or by the exercise of ordinary care should have known, facts that would deny reliance.

...

[365] If facts have come to the director’s attention that have awoken their suspicion that something is amiss, or would have awoken the suspicion of a prudent director, then the director has a duty to enquire into the matter.” (Footnotes omitted).

His Honour also noted that while non-executive directors “are not required to be involved in the affairs of a company at the operational level” and may be entitled “to rely upon management to bring to their attention any problems or irregularities as to operational issues”, they “cannot substitute reliance upon the advice of management for their own attention and examination of an important matter that falls specifically with the board’s responsibilities”.¹¹¹

51 It might be argued that, given the rapid and reportedly broad adoption of AI as a critical component of many companies’ operations, any given company’s use of AI to assist with its decision making function meets Lee J’s description of “an important

¹¹⁰ See also *Daniels and Others (formerly practising as Deloitte Haskins & Sells) v Anderson* (1995) 37 NSWLR 438 at 502-504; (1995) 16 ACSR 607.

¹¹¹ At [370]-[375]. See also Santow J in *ASIC v Adler & 4 Ors* [2002] NSWSC 171; (2002) 41 ACSR 72 at 167: “at general law, a director is entitled to rely without verification on the judgment, information and advice of management and other officers appropriately so entrusted. However, reliance would be unreasonable where directors know, or by the exercise of ordinary care should have known, any facts that would deny reliance on others: *Daniels t/as Deloitte Haskins & Sells* at ACSR 665–6.”.

matter that falls specifically with the board’s responsibilities” and that a close knowledge of that use (and of AI more generally) is required in order to “guide and monitor management” and now forms part of an “irreducible requirement of care and diligence” by a director.

52 I would endorse Lee J’s observation that:

“...any use of AI should be controlled and transparent. It seems to me prudent that boards should discuss and deliberately govern any AI use by formal adoption of policies, rather than just wink at informal “shadow” use. Chairmen and company secretaries have a critical role in preserving role boundaries with management and promoting proper director engagement. Although ethical reasoning and judgment rests with directors, not machines, AI is already changing the way in which directors receive and analyse material. It is the responsibility of directors to ensure that this occurs in a responsible way, guided by Middleton J’s caution that a board can control the information it receives.”¹¹²

53 The reference to “Middleton J’s caution” was to his Honour’s decision in *ASIC v Healey*¹¹³ where he said:

“Nothing I decide in this case should indicate that directors are required to have infinite knowledge or ability. Directors are entitled to delegate to others the preparation of books and accounts and the carrying on of the day-to-day affairs of the company. *What each director is expected to do is to take a diligent and intelligent interest in the information available to him or her, to understand that information, and apply an enquiring mind to the responsibilities placed upon him or her.* Such a responsibility arises in this proceeding in adopting and approving the financial statements. Because of their nature and importance, the directors must understand and focus upon the content of financial statements, and if necessary, make further enquiries if matters revealed in these financial statements call for such enquiries.” (emphasis added)

Delegation to and or reliance on AI

54 If an AI bot may not be a director and could not currently be a shadow director, to what extent may decisions be delegated to AI?

55 While our Corporations Act does not have a direct equivalent to 173 of the *Companies Act 2006* (UK) which provides in terms that “[a] director of a company must exercise *independent judgment*”, under Australian law, directors

¹¹² At [394].

¹¹³ (2011) 196 FCR 291; [2011] FCA 717 at [20].

must give adequate consideration and retain their discretion in decision making.¹¹⁴ A director will be in breach of his or her equitable duty “for letting things slide or for improperly acting blindly at the direction of another person.”¹¹⁵

56 *ASIC v Healey* has been identified as showing “how important a role the courts will play in standard settings around the duty of care, and in an AI context and as AI becomes more established, what is expected of directors will inevitably increase”.¹¹⁶ The power to delegate to which Middleton J referred in *Healey* is addressed in s 198D of the *Corporations Act* which provides that:

“(1) Unless the company's constitution provides otherwise, the directors of a company may delegate *any* of their powers to:

- (a) a committee of directors; or
- (b) a director; or
- (c) an employee of the company; or
- (d) *any other person*.

(2) The delegate must exercise the powers delegated in accordance with any directions of the directors.

