CRITIQUE AND COMMENT

CORPORATE RESPONSIBILITY AND DIRECTORS' DUTIES IN THE ERA OF ARTIFICIAL INTELLIGENCE

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The public emergence of generative AI ('Gen AI') in late 2022 has had, and continues to have, profound effects across the board but its value, efficacy and impact may vary between different contexts. Corporations, directors and officers are subject to important and onerous statutory responsibilities. This article explores some of the challenges and implications of the emergence and availability of Gen AI for corporate and director/officer responsibility, including whether AI bots could be liable as shadow directors, the impact of AI on the way directors fulfil their duty of care and diligence, and the effect of AI participation and transcription in boardrooms.

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I INTRODUCTION

Dean Foster, Chief Justice Niall, members of the Melbourne Law School, distinguished guests, friends and colleagues. I begin by acknowledging the

* This is an edited version of the 2026 *Harold Ford Memorial Lecture*, delivered at the Melbourne Law School on Thursday 21 May 2026. 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.

Wurundjeri people of the Kulin Nation and pay my respects to Elders, past and present and all Indigenous Peoples present this evening.

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 Melbourne Law School where I taught a postgraduate course in Commercial Conflict of Laws for a number of years in the early 2000s.

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 1963–64, the preparation of the National Companies Bill in the mid 1970s, chairing the Corporate Affairs/Stock Exchange working party in the late 1970s, which recommended a central clearing house system that ultimately became CHESS, and then capping his career by chairing the Companies and Securities Law Review Committee from 1984–90 which resulted in significant corporate law reform.[1]

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.

[1] This paragraph draws from Ian Ramsay, 'Remembering Professor Harold Ford', *Melbourne Law School* (Web Page, October 2012) <https://law.unimelb.edu.au/alumni/mls-news/issue-8-october-2012/remembering-professor-harold-ford>, archived at <https://perma.cc/F37L-DRCU>.

This period coincided with what has come to be known as the 'second AI-winter',[2] a season from which we have well and truly emerged.

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, it also feels like we are living on a hinge of history, what some have termed the 'Fourth Industrial Revolution'.[3]

The public emergence of generative AI ('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 nonlinear, apparently unstoppable and ever increasing in its speed and intensity. And Gen 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.[4]

[2] Dan Hunter, 'The Death of the Legal Profession and the Future of Law' (2020) 43(4) *University of New South Wales Law Journal* 1199, 1214. See also John Armour and Horst Eidenmüller, 'Self-Driving Corporations?' (2020) 10(1) *Harvard Business Law Review* 87, 96.

[3] See, eg, Emelia Terzon, 'Is Artificial Intelligence Overhyped or Is AI the "Fourth Industrial Revolution"?', *ABC News* (online, 22 September 2025) <https://www.abc.net.au/news/2025-09-22/is-ai-the-fourth-industrial-revolution/105790912>, archived at <https://perma.cc/95BW-53L7>.

[4] Cole Stryker, 'What Is Agentic AI?', *IBM* (Web Page) <https://www.ibm.com/think/topics/agentic-ai>, archived at <https://perma.cc/2TQG-2S45>.

The impact of artificial intelligence has been ubiquitous; no business or profession is immune.[5] 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'.[6] 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 a legal and ethical perspective,[7] with 'AI avoidance by boards of directors and C-Suiters' no longer an option.[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,[9] 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.

Another incident of the speed and the rate of change is that scholarship and the insights provided by it may date almost immediately. For example, the chapter which sparked my interest in the subject of this lecture, that by Professor

[5] Australian courts have responded to the challenge with a series of practice notes and guidelines for judges. See, eg, Supreme Court of New South Wales, *Practice Note SC GEN 23: Use of Generative Artificial Intelligence (Gen AI)*, 28 January 2025 ('*Gen AI Practice Note*'); Supreme Court of Victoria, *Practice Note SC Gen 25: The Use of Artificial Intelligence by Court Users*, 14 May 2026; Federal Court of Australia, *Practice Note GPN-AI: Use of Generative Artificial Intelligence*, 16 April 2026.

[6] Vivienne Brand, 'Directors' Duties and AI Regulation' (2024) 33(4) *Griffith Law Review* 324, 333 ('Directors' Duties').

[7] Patrick J 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' in Mimi Zou et al (eds), *The Cambridge Handbook of Generative AI and the Law* (Cambridge University Press, 2025) 367, 367.

[8] Ibid 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': Nick van der Muelen, Jennifer Jewer and Nadège Levallet, 'Minimum Viable Governance for Generative AI' (Research Briefing No XXVI-3, MIT Center for Information Systems Research, 19 March 2026) 1–2 <https://cisr.mit.edu/publication/2026_0301_GenAIGovernance_VanderMeulenJewerLevallet>, archived at <https://perma.cc/5933-RQEY>.

[9] See Gizem Halis Kasap, 'Can Artificial Intelligence ("AI") Replace Human Arbitrators? Technological Concerns and Legal Implications' [2021] 2 *Journal of Dispute Resolution* 209, 229, 237–8.

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* until August 2025.[10] And it is more than six years since Professors John Armour and Horst 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'.[11] There is, unsurprisingly, a growing volume of literature on the topic of AI in corporate governance.[12]

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* judgement to bear on corporate decision-making are under challenge.

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

[10] O'Malley (n 7) 368.

[11] Armour and Eidenmüller (n 2) 87.