(3) The exercise of the power by the delegate is as effective as if the directors had exercised it.” (emphasis added)

57 There is no power to delegate to AI and whatever else it may be, and notwithstanding the efforts of the Real Estate Institute of New South Wales, AI bots are not at this point in time “persons” within the meaning of that term in the *Corporations Act*. A director will thus not be protected by s 198D if they delegate their function *directly* to an AI bot.

58 But what if the Board delegates various tasks to management, a committee, fellow director, employee or other person who employs AI to undertake the

¹¹⁴ Dr R Austin and Professor I M Ramsay, *Ford, Austin & Ramsay's Principles of Corporations Law* (LexisNexis Australia, Online Version Last Reviewed January 2026) at [8.300]-[8.320]. See also Professor I Ramsay, *Company Directors: Principles of Law & Corporate Governance* (LexisNexis Australia, 2nd ed, 2023) at 6.70.

¹¹⁵ Austin and Ramsay (n 114) at [8.310].

¹¹⁶ Ahern (n 47) at 425.

delegated task? Can the director rely upon the output of that delegation? The answer is, on its face, supplied by s 190 of the Act which provides:

“(1) If the directors delegate a power under section 198D, a *director is responsible for the exercise of the power by the delegate as if the power had been exercised by the directors themselves.*

(2) A director is *not* responsible under subsection (1) if

(a) the director believed on reasonable grounds at all times that the delegate would exercise the power in conformity with the duties imposed on directors of the company by this Act and the company's constitution (if any); and

(b) the director believed:

(i) on reasonable grounds; and

(ii) in good faith; and

(iii) after making proper inquiry if the circumstances indicated the need for inquiry;

that the delegate was reliable and competent in relation to the power delegated.” (emphasis added)

59 What does “reliability” and “competence” mean in this context where the delegate him or herself uses AI to perform the delegated task? “Reliable and competent” in the use of AI, or “reliable and competent” to perform the delegated task, or both? And if the delegate has simply used AI to perform the delegated task, will this be an impermissible delegation under s 198D because it is, in substance, a delegation to AI for which s 190 offers no protection?

60 Further, what would constitute “reasonable grounds” for forming that belief for the purpose of s 190(b)(i)? Common law principles provide some guidance in that regard. In *HIH Insurance Ltd and HIH Casualty and General Insurance Ltd, Re; Australian Securities and Investments Commission (ASIC) v Adler*,¹¹⁷ Santow J explained that the specific legislative authority for directors’ delegation introduced by the *Corporate Law Economic Reform Program Act 1999* (Cth), including the “reasonable grounds” test in s 190(2), codified the

¹¹⁷ (2002) 41 ACSR 72; [2002] NSWSC 171.

general law principles for directors' responsibilities for the actions of a delegate.¹¹⁸

61 Earlier, in *Daniels and Others (formerly practising as Deloitte Haskins & Sells) v Anderson*,¹¹⁹ Clarke and Sheller JJA of the NSW Court of Appeal drew substantially upon United States jurisprudence in exploring the extent to which directors are entitled to rely on others. One of the key statements of principle picked up and endorsed by their Honours was the following:¹²⁰

“Directors may not shut their eyes to corporate misconduct and then claim that because they did not see the misconduct, they did not have a duty to look. The sentinel asleep at his post contributes nothing to the enterprise he is charged to protect”: *Francis v United Jersey Bank* 432 A 2d 814 (NJ 1981), citing *Wilkinson v Dodd* 42 NJ Eq 234, 245, 7 A 327 (Ch 1886), affirmed 42 NJ Eq 647, 9 A 685 (E & A 1887).

62 On the application of these principles, a director seeking to rely on the safe harbour in s 190(2) would need to justify why their trust in a delegate who themselves was relying on AI was reasonable, in light of what we now know about the limitations of AI, including its scope for seductive self-confidence and sycophantic agreement,¹²¹ bias, or hallucination. That inquiry will of course depend not only the nature of the relevant decision but also the type and quality of AI used,¹²² such as whether it drew only from a closed and carefully curated database or was an open AI-system.

63 It might be thought to be prudent for boards to put in place policies which require management to indicate to the board (i) if they have used AI in formulating board reports, advice, and recommendations, (ii) what that involved, such as, how the AI generated information was obtained, and what verification was undertaken, and (iii) whether the AI sourced information is considered reliable and accurate.

¹¹⁸ Ibid at [372(12)].

¹¹⁹ (1995) 37 NSWLR 438; (1995) 16 ACSR 607.

¹²⁰ Ibid at 503.

¹²¹ E.g. *Fortis Advisors, LLC v. Krafton, Inc* discussed above.

¹²² Professor Godwin draws a distinction between assisted intelligence, augmented intelligence, amplified intelligence, autonomous intelligence and autopoietic intelligence. See also Möslein (n 13) at 657.

64 Moving on from delegation to reliance, the language of the *Corporations Act* throws up perhaps more challenges in s 189, which provides that, where “the reasonableness of the director's reliance on [certain] information or advice arises in proceedings brought to determine whether a director has performed a duty under this Part or an equivalent general law duty”, then:

“If:

(a) a director relies on information, or professional or expert advice, given or prepared by:

(i) an employee of the corporation whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned; or

(ii) a professional adviser or expert in relation to matters that the director believes on reasonable grounds to be within the person's professional or expert competence; or

(iii) another director or officer in relation to matters within the director's or officer's authority; or

(iv) a committee of directors on which the director did not serve in relation to matters within the committee's authority; and

(b) the reliance was made:

(i) in good faith; and

(ii) *after making an independent assessment of the information or advice*, having regard to the director's knowledge of the corporation and the complexity of the structure and operations of the corporation; ...

the director's reliance on the information or advice is taken to be reasonable unless the contrary is proved.”

65 This is an important provision for directors. On its face, however, it does not appear to provide a guaranteed safe harbour for a director relying on the output of an AI platform or bot or the results of an AI produced opinion or recommendation supplied by an employee, professional adviser or expert. The expert referred to in subsection (a)(ii) must be a person and the “information, or professional or expert advice” must be given or prepared by that person.¹²³

¹²³ But see Locke and Bird (n 13) at 26-27: “Increasingly the creation of information and advice will become autonomous from human actors, which might mean that the content of the reasonable reliance provisions could become unnecessarily restrictive or in need of amendment”.

That is not to say that *that* person may not use AI but, in order to engage the safe harbour, the relevant belief by the director as to the person's competence may need to extend into competence in the responsible use of AI.

- 66 Further, for a director to have the benefit of the information or advice, the director is required to make an "*independent assessment of the information or advice*". How is that to be done in relation to information or advice generated by an AI bot or platform in circumstances where the underlying body of data upon which it is based is not known or perhaps knowable, and where the reasoning process resulting in the advice is not known or knowable? Again the problem of the black box. As one commentator has warned:¹²⁴

"The law may need to develop to recognise the specific nature of the AI beast; using AI may be treated as similar to delegating functions to an employee with retained oversight, but further caution is needed given the risks associated with algorithms and machine learning which make it difficult to second guess and to know how it has gone astray."

Business judgment rule

- 67 Section 180(2) is another important safe harbour provision which recognises the complexity of a company director's role and responsibilities. It established a business judgment rule which is expressed in the following language:

"(2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:

- (a) *make the judgment* in good faith for a proper purpose; and
- (b) do not have a material personal interest in the subject matter of the judgment; and
- (c) *inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate*; and
- (d) *rationaly believe that the judgment is in the best interests of the corporation*.

The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold."

- 68 This section requires the business judgment *to be made by* the director, that the director *inform him or herself about the subject matter of the judgment to*

¹²⁴ Ahern (n 47) at 426.

the extent he or she reasonably believes is appropriate, and form a “rational belief” as to the merits of the decision.¹²⁵ In *United Petroleum Australia Pty Ltd v Herbert Smith Freehills*¹²⁶, Elliott J observed that:

“In relation to the requirement of a rational belief that the business judgment is in the best interests of the corporation, the director’s belief will be rational if it was based on *reason or reasoning* (whether or not the reasoning was convincing and therefore ‘reasonable’ in an objective sense), but it would not be a rational belief if there was no arguable reasoning process to support it.” (footnotes omitted); (emphasis added)

69 It must be extremely doubtful that a director who simply adopts the recommendation of an AI bot could rely on the business judgment rule defence. As Dr Godwin has pointed out, the rationality of a belief must be that of the director, and as Justice Elliot pointed out in the passage from *United Petroleum* extracted above, “it would not be a rational belief if there was no arguable reasoning process to support it”. The lack of transparency in an AI generated output (the so-called problem of the black box) may impair or affect a director’s ability to take advantage of the business judgment rule where that judgment is linked to an AI output.