[12] Some notable examples include Andrew Godwin, 'A Duty to Use Artificial Intelligence? Learning from the Past and Hedging for the Future' in Rosemary Teele Langford (ed), *Corporate Law and Governance in the 21st Century* (Federation Press, 2023) 174; Brand, 'Directors' Duties' (n 6); O'Malley (n 7); Florian Möslein, 'Robots in the Boardroom: Artificial Intelligence and Corporate Law' in Woodrow Barfield and Ugo Pagallo (eds), *Research Handbook on the Law of Artificial Intelligence* (Edward Elgar Publishing, 2025) 614 ('Robots in the Boardroom'); David F Larcker et al, 'The Artificially Intelligent Boardroom' (Working Paper No CL110, Rock Center for Corporate Governance, Stanford University, 17 March 2025) <https://www.gsb.stanford.edu/faculty-research/publications/artificially-intelligent-boardroom>, archived at <https://perma.cc/WDA9-V5YX>; Armour and Eidenmüller (n 2); Martin Petrin, 'Corporate Governance' in Charles Kerrigan (ed), *Artificial Intelligence: Law and Regulation* (Edward Elgar Publishing, 2nd ed, 2025) 115; Zhaoyi Li, 'Artificial Fiduciaries' (2024) 81(4) *Washington and Lee Law Review* 1299; Eleanore Hickman and Martin Petrin, 'Trustworthy AI and Corporate Governance: The EU's Ethics Guidelines for Trustworthy Artificial Intelligence from a Company Law Perspective' (2021) 22(4) *European Business Organization Law Review* 593; Michael R Siebecker, 'Reconceiving Corporate Rights and Regulation in the AI Era' (2024) 89(3) *Missouri Law Review* 941; Lynn M Lopucki, 'Algorithmic Entities' (2018) 95(4) *Washington University Law Review* 887; Jingchen Zhao, 'Artificial Intelligence and Corporate Decisions: Fantasy, Reality or Destiny' (2022) 71(4) *Catholic University Law Review* 663; Lynn Warneke, 'Directors in the Loop: Responsible Corporate Governance for the Era of AI' (2024) 15 *Revista Facultad de Jurisprudencia* [Journal of the Faculty of Jurisprudence] 73; Mustafa Kenan Ustahaliloğlu, 'Artificial Intelligence in Corporate Governance' (2025) 7(1) *Corporate Law and Governance Review* 123; Natania Locke and Helen Bird, 'Perspectives on the Current and Imagined Role of Artificial Intelligence and Technology in Corporate Governance Practice and Regulation' (2020) 35(1) *Australian Journal of Corporate Law* 4.

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.[13] 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.[14]

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 ChatGPT or Google Gemini which may carry greater risks in terms of the quality and integrity of underlying data and security.[15]

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 boardroom 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 (eg meeting preparation, agenda setting and information management), assessing risk compliance,[16] decision-making with respect to

[13] Professor Andrew Godwin referred to the distinction between 'governance of artificial intelligence' and 'governance with artificial intelligence': Godwin (n 12) 177–8.

[14] 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 2001* (Cth) ('*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) 275 FCR 533, 640 [456] (Thawley J).

[15] See Australian Institute of Company Directors, *AI Use by Directors and Boards: Early Insights* (Report, December 2025) 14, 26 <https://www.aicd.com.au/innovative-technology/digital-business/artificial-intelligence/AI-use-by-directors-and-boards-early-insights.html>, archived at <https://perma.cc/YD5Y-UGW2> ('*AI Use by Directors*').

[16] Locke and Bird (n 12) 11–16.

investment, personnel selection, procurement, production planning and control, pricing, sales and marketing, and pressure testing corporate strategy (eg scenario modelling),[17] as well as the integration of AI technology within board portals.[18] This is no doubt an incomplete account.

A March 2025 survey conducted by the United Kingdom-based Institute of Directors 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'.[19] Interestingly, 25% of those surveyed described one of the 'biggest barriers or concerns regarding AI adoption in [their] organisation' as a '[l]ack of an internal AI policy, strategy or data governance framework'.[20] 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 widescale adoption of AI in Australian public companies and by their boards.

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

[17] *AI Use by Directors* (n 15) 13.

[18] Locke and Bird (n 12) 9–10.

[19] The full results from the survey may be accessed at 'Major Blockers to AI Adoption in British Business', *Institute of Directors* (Web Page, 28 April 2025) <https://www.iod.com/news/science-innovation-and-tech/major-blockers-to-ai-adoption-in-british-business/>, archived at <https://perma.cc/AWD4-B39U>. For the business paper summarising the results, see Institute of Directors, *Policy Voice: Full Survey Results March 2025* (Report, 2025) <https://www.iod.com/resources/data/policy-voice-march-2025-business-costs-uk-eu-regulatory-alignment-ai-adoption-and-us-edi-policy/>, archived at <https://perma.cc/X8FJ-JF59> ('*Policy Voice Survey Results*').

[20] *Policy Voice Survey Results* (n 19) 13.

[21] PwC, *2025 Annual Corporate Directors Survey: Driving a Culture of Accountability in the Boardroom* (Report, 2025) 19–20 <https://www.pwc.com/us/en/services/governance-insights-center/library/annual-corporate-directors-survey.html>, archived at <https://perma.cc/5XFB-WVNX>. See also Elisa Pereira, Alvin Wang Graylin and Erik Brynjolfsson, *The Enterprise AI Playbook: Lessons from 51 Successful Deployments* (Report, April 2026) 11 <https://digitaleconomy.stanford.edu/publication/enterprise-ai-playbook/>, archived at <https://perma.cc/EFZ3-KBU7>.

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;
- those companies which do have a publicly available AI governance framework or policy tend to disclose it either as a standalone report[24] or within existing policies and guidelines, including third-party risk assessments, security guidelines or in the company's code of conduct;[25]

[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 capitalisation) made no reference to the use of Gen AI in their publicly available board charters: Commonwealth Bank, BHP Group, Westpac Banking Corporation, NAB, ANZ Bank, Macquarie Group, Wesfarmers, 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 that '[w]e leverage data, technology and artificial intelligence to materially enhance our decision making and optimise our operations': Woolworths Group, *Realising Our Potential* (Annual Report, 2025) 12. Westpac Banking Corporation's 2025 Annual Report mentions the existence of an 'AI Risk Management Standard' and a 'Responsible AI Playbook' without expanding on their contents: Westpac Banking Corporation, *2025 Annual Report* (Report, 2025) 41. It also hyperlinks to a webpage containing eight 'Responsible AI Principles': 'Artificial Intelligence at Westpac', *Westpac* (Web Page) <https://www.westpac.com.au/about-westpac/westpac-group/corporate-governance/artificial-intelligence-at-westpac/>, archived at <https://perma.cc/2LA6-RC7V>.

[24] For example, on 5 February 2026, Commonwealth Bank published a report entitled 'Our Approach to Adopting AI': Commonwealth Bank, *Our Approach to Adopting AI* (Report, 5 February 2026). Commonwealth Bank is reported as being the first Australian bank to release such a report outlining how it is ideating, developing, deploying and managing AI at an organisational level with a focus on responsible practices: 'CommBank Releases Australian-First Report Outlining How It Is Adopting AI', *CommBank* (Web Page, 5 February 2026) <https://www.commbank.com.au/articles/newsroom/2026/02/cba-approach-to-adopting-ai-report-announcement.html>, archived at <https://perma.cc/SH3J-L6CN>. Similarly, in October 2025, Atlassian published a public responsible AI governance framework: Atlassian, *Our No BS Guide to Responsible AI Governance: Playing Responsibly, As a Team* (Report, 2025) <https://www.atlassian.com/trust/responsible-tech-principles#resources>, archived at <https://perma.cc/ZF9M-E5F8>.

[25] For example, Coles Group's Code of Conduct contains a section on 'Responsible Use of Artificial Intelligence ("AI") Systems': *Code of Conduct*, Coles Group (at September 2025) 4 [4.5] ('*Coles Code of Conduct*'). Brambles has a similar section in their Code of Conduct: *Code of Conduct*, Brambles (at 1 July 2025) 22.

- 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 the 2024–25 financial year;
- 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]

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 claims,[28] 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 on the issue by the Australian Securities and Investments Commission ('ASIC') and the Australian Prudential Regulatory Authority ('APRA'). In October 2024, ASIC released *Beware the Gap: Governance Arrangements in the Face of AI Innovation*, a report that confirmed a governance gap between

[26] See, eg, Telstra Group's 'Responsible Artificial Intelligence Policy': Telstra Group Ltd, *Code of Conduct* (at August 2025) 11; Coles Group's 'Responsible AI Policy': *Coles Code of Conduct* (n 25) 4; Woolworths Group's 'Responsible AI Do's and Don'ts': Woolworths Group, *Our Code of Conduct* (at September 2025) 22.

[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': Fortescue, *Annual Report 2025* (Report, 2025) 114. Brambles reports that it has a 'cross functional AI and Generative AI Centre of Excellence in place to enable responsible and risk informed use of AI and Generative AI and to comply with relevant legislation and regulation such as the *European Union Artificial Intelligence Act*': Brambles, *Leading a Future of Connection and Illumination* (Annual Report, 2025) 32.

[28] This includes a rise in securities class action lawsuits alleging that defendants made false or misleading statements related to AI disclosures, including alleged exaggeration of AI capabilities, AI-driven revenue or third-party validation of AI technologies: see Melanie E Walker and Emma Peplow, 'AI-Related Securities Class Action Filings Are on the Rise: Key Observations', *DLA Piper* (Blog Post, 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>, archived at <https://perma.cc/3ACS-H8L7>.

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:

> 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.[29]

In March 2026, the ASIC Chair spoke about 'the risks and opportunities of AI' in the context of its use by directors and observed:

> 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.[30]

In May of this year, ASIC issued a letter to industry calling for 'urgent cyber uplift as AI accelerates cyber threats'.[31] In that letter, it was observed:

[29] Australian Securities and Investments Commission, *Beware the Gap: Governance Arrangements in the Face of AI Innovation* (Report No 798, October 2024) 34. See also 'Artificial Intelligence Transparency Statement', *Australian Securities and Investments Commission* (Web Page, 27 February 2026) <https://www.asic.gov.au/about-asic/what-we-do/how-we-operate/accountability-and-reporting/artificial-intelligence-transparency-statement>, archived at <https://perma.cc/9YC2-X7GN>. Further, in January of this year, 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': Joe Longo, 'Key Issues Outlook 2026', *Australian Securities and Investments Commission* (Web Page, 27 January 2026) <https://www.asic.gov.au/about-asic/news-centre/news-items/key-issues-outlook-2026/>, archived at <https://perma.cc/W23F-Q8RC>.

[30] Joe Longo, 'It's Tough Being a Director (But That Doesn't Mean You Shouldn't Do It)' (Speech, AICD Australian Governance Summit, 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/>, archived at <https://perma.cc/A8VQ-EJM7>.

[31] Australian Securities and Investments Commission, 'ASIC Calls for Urgent Cyber Uplift as AI Accelerates Cyber Threats' (Media Release 26-092MR, 8 May 2026)

> 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, 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.[32]

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 [b]oards are still developing the technical literacy required to provide effective challenge on AI related risks and oversight'.[33] 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.

In its *Corporate Plan 2025–26*, ASIC signalled the taking of enforcement action in relation, inter alia, to the 'poor use of AI'.[34]

<https://www.asic.gov.au/about-asic/news-centre/find-a-media-release/2026-releases/26-092mr-asic-calls-for-urgent-cyber-uplift-as-ai-accelerates-cyber-threats/>, archived at <https://perma.cc/UBC8-2RBT>.

32 Simone Constant, *Australian Securities and Investments Commission* (Letter, 8 May 2026) <https://download.asic.gov.au/media/xhrf1w0e/26-092mr-open-letter-to-afs-licensees-and-market-participants.pdf>, archived at <https://perma.cc/T9B3-PD2C>.

33 Therese McCarthy Hockey, 'APRA Letter to Industry on Artificial Intelligence (AI)', *Australian Prudential Regulation Authority* (Letter, 30 April 2026) <http://apra.gov.au/apra-letter-to-industry-on-artificial-intelligence-ai>, archived at <https://perma.cc/5NRM-57TB>.

34 Australian Securities and Investments Commission, *Corporate Plan 2025–26* (Report, 26 August 2025) 19 <https://www.asic.gov.au/about-asic/corporate-publications/asic-corporate-plan/>, archived at <https://perma.cc/SU8W-GD6L>. 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: 'Australia's AI Ethics Principles', *Department of Industry, Skills and Resources* (Web Page, 2 December 2025) <https://www.industry.gov.au/publications/australias-ai-ethics-principles>, archived at <https://perma.cc/52SC-XNJW>. 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.