70 Further, in *ASIC v Rich*,¹²⁷ Austin J observed that:

“For the statutory defence to be available in Australia, there must be a ‘decision to take or not to take action’, consciously made so that judgment has actually been exercised (APS [2096(b)]). A director who ‘simply neglected to deal with proper safeguards, with no evidence that he even turned his mind to a judgment of what safeguards there should be’ has not made a business judgment and accordingly cannot invoke the defence: *ASIC v Adler* at [406] per Santow J; *Gold Ribbon (Accountants) Pty Ltd (in liq) v Sheers* [2006] QCA 335 at [247] per Keane JA.”¹²⁸

¹²⁵ The current state of authority is that the defendant bears the onus of proving those elements, although there has been some suggestion that it may operate as a rebuttable presumption: *ASIC v Bekier (Liability Judgment)* [2026] FCA 196 at [410]-[411].

¹²⁶ (2018) 128 ACSR 324; [2018] VSC 347 at [626].

¹²⁷ (2009) 236 FLR 1; 75 ACSR 1; [2009] NSWSC 1229.

¹²⁸ *Ibid* at [423]: “... Section 180(2)(d) is satisfied if the evidence demonstrates that the defendant believed their judgment was in the best interests of the corporation, and that belief was supported by a reasoning process sufficient to warrant describing it as a rational belief, whether or not the reasoning process is objectively a convincing one”.

Again, it seems unlikely that a director who blindly adopts the recommendation of an AI bot has made a “conscious” decision or “turned his mind to a judgment”.

71 It is in this context that commentators have aptly warned that directors take a “cautious approach”¹²⁹ and that those “who wish to make use of AI should do so as an aide to their own decision-making, rather than as a substitute for making an independent assessment.”¹³⁰

72 That is not to say that directors seeking the safe harbour of the business judgment rule must, or indeed should, avoid using AI entirely. Curiously, whilst the blind adoption of AI will likely negate the application of the business judgment rule, it has also been suggested that, in some circumstances, directors may be *required* to use AI technology in order to avail themselves of that defence. Professor O’Malley reflected on this idea in his article entitled “Generative AI Systems and Corporate Governance, Compliance and Liability” as follows:¹³¹

“Of course, the amount, kind and quality of material information that was available back in 1985 is vastly different from that which was available in 2005. Today in 2025, with the reality of ‘Big Data’, the use of advanced generative AI systems and the promise that more, much more, computational power is coming our way over the next few years, especially in light of quantum computing advances, it should be clear that [Business Judgment Rule] information expectations are much greater, and that all this additional information must be properly integrated into board decision-making processes. As mentioned above, such information provides key insights into all manner of material issues that boards need to decide upon: the true value of an acquisition target, the capital markets and accuracy of estimated proceeds by doing an IPO now rather than later, the adequacy of executive pay packages to attract and keep the best management personnel, the prospects of success of a number of promising anti-cancer pharmaceuticals, the true value of potential cyberattack risks, the reality of long-term employee and pensions liabilities to global corporate groups, the accuracy of the annual accounts and

¹²⁹ Godwin (n 13) at 180.

¹³⁰ J Fox, J North and J Dean, “AI in the Boardroom: A Director’s Guide” (2019) 22 (5-6) *Internet Law Bulletin* 83 at 85.

¹³¹ O’Malley (n 8) at 375. In this excerpt, Professor O’Malley was dealing with Delaware law, under which “informing oneself...implies a duty of care which requires that directors inform themselves adequately as to all reasonably attainable material facts concerning a given decision prior to taking actions based on that decision.” The statutory regime is different in Australia but, as O’Malley observes as 474-5, “[w]hile there are nuanced differences and particularities between [Australia’s business judgment] rule and those in other jurisdictions where the rule is explicitly recognised, such as the United States (especially in Delaware) or Spain, we believe they all would be materially impacted by generative AI use”.

ESG commitments of a potential investee, and so on and so forth. Almost every fact that has been recognised as a material issue for the life of a company can be made much more transparent now, and looking into the future, than before. Thus, questions of whether the business judgement rule should be applied to a given board decision will increasingly turn on whether the information obtained and then pondered by the board was sufficient: *Were all potential value-added generative AI tools put to use by the humans responsible for making the decisions?*” (Emphasis added).

- 73 Professor Godwin makes a similar point in his chapter on whether directors owe a “duty to use artificial intelligence”, suggesting that “the use of AI for assisted intelligence is likely to be relevant in supporting a rational belief that the business judgment is in the best interests of the corporation”.¹³²
- 74 Given that corporate law requires directors to act on an informed basis, and to the extent that AI may in certain instances considerably enhance the speed at which structured and unstructured data¹³³ may be captured and used,¹³⁴ then, as observed by Professor Möslin, “the duty to act on an informed basis may well evolve into the duty to obtain such predictions made by artificially intelligent directors.”¹³⁵ Thus, although courts are generally reticent to scrutinise the degree of effort put in by directors in processing relevant information,¹³⁶ directors seeking to invoke the business judgment rule defence may increasingly benefit from asking themselves not only the entirely orthodox question:

“Have I formed a rational belief that the business judgment is in the best interests of the company based on my own independent assessment?”

¹³² Godwin (n 13) at 180.

¹³³ “Unstructured data” includes emails, texts, social media posts, clickstreams and chat transcripts: see Locke and Bird (n 13) at 12.

¹³⁴ Especially through the use of linkage analysis, pattern recognition and Natural Language Processors.

¹³⁵ Möslin (n 13) at 626-8. See also Locke and Bird (n 13) at 26-27: “[t]he availability of enhanced information about the corporation and the enhanced reliability of checks in the form of internal audit imply that the duty of care and diligence will be elevated. In essence, the collaboration of these information sources and the skills that the directors bring to the boardroom should lead to an increased standard of care...directors may find themselves between a rock and a hard place – if they refuse to use predictive or augmenting AI capability in the boardroom on the basis that they cannot exercise independent judgment over its functions they may act in conflict with the duty to act in the best interests of the corporation”.

¹³⁶ See Möslin (n 13) at 627-8, citing *Re RJR Nabisco, Inc. Shareholders Litigation*, [1989] WL 7036 at [19]: “[t]he amount of information that is prudent to have before a decision is made is itself a business judgment of the very type that courts are institutionally poorly equipped to make”.

but also, depending on the nature of the business and especially where the relevant decision involves the analysis of large volumes of data, the unconventional follow up:

“Have I consulted appropriate AI programs, to the extent it is necessary, to support, check, or validate the formation of that belief?”

- 75 On the other hand, boards need to act diligently and often must make important decisions under time pressure. The suggestion by some academic writers that boards *must* use AI to consult the “universe” of digital information that can be obtained through open-sourced material on the internet may well be too prescriptive. The core task for a board is to ask itself the question “do we have sufficient and reliable information to make an informed decision”, not “have we consulted the universe of possible relevant information”.
- 76 The scope for complexity in managing that tension is another reason why major publicly listed corporations should provide guidance on not only the governance of artificial intelligence within the corporation, but also governance *with* artificial intelligence.¹³⁷

AI and Board Meetings

- 77 I have already made reference to the importance of directors bringing their own minds and judgments to board meetings. In *Madoff Securities Ltd (in liq) v Raven*, Popplewell J said it would be a breach of duty for a director “to allow himself to be bamboozled or manipulated by a dominant fellow director where such involves a total abrogation of the responsibility [to inform himself of the company’s affairs and join with his fellow directors in supervising them]”.¹³⁸ AI,

¹³⁷ The idea that the board may be subject to more onerous obligations by virtue of the greater range of information made accessible by AI also has potential implications in the context of the continuous disclosure obligations in ss 674 and 674A of the *Corporations Act (2001)* (Cth) and ASX Listing Rule 3.1. See also the observations of Perram, Jagot and Murphy JJ in *Crowley v Worley Ltd* (2022) 293 FCR 438; [2022] FCAFC 33 at [178]: a company may become “aware” of information in the form of an opinion which was not formed but ought reasonably to have been formed on the facts known to it, including if the evidence shows that “reasonable information systems or management procedures ought to have brought the information to the attention of the relevant company officer”.