At the 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.[35] Beyond the jargon in the Commonwealth Government's *National AI Plan*, 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'.[36] 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

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.

8 Accountability: People responsible for the different phases of the AI system lifecycle should be identifiable and accountable for the outcomes of the AI systems, and human oversight of AI systems should be enabled.

[35] Jake Evans, 'Artificial Intelligence to Be Managed through Existing Laws under National AI Plan', *ABC News* (online, 2 December 2025) <https://www.abc.net.au/news/2025-12-02/national-artificial-intelligence-plan-growth-existing-laws/106086474>, archived at <https://perma.cc/U44A-R3YA>.

[36] Department of Industry, Science and Resources (Cth), *National AI Plan* (Report, 2 December 2025) 28 <https://www.industry.gov.au/publications/national-ai-plan>, archived at <https://perma.cc/8W9K-H2UT>. The Plan also states:

> 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.

context of AI.[37] As Professor Black explains, PBR (of the kind, I interpolate, that is reflected in the general and relatively high level language of key provisions of our *Corporations Act 2001* (Cth) ('*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.[38] As Professor Brand perceptively comments, 'higher-order principles are more capable of adapting and allowing for evolution of regulatory problems than more specific, mandated rules'.[39]

Beyond the *Corporations Act*, an example of an existing regulatory standard which may be applied to AI is APRA's *Prudential Standard CPS 230 Operational Risk Management*, issued in July 2025.[40] That Standard does not mention AI 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.[41] Other areas where 'technology-neutral' obligations will be engaged by a company's adoption of AI include the areas of privacy,[42] consumer protection, intellectual property, cybersecurity,[43] anti-discrimination, work, health and safety, and even human rights guidelines.[44]

[37] Brand, 'Directors' Duties' (n 6) 330.

[38] Julia Black, 'Forms and Paradoxes of Principles-Based Regulation' (2008) 3(4) *Capital Markets Law Journal* 425, 426.

[39] Brand, 'Directors' Duties' (n 6) 331.

[40] Australian Prudential Regulation Authority, *Prudential Standard CPS 230 Operational Risk Management* (at July 2023) ('*Prudential Standard CPS 230*').

[41] In respect of financial services licensees, see *Corporations Act* (n 14) s 912A.

[42] See, eg, *Privacy Act 1998* (Cth) sch 1; 'Guidance on Privacy and the Use of Commercially Available AI Products', *Office of the Australian Information Commissioner* (Web Page, 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>, archived at <https://perma.cc/SQQ3-XLM4>.

[43] See, eg, *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); Australian Prudential Regulation Authority, *Prudential Standard CPS 234 Information Security* (at July 2019); *Prudential Standard CPS 230* (n 40).

[44] See, eg, John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc A/HRC/17/31 (21 March 2011).

The Australian Securities Exchange ('ASX') is currently in the course of revising its *Corporate Governance Principles and Recommendations*, last issued in 2019,[45] and established an Advisory Group on Corporate Governance under the Chairmanship of Dr Philip Lowe in January of this year to do so.[46] One might hope that AI will be covered in those revised principles.[47] Also in January of this year, the Australian Council of Superannuation Investors issued the 12th edition of its *Governance Guidelines* which include the following statement:

> 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.[48]

Perhaps the most useful guidance as to the use of AI by Australian directors has been provided by the Australian Institute of Company Directors ('AICD') in a series of reports and guidance notes which are referred to in more detail below.[49]

45 See 'ASX Corporate Governance Council', *ASX* (Web Page) <https://www.asx.com.au/about/regulation/corporate-governance-principles-and-recommendations/asx-corporate-governance-council>, archived at <https://perma.cc/BE5A-BJRN>.

46 'Advisory Group on Corporate Governance', *ASX* (Web Page) <https://www.asx.com.au/about/regulation/corporate-governance-principles-and-recommendations/advisory-group-on-corporate-governance>, archived at <https://perma.cc/T7RD-5E6C>.

47 Although, the two communiqués released by the Advisory Group have not yet made any mention of AI: Philip Lowe, *Advisory Group on Corporate Governance Communique* (Communiqué, 17 February 2026); Philip Lowe, *Advisory Group on Corporate Governance Communique* (Communiqué, 1 April 2026). The Advisory Group is set to meet again later in May 2026.

48 Australian Council of Superannuation Investors, *Governance Guidelines* (Guidelines, 12th ed, January 2026) 33 <https://acsi.org.au/publications/governance-guidelines/>, archived at <https://perma.cc/PK82-6PZP>.

49 See below nn 87–92 and accompanying text.

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',[50] sight should not be lost of the Robodebt fiasco in Australia[51] and the Post Office Horizon scandal in the United Kingdom,[52] which stand as potent and salutary reminders of the risks of overenthusiastic and uncritical adoption of automated decision-making.

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 Wales ('NSW')[53] 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;[54]
- algorithmic failure;[55]
- large issues of confidentiality, privacy and data protection;[56]

50 Deirdre Ahern, 'Corporate Law, Corporate Governance and AI: Are We Ready for Robots in the Boardroom?' in Ernest Lim and Phillip Morgan (eds), *The Cambridge Handbook of Private Law and Artificial Intelligence* (Cambridge University Press, 2024) 409, 428.

51 See *Royal Commission into the Robodebt Scheme* (Report, July 2023).

52 See *Post Office Horizon IT Inquiry Report* (Report, July 2025); 'Post Office Horizon Scandal: Why Hundreds Were Wrongly Prosecuted', *BBC News* (online, 10 October 2025) <https://www.bbc.com/news/articles/c1wpp4w14pqo>, archived at <https://perma.cc/SG8Z-UBAF>.