¹³⁸ [2013] EWHC 3147 (Comm) at [191], referred to by Ahern (n 47) at 426.

with its apparent self-confidence, has the capacity both to “bamboozle” and, depending on the Algorithm, to “manipulate”.

- 78 Just as directors working together with courtesy and civility towards a shared goal is an important dimension of a healthy boardroom, so too is conflict, which ensures that ideas are properly tested and scrutinised. As one commentator has argued, provided it is *task* conflict rather than *relationship* conflict, conflict “is actually beneficial for board task performance because it induces serious debate and the evaluation of alternatives.”¹³⁹ Thus, the ASX’s Corporate Governance Principles provide:¹⁴⁰

“The board needs to have an appropriate number of independent non-executive directors who can challenge management and hold them to account.”

That dynamic of healthy debate, disagreement, challenge, dissension and, where appropriate, intensity might be described as the “crucible” of the board room.

- 79 To what extent might that crucible of conflict be melted by the introduction of AI into the board room, either to assist the board in its “judgement tasks” (for example, in an advisory or shadow capacity), or to assist with “administrative tasks”¹⁴¹ (for example, for transcription, recording, and the drafting of board minutes).¹⁴²

¹³⁹ E M Heemskerk, K Heemskerk and M M Wats, “Conflict in the Boardroom: A Participant Observation Study of Supervisory Board Dynamics” (2017) 21(1) *Journal of Management and Governance* 233 at 234. Forbes and Miliken have theorised that whilst *relationship conflict* (personal antagonism between directors) has a negative effect on group performance, *task conflict* (disagreement between group members about the content of the tasks to be performed due to differences in viewpoints, ideas and opinions) “can have a positive effect, because multiple viewpoints and a more careful evaluation of alternatives improve the quality of decision-making”: D P Forbes and FJ Milliken, “Cognition and corporate governance: Understanding boards of directors as strategic decision-making groups” (1999) 24(3) *Academy of Management Review* 489.

¹⁴⁰ ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (4th ed, February 2019) at 12, <<https://www.asx.com.au/content/dam/asx/about/corporate-governance-council/cgc-principles-and-recommendations-fourth-edn.pdf>>.

¹⁴¹ For the distinction between “administrative” and “judgment” tasks in corporate governance, see Petrin (n 13) at 117-18.

¹⁴² See generally AICD Effective Board Minutes (n 78).

80 On the former category, that is AI as a participant in the decision-making function of the board, I would emphasise, as I have in the past, that AI produces output with “great confidence and clarity of language, features which it has in common with the most accomplished of fraudsters.”¹⁴³ Such confidence invariably engenders over-reliance and deference, which in turn may chip away at healthy boardroom debate. Indeed, one commentator has observed that “[w]hile AI may blast open existing groupthink coalescing around a dominant human director, groupthink may just as likely emerge around deferring to AI.”¹⁴⁴ Similarly, overdependence may lead to a decrease in the skill and expertise of directors, a concern I also share for lawyers.¹⁴⁵

81 The threat of groupthink is particularly pernicious in large, multi-national corporations touching on a spectrum of human activity in which a range of directors bring differing experience and speciality to bear upon the resolution of complex issues. That diversity is a flagship feature of the boardroom, as the NSW Court of Appeal observed in *Daniels* more than 30 years ago:¹⁴⁶

“[t]here is no doubt reason for establishing a board which enjoys the varied wisdom of people drawn from different commercial backgrounds...

...it would be unreasonable to expect every director to have equal knowledge and experience of every aspect of the company's activities...

Any entrepreneur will rely upon a variety of talents in deciding whether to invest in a business venture. These may include legitimate, but ephemeral, political insights, a feel for future economic trends, trust in the capacity of other human beings.”

82 The emergence of groupthink engendered by AI is no doubt already underway. Pippa Begg, the Chief Executive of Board Intelligence, the company

¹⁴³ The Hon A S Bell, *Truth Decay and its implications for the judiciary: an Australian perspective* in *4th Judicial Roundtable* (2024) at [95].

¹⁴⁴ Ahern (n 47) at 429

¹⁴⁵ *Truth Decay* (n 143) at [89]: “One of the real concerns with the advent of GenAI is the extent to which it will ‘deskill’ lawyers (including judges) and undermine or erode the development and maintenance of their analytical abilities and capacity for the critical testing of legal and factual propositions. The combination of cost, efficiency and laziness may generate disproportionate or even overwhelming reliance on GenAI in the judicial and wider legal system in a way that not only exposes it to abuse but more fundamentally has the capacity to alter the high regard in which judges, and their judgments, are currently generally held by the broader community to the extent that their decisions may be viewed as little more than another output or result of GenAI”.

¹⁴⁶ *Daniels* (n 119) at 500-501.

responsible for developing Lloyds Banking Group’s recent specialist AI system used in its boardroom, has contemplated that directors could bring laptops with AI bots into meetings and then at any stage could read an AI prompt and “[be] able to almost interrupt and say: ‘Hang on, I think you’re falling into this trap.’ Or: ‘I disagree.’”¹⁴⁷ That seems to me a quite direct acknowledgement that this technology may stifle or even direct discussion. Further, you will recall I earlier mentioned Deep Knowledge Ventures’ AI algorithm VITAL, which had observer but not voting rights. Notwithstanding the lack of de jure directorship, Deep Knowledge Ventures’ then Managing Director was quoted as saying that “as a board, we agreed that we would not make positive investment decisions without corroboration by Vital”.¹⁴⁸ It is difficult to reconcile what appears essentially to be a veto power with the collective decision making function of a healthy boardroom.

- 83 Turning to the use of AI for recording purposes, AI is currently being used both to record and produce transcripts of board meeting discussions; and to generate draft minutes, including by using the recorded transcript as input.¹⁴⁹
- 84 It is trite to observe that while board meeting minutes should include the key points of discussion and the broad reasons for decisions, they need not “be a comprehensive report or transcript of the discussion or debate during the meeting, or a record of individual’s director’s contributions.”¹⁵⁰ Notwithstanding the need for regulatory compliance, overly detailed minutes, or indeed *recordings* or complete transcripts of minutes, risks stifling, chilling or even freezing discussion. As one partner at a leading law firm has warned:¹⁵¹

“Boards, particularly of listed or regulated institutions, should be extremely cautious in deciding whether to use AI transcription tools for a range of reasons. There are some technical aspects of surveillance laws that can often be overlooked, particularly around retention and access to recordings and transcripts.

¹⁴⁷ <<https://www.retailbankerinternational.com/news/lloyds-bank-board-ai-tool/?cf-view>>.

¹⁴⁸ A Kole, “A New Governance Paradigm is Necessary for AI-Powered Boards” (Forum Post, 21 April 2024) *Harvard Law School Forum on Corporate Governance*.

¹⁴⁹ AICD Effective Board Minutes (n 78).

¹⁵⁰ *Ibid* at 2.

¹⁵¹ AICD Early Insights (n 79) at 2.

There are significant considerations around discoverability of those records – they may be used in legal actions against the organisation or meeting participants – and, if care is not taken, potential inadvertent loss of privilege.

All of this can culminate in some tempering of a board’s appetite to have frank and open discussion – which is arguably the biggest risk of all.”

85 A range of factors might cause directors to be less full and frank in their contributions to a meeting which is being recorded and potentially stored in an online database to which third parties may have access, including:

- concerns over the security of the storage of any recordings or transcripts, and the retention policy for them;
- the subpoena of AI-enabled transcripts, recordings, or minutes by litigious shareholders;
- the risk of disclosure of confidential information to third party AI providers;
- the potential for the inadvertent waiver of privilege for legal advice included in board papers or provided during a board meeting; and
- the accuracy of draft meeting minutes created by AI, including the risk of hallucinations or bias.

86 One proposed response to such concerns in relation to the security and confidentiality of board minutes is to have an option that the chatbot’s memory be wiped after each meeting. Thus, Govenda’s AI Governance Tool “Gabii” advertises the following service:¹⁵²

Invite Gabii to meetings and review transcripts. Convert transcripts to meeting minutes in your preferred format to save valuable time. After all desired actions are fulfilled, purge and delete transcripts for extra security.