53 See *Gen AI Practice Note* (n 5).

54 See, eg, Brand, 'Directors' Duties' (n 6) 327; *National AI Plan* (n 36) 7.

55 Armour and Eidenmüller (n 2) 92.

56 Australian Institute of Company Directors and Human Technology Institute, University of Technology Sydney, *A Director's Introduction to AI* (Report, 2024) 19 <https://www.aicd.com.au/content/dam/aicd/pdf/tools-resources/director-resources/a-directors-introduction-to-ai-web.pdf>, archived at <https://perma.cc/PD6L-R3W2> ('*Director's Introduction to AI*'); Hickman and Petrin (n 12) 618; *National AI Plan* (n 36) 7.

- cybersecurity risks;[57]
- 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, who are presumably using top shelf Gen AI technology;[58]
- 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;[59]
- the twin phenomena of AI sycophancy[60] and seduction coupled with 'dashboard myopia';[61] and
- users' ignorance of the algorithmic underpinnings of the platform being used and the related problem of the black box, that is, the lack of transparency as to how answers are generated and the 'reasoning' processes deployed.[62]

Many of these risks came home to an enthusiastic early adopter of AI in the case of *Fortis Advisors LLC v Krafton Inc* in the Delaware Court of Chancery, where a CEO's execution of a ChatGPT-generated corporate strategy went

[57] See, eg, Australian Institute of Company Directors and Cyber Security Cooperative Research Centre, *Cyber Security Governance Principles* (Report, November 2024) 12 <https://www.aicd.com.au/risk-management/framework/cyber-security/cyber-security-governance-principles.html>, archived at <https://perma.cc/GD53-7ZT8> ('*Cyber Security Governance Principles*'); *National AI Plan* (n 36) 11.

[58] Mark Sweney, 'AI Hallucinations Found in High-Profile Wall Street Law Firm Filing', *The Guardian* (online, 22 April 2026) <https://www.theguardian.com/technology/2026/apr/22/ai-hallucinations-found-in-high-profile-wall-street-law-firm-filing>, archived at <https://perma.cc/2QFM-PGB3>.

[59] See the examples in Chief Justice AS Bell, 'Change at the Bar and the Great Challenge of Gen AI' (Speech, Australian Bar Association, 29 August 2025) 17–29 [53]–[82]. It has been said that '[t]he 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': Julian Koplin and Megan Frances Moss, 'Is Richard Dawkins Right about Claude? No', *The Conversation* (online, 7 May 2026) <https://theconversation.com/is-richard-dawkins-right-about-claude-no-but-its-not-surprising-ai-chatbots-feel-conscious-to-us-282151>, archived at <https://perma.cc/5MUF-6V2Y>.

[60] See generally Myra Cheng et al, 'Sycophantic AI Decreases Prosocial Intentions and Promotes Dependence' (2026) 391(6792) *Science* 1348.

[61] Armour and Eidenmüller (n 2) 101.

[62] See Brand, 'Directors' Duties' (n 6) 74–6.

awry.[63] 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*.[64] 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.[65] The CEO of Krafton decided the earnout payment agreement was a 'bad deal' and sought advice from Krafton's legal team on how to get out of it;[66] they cautioned that terminating key employees for cause would not determine the earnout obligation and would expose Krafton to 'lawsuit and reputation risk'.[67] So instead, the CEO turned to ChatGPT, which ultimately guided him through a course of conduct which included, according to the Court, breaching the earnout payment agreement by terminating the key employees without valid cause and by improperly seizing operational control of Unknown Worlds.[68] He followed almost all ChatGPT'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.[69]

Although it was not brought as a breach of directors' duties case, it has been observed that the case

> colorfully highlights risks attendant to following 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*.[70]

63 354 A 3d 906 (Del Ch, 2026) ('*Fortis*').

64 Ibid 913 (Will V-C).

65 Ibid.

66 Ibid 926.

67 Ibid 941.

68 Ibid 928–9, 931.

69 Ibid 927–9.

70 'Delaware Court of Chancery Reinstates Seller CEO and Extends Earnout Payment Window, as Buyer's ChatGPT Strategy Fails', *Herbert Smith Freehills Kramer* (Insight, 8 April 2026) (emphasis added) <https://www.hsfkramer.com/insights/2026-04/delaware-court-of-chancery-reinstates-seller-ceo-and-extends-earnout-payment-window-as-buyers-chatgpt-strategy-fails>, archived at <https://perma.cc/4ULZ-KSK7>.

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 between 2020 and 2025 in the United States.[71]

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.[72]

Such questions may include:

- Do existing statutory and common law directors' duties impose a duty on directors to use AI in the discharge of their various obligations?[73]
- 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 their obligations?

[71] Muhammad Bilal Qadir Shah, Chris Riper and Lauren Nasta, Secretariat, *Trends in AI-Related Securities Class Actions through 2025* (Report, 2026) 1 <https://secretariat-intl.com/insights/trends-in-ai-related-securities-class-actions-through-2025/>, archived at <https://perma.cc/RJ6C-9HD3>; Perrie 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/>, archived at <https://perma.cc/QV9F-UH7E>.

[72] As Lee J observed in *Australian Securities and Investments Commission v Bekier* [2026] FCA 196, [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.'

[73] A question which was addressed and, broadly speaking, answered in the affirmative by Professor Godwin in his contribution to a *festschrift* for Professor Ian Ramsay AO in 2023: see Godwin (n 12).

- What implications does such use have for a director's individual responsibility to bring their *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 boardroom erode the dynamism of boardroom 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 the 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?[74]
- 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 dataset[75] and the relevant algorithmic goal function germane to this question, namely how the 'best interests of the company' are to be assessed

[74] ASX, *Listing Rules* (at 19 December 2019) r 3.1 ('*ASX Listing Rules*').

[75] Armour and Eidenmüller (n 2) 97–100.

(ie by reference solely to shareholder return or by reference to broader considerations such as environmental, social and governance criteria)?[76]

- Would such reliance fall within the deemed reasonable reliance provision in s 189 of the *Corporations Act*?[77]
- Should boards be forming AI committees in the same way they have audit committees, remuneration and other subcommittees?
- 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?[78]
- Can an incorporated AI provider be accessorily liable for involvement in a contravention of a director's duty?[79]
- If an AI program cannot be a director, can it or should it be treated as a shadow director or a de facto director[80] and, if so, who could be liable for its acts or omissions?[81]
- 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?[82]

[76] Ibid 101, 109. See *Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Act 2024* (Cth) sch 4, which amended the *Australian Securities and Investments Commission Act 2001* (Cth) and the *Corporations Act* (n 14) to introduce mandatory climate-related financial disclosures for all entities required to issue financial reports under pt 2M of the *Corporations Act* (n 14). In what is a phased approach, very large companies (roughly equivalent to the ASX 200 and their private equivalents) were, from 1 January 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 International Sustainability Standards Board's IFRS S2): *Australian Sustainability Reporting Standard AASB S2: Climate-Related Disclosures 2024* (Cth).

[77] See below Part IV.

[78] A phenomenon that has been flirted with on numerous occasions already: see below Part II.

[79] See, eg, *Corporations Act* (n 14) ss 79, 181(2), 1317E(4).

[80] See ibid s 9AC(1).

[81] See below nn 102–32 and accompanying text.

[82] A question addressed in Petrin (n 12) 118–19 [6.009], 144 [6.077]–[6.078].

- Could we see the emergence of 'AI-specific directors' duties?'[83]

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?
- 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 boardroom discussion?

And there are other issues relating to Gen AI which directors must be aware of, 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 actors[84] and the spectre of Anthropic's Claude Mythos;[85] and

[83] A concept discussed by Dr Florian Möslein in Florian Möslein, 'AI and Corporate Law' in Larry A DiMatteo, Cristina Poncibò and Michel Cannarsa (eds), *The Cambridge Handbook of Artificial Intelligence: Global Perspectives on Law and Ethics* (Cambridge University Press, 2022) 74, 81–4. 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: Lauren E Willis, 'Performance-Based Consumer and Investor Protection: Corporate Responsibility without Blame' in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 417, 417–18.

[84] On this, see the following resources released by the AICD on cybersecurity and AI: *Cyber Security Governance Principles* (n 57); Australian Institute of Company Directors, Cyber Security Cooperative Research Centre and Ashurst, *Governing Through a Cyber Crisis: Cyber Incident Response and Recovery for Australian Directors* (Report, March 2024) <https://www.aicd.com.au/risk-management/framework/cyber-security/governing-through-a-cyber-crisis-cyber-incident-response-and-recovery-for-australian-directors.html>, archived at <https://perma.cc/MY5W-N74D>.

[85] Mythos is one of Anthropic's latest AI models, which the company says may outperform humans at cybersecurity and hacking tasks: see Liv McMahon and Joe Tidy, 'What Is Claude Mythos and What Risks Does It Pose?', *BBC News* (online, 17 April 2026) <https://www.bbc.com/news/articles/crk1py1jgzko>, archived at <https://perma.cc/2H3L-7ZQX>.

- the ethical implications of AI use on corporate boards.[86]

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

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,[87] 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*;[88]
- *A Director's Guide to AI Governance*;[89]
- *Data Governance Foundations for Boards*;[90]
- *Effective Board Minutes and the Use of AI: A Joint Statement*;[91]

86 See Vivienne Brand, 'Artificial Intelligence and Corporate Boards: Some Ethical Implications' in Andrew Godwin, Pey W Lee and Rosemary Teele Langford (eds), *Technology and Corporate Law: How Innovation Shapes Corporate Activity* (Edward Elgar Publishing, 2021) 70; Siebecker (n 12) 960–1.

87 See, eg, Sally Linwood, 'A Parable As Well As a Precedent: AICD Webinar on Star Judgment with Panel of Experts', *Australian Institute of Company Directors* (Web Page, 8 April 2026) <https://www.aicd.com.au/risk-management/framework/plan/expert-panel-on-star-judgment-webinar.html>, archived at <https://perma.cc/TMW9-SDHY>.

88 *Director's Introduction to AI* (n 56).

89 Australian Institute of Company Directors and Human Technology Institute, University of Technology Sydney, *A Director's Guide to AI Governance* (Report, 2024) <https://www.aicd.com.au/news-media/research-and-reports/a-directors-guide-to-ai-governance.html>, archived at <https://perma.cc/8DR4-VJKL>.

90 Australian Institute of Company Directors, Allens and Centre for Business Analytics, The University of Melbourne, *Data Governance Foundations for Boards: Key Principles for Director Oversight and Value Creation* (Report, May 2025) <https://www.aicd.com.au/good-governance/it/data-governance/data-governance-foundations.html>, archived at <https://perma.cc/952Y-Z544>.

91 Australian Institute of Company Directors and Governance Institute of Australia, *Effective Board Minutes and the Use of AI: A Joint Statement* (Report, May 2025) <https://www.aicd.com.au/board-of-directors/meeting/minutes/board-minutes-and-the-use-of-ai.html>, archived at <https://perma.cc/F6HQ-ARW7> ('*Effective Board Minutes*').

- *AI Use by Directors and Boards: Early Insights*.[92]

The last of these documents was cited by Lee J in *Australian Securities and Investments Commission v Bekier* ('*Bekier*'), the first Australian judgment to reflect on AI use by directors and one to which I will return.[93]

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*;[94]
- Herbert Smith Freehills Kramer, 'Embracing Artificial Intelligence: Incorporating AI in the Boardroom and Beyond?';[95]
- Skadden, 'Do's and Don'ts of Using AI: A Director's Guide';[96]
- The University of Melbourne and KPMG International, *Trust, Attitudes and Use of Artificial Intelligence: A Global Study 2025*;[97]
- KPMG International and INSEAD, *AI Governance: Principles for Boards*.[98]

One international guideline which numerous (including Australian)[99] companies have picked up in their corporate governance documents is

92 *AI Use by Directors* (n 15)

93 *Bekier* (n 72) [390].

94 Deloitte, *State of AI in the Enterprise: The Untapped Edge* (Report, January 2026) <https://www.deloitte.com/cy/en/issues/generative-ai/state-of-ai-in-enterprise.html>, archived at <https://perma.cc/95GE-V79X>.

95 'Embracing Artificial Intelligence: Incorporating AI in the Boardroom and Beyond', *Herbert Smith Freehills Kramer* (Web Page, 26 June 2025) <https://www.hsfkramer.com/insights/reports/2025/governance-insights-2025/embracing-artificial-intelligence-incorporating-ai-in-the-boardroom-and-beyond>, archived at <https://perma.cc/XQL2-FSEP>.

96 Ken D Kumayama, Sonia K Nijjar and Jenness E Parker, 'Do's and Don'ts of Using AI: A Director's Guide' (Guide, 14 September 2025) <https://www.skadden.com/insights/publications/2025/09/dos-and-donts-of-using-ai-a-directors-guide>, archived at <https://perma.cc/F35R-J2BE>.

97 The University of Melbourne and KPMG International, *Trust, Attitudes and Use of Artificial Intelligence: A Global Study 2025* (Report, April 2025) <https://kpmg.com/xx/en/our-insights/ai-and-technology/trust-attitudes-and-use-of-ai.html>, archived at <https://perma.cc/YV3E-7S2F>.

98 KPMG International and INSEAD, *AI Governance Principles for Boards* (Report, April 2026) <https://kpmg.com/xx/en/our-insights/ai-and-technology/ai-governance-principles-for-boards.html>, archived at <https://perma.cc/LY33-HJ78>.

99 See, eg, Fortescue, which claims in its 2025 Annual Report to have 'an artificial intelligence (AI) governance framework aligned with international standards such as the NIST AI RMF, GDPR and ISO 42001': Fortescue, *Annual Report 2025* (Report, 2025) 114.

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.[100] Another important international standard is the Organisation for Economic Co-operation and Development ('OECD') 'AI Principles', the first intergovernmental standard on AI, adopted in 2019 and updated in 2024, which has reportedly been followed by over 1000 policy initiatives across more than 70 jurisdictions.[101] Both guidelines regulate AI from consumer protection, trustworthiness and cross-border collaboration perspectives, without engaging directly with its use by directors in the boardroom.

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.

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

The concept of AI bots taking on the role of directors, or shadow directors, has been extensively contemplated in the literature.[102] At an extreme end of the spectrum,[103] for example, Martin Petrin in his chapter 'Corporate Governance'

[100] International Organization for Standardization and International Electrotechnical Commission, *ISO/IEC 42001:2023: Information Technology — Artificial Intelligence — Management System* (International Standard, 1st ed, December 2023). See also International Organization for Standardization and International Electrotechnical Commission, *ISO/IEC 5259-1:2024: Artificial Intelligence — Data Quality for Analytics and Machine Learning* (International Standard, 1st ed, 2024).

[101] 'AI Principles', *Organisation for Economic Co-operation and Development* (Web Page) <https://www.oecd.org/en/topics/ai-principles.html>, archived at <https://perma.cc/2ZHC-F62L>.

[102] See, eg, Petrin (n 12) 117–35; Möslein, 'Robots in the Boardroom' (n 12) 629–32; Yolanda Simbolon, 'Considering the Use of Artificial Intelligence in the Board of Directors: A Corporate Law Review' (Conference Paper, International Conference Restructuring and Transforming Law, 27 February 2025); Armour and Eidenmüller (n 2) 106; Barry Libert, Megan Beck and Mark Bonchek, 'AI in the Boardroom: The Next Realm of Corporate Governance', *MIT Sloan Management Review* (Blog Post, 19 October 2017); Susan Watson, 'Viewing Artificial Persons in the AI Age through the Lens of History' in Andrew Godwin, Pey W Lee and Rosemary Teele Langford (eds), *Technology and Corporate Law* (Edward Elgar Publishing, 2021) 21, 21–3.

[103] 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

in the second edition of *Artificial Intelligence: Law and Regulation* contemplated that

> AI will usher in the end of the corporate board … AI will gradually replace human directors on boards, 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.[104]

In Australia, the *Corporations Act* requires a director to be a human being, with 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 Union[105] and has been the subject of academic advocacy.[106] As 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?'[107] What would Professor Harold Ford have made of this?

Some examples, perhaps hyperbolic or attention seeking, of at least purported AI directors are recorded in dispatches. 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

to contrast a perfect technology-enhanced but hypothetical world with the real, imperfect one in which humans currently live': Luca Enriques and Dirk A Zetzsche, 'Corporate Technologies and the Tech Nirvana Fallacy' (Working Paper No 457/2019, European Corporate Governance Institute, March 2020) 24–5.

104 Petrin (n 12) 117–18.

105 O'Malley (n 7) 371.

106 See Nadia Banteka, 'Legal Personhood and AI: AI Personhood on a Sliding Scale' in Ernest Lim and Phillip Morgan (eds), *The Cambridge Handbook of Private Law and Artificial Intelligence* (Cambridge University Press, 2024) 618. Banteka advocates for a flexible 'inverted scale' approach to electronic personhood: at 628–34.

107 Ahern (n 50) 419.

company director'.[108] Vital, in fact, was not a de jure director,[109] and had observer but not voting rights.[110] In August 2022, it was reported that a Hong Kong listed company, NetDragon Websoft Holdings, had appointed Ms Tang Yu, an AI-powered virtual humanoid robot, as the Rotating CEO of its flagship subsidiary, Fujian NetDragon Websoft.[111] In 2024, Ms Yu was apparently awarded the title of 'China's Best Virtual Employee of the Year' at the China Digital Human Industry Forum.[112]

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

[108] 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': Ellie Zolfagharifard, 'Would You Take Orders from a Robot? An Artificial Intelligence Becomes the World's First Company Director', *Daily Mail* (online, 20 May 2014) <http://www.dailymail.co.uk/sciencetech/article2632920/Would-orders-ROBOT-Artificial-intelligence-world-s-company-director-Japan.html>, archived at <https://perma.cc/5LNA-SK7R>.

[109] Nor was it what we would now consider artificially intelligent in the proper sense: Möslein, 'Robots in the Boardroom' (n 12) 615.

[110] Ibid. Additionally, 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': 'Tieto to Appoint Artificial Intelligence to the Leadership Team of the New Data-Driven Business Unit', *Financial IT* (Web Page, 17 October 2016) <https://financialit.net/news/infrastructure/tieto-appoint-artificial-intelligence-leadership-team-new-data-driven-businesses>, archived at <https://perma.cc/PL8T-SQNQ>. 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?': David Reid, 'Marc Benioff Brings an AI Machine Called Einstein to His Weekly Staff Meeting', *CNBC* (online, 25 January 2018) <https://www.cnbc.com/2018/01/25/davos-2018-ai-machine-called-einstein-attends-salesforce-meetings.html>, archived at <https://perma.cc/FT35-X5LK>; Petrin (n 12) 115 [6.002].

[111] NetDragon Websoft Holdings, '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>, archived at <https://perma.cc/ZD9K-GPZT>.

[112] 'NetDragon's AI Leader Tang Yu Named China's Best Virtual Employee of 2024', *NetDragon Websoft Holdings* (Web Page, 28 April 2024) <https://www.netdragon.com/content/2024-04-28/20240428231345555.shtml>, archived at <https://perma.cc/79NQ-ZYMW>. See also Sherzod Odilov, 'Can AI Become Your Next CEO?', *Forbes* (online, 11 January 2024) <https://www.forbes.com/sites/sherzododilov/2024/01/11/can-ai-become-your-next-ceo/>, archived at <https://perma.cc/S3GK-5JFA>.

Advisor'.[113] 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'.[114] 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.'[115]

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

Also in 2024, the largest publicly traded entity in the United Arab Emirates, International Holding Company, appointed 'Aiden Insights' as an AI board observer, describing it as an active participant in boardroom conversations.[116] 2024 was two years ago, which is an eon in the world of AI, and AI bots or advisors are presumably being used more and more by boards in Australia and beyond, even if not performing the role of a director.

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 do the following:

[113] 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>, archived at <https://perma.cc/8M64-Q9EB>.

[114] Ibid.

[115] Ibid.

[116] *AI Use by Directors* (n 15) 10.

- 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.[117]

In April this year, Lloyds Banking Group announced that it had deployed a specialist AI bot in its boardroom which was developed by United Kingdom board tech group, Board Intelligence.[118] 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.[119] Other technology providers including Nasdaq's 'Boardvantage' and Govenda's 'Gabii' are reportedly offering similar AI tools to assist directors before, in and after the board meeting.[120] The possibility that directors might start testing ideas with an 'AI avatar', such as that being developed by Mark Zuckerberg as Chief Executive of Meta,[121] may well be something to look out for in the not-too-distant future.

[117] 'Meet Your AI Board Member', *Diligent* (Web Page) <https://learn.diligent.com/AI_Board_Member_Registration.html>, archived at <https://perma.cc/5JMV-JKYK>. See also Andrew Hill and Ashley Armstrong, 'Should Your Board Appoint a Bot?', *Financial Times* (online, 27 April 2026) <https://www.ft.com/content/082192c1-a888-4000-8796-020c83a2b4f3?syn-25a6b1a6=1>, archived at <https://perma.cc/9BPX-SKFM>.

[118] Vidhya Edwards Munnangi, 'Lloyds to Use AI Tool in Board Meetings', *Retail Banker International* (online, 13 April 2026) <https://www.retailbankerinternational.com/news/lloyds-bank-board-ai-tool/>, archived at <https://perma.cc/H3JD-YH4V>.

[119] Ibid. In a statement to Retail Banker International, Lloyds Banking Group'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.'

[120] Hill and Armstrong (n 117).

[121] Hannah Murphy, 'Meta Builds AI Version of Mark Zuckerberg to Interact with Staff', *Financial Times* (online, 13 April 2026) <https://www.ft.com/content/02107c23-6c7a-4c19-b8e2-b45f4bb9ce5f?syn-25a6b1a6=1>, archived at <https://perma.cc/VX2Q-DKVG>.

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?[122]

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',[123] 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?'[124]

Questions would of course then arise as to how the bot would 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 would be liable.[125] 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 arise in pursuing claims brought against AI providers, especially those outside Australia.

III Care and Diligence in Relation to Corporate Use Of AI

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

[122] *Ho v Akai Pty Ltd (in liq)* (2006) 247 FCR 205, 210 [21] (Finn, Weinberg and Rares JJ); *Standard Chartered Bank of Australia Ltd v Antico [Nos 1 and 2]* (1995) 38 NSWLR 290, 327–8 (Hodgson J); *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* (2010) 238 FLR 384, 435 [231] (White J) ('*Buzzle*').

[123] *Buzzle* (n 122) 438 [239], quoting *Secretary of State for Trade and Industry v Deverell* [2001] Ch 340, 354 [35] (Morritt LJ). See also *Buzzle* (n 122) 436–7 [235], 440–1 [247].

[124] Michael D Hobson, 'The Law of Shadow Directorships' (1998) 10(2) *Bond Law Review* 184, 187, quoting Pearlie MC Koh, 'Shadow Director, Shadow Director, Who Art Thou?' (1996) 14(6) *Companies and Securities Law Journal* 340, 340.

[125] Armour and Eidenmüller (n 2) 111.

themselves in a position to guide and monitor the management of the company'.[126] In respect of directors delegating to or relying on others, his Honour added the following useful summary of very familiar principles:

> 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 … 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.[127]

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'.[128]

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 matter that falls specifically [within] the board's responsibilities'[129] 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.[130] I would endorse Lee J's observation that

126 *Bekier* (n 72) [368].

127 Ibid [363], [365] (citations omitted). See also *Daniels v Anderson* (1995) 37 NSWLR 438, 502–4 (Clarke and Sheller JJA), 603–4, 606 (Powell JA) ('*Daniels*').

128 *Bekier* (n 72) [370]–[371] (Lee J). See also *ASIC v Adler* (2002) 168 FLR 253, 348 [372] (Santow J) ('*Adler*'), citing *Daniels* (n 127) 502–3 (Clarke and Sheller JJA):

> 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.

129 *Bekier* (n 72) [371].

130 Ibid [368].

> 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.[131]

The reference to 'Middleton J's caution' was to his Honour's decision in *Australian Securities