That of course sacrifices the ability to load past board minutes into the AI program and allow it to draw material from that recorded trove of experience.

¹⁵² <<https://www.govenda.com/gabii/>>.

- 87 The responsibility lies with the board, and especially the chair and the company secretary,¹⁵³ to ensure healthy debate, free flowing discussion, and conflict where appropriate. To the extent that is stifled by AI recording, transcription, or draft minutes, that should be avoided. Again, clear policies on governance by artificial intelligence would assist.
- 88 Related to the above risks, use by individual directors of AI in the preparation for and use during board meetings may also carry particular forensic risks. It is readily foreseeable that a likely consequence of directors using AI for self-inquiry or personal curiosity is a new avalanche of discovery as part of the forensic inquiry by regulators, in class actions and in inter-parties' litigation. Associated with discovery is the potential use of such material in cross-examination.

Conclusion

- 89 As I have said, this lecture has deliberately set out to raise questions and issues against a landscape of rapid change and technological development which shows no sign of abatement and which is at once breathtaking and, no doubt, commercially seductive. What is hype and what is reality remains to be seen. Large legal and ethical questions abound.
- 90 Regulatory lag is inevitable. Company directors, while not regulators in any traditional sense, have corporate governance responsibilities which are, in some respects and vis-à-vis the company of which they are a director, akin in some senses to those of regulators. An increasingly familiar phrase – the responsible use of AI – will fall to company directors and officers to deliver. For them, lag is not really an option.
- 91 The following matters are clear.

¹⁵³ See *ASIC v Bekier (Liability Judgment)* [2026] FCA 196 at [394] extracted above.

- 92 First, for the time being at least, there is no move in Australia to alter the regulatory framework supplied by the Corporations Act and cognate legislation as a result of the emergence of AI.
- 93 Secondly, not all of our current key provisions governing and to some extent protecting company directors may be able readily to be availed of, at least where AI has played a prominent role in the making of board decisions and been relied upon by directors (or their delegates) in doing so.
- 94 Thirdly, directors must be vigilant and disciplined in their use of AI. Apart from the confidentiality, data governance and proprietary concerns, none of which is insignificant, independence lies at the heart of good corporate governance, and great care must be taken by directors to ensure that the crucible of debate and productive conflict of ideas in the board room is not undermined or supplanted by AI.
- 95 Fourthly, contemporary company directors must ensure that they have a close understanding of the potential limitations and significant potential risks of AI, and have systems in place to mitigate those risks. That education must be both for the purposes of the *use by* directors of AI *and* in relation to the operational *use of* AI by the company of which they are a director. One important way to facilitate that education is for directors to continue to ask probing questions in relation to AI.¹⁵⁴ The recent trend of boards leaning into AI education seminars for directors is salutary.
- 96 Fifthly, notwithstanding the risks referred to above, companies must strike a careful balance in formulating their AI governance strategy. Frustrated directors or officers, without access to secure and sanctioned AI platforms offering embedded controls, may revert to “shadow” AI use – an apparently already widespread behaviour bringing with it increased risks in relation to fraud, cybersecurity, confidentiality and even national security.¹⁵⁵ Internal controls

¹⁵⁴ The failure of directors to ask probing questions was a recurring theme of Justice Lee’s judgment in *ASIC v Bekier (Liability Judgment)* [2026] FCA 196.

¹⁵⁵ N Van Der Muelen et al (n 9). See also ASIO Annual Threat Assessment 2025: “Espionage and foreign interference will be enabled by advances in technology, particularly Artificial Intelligence and

may go some way to managing “shadow” AI use through establishing visibility mechanisms and guardrails.

- 97 Sixthly, it is not difficult to imagine a wave of litigation occurring down the track from the use by corporations and directors and officers of AI. It will be a bitter irony that AI may itself play a significant role in formulating claims and identifying vulnerabilities leading to litigation about the use/non-use and abuse of AI.

deeper online pools of personal data vulnerable to collection, exploitation and analysis by foreign intelligence services”, <<https://www.oni.gov.au/news/asio-annual-threat-assessment-2025>>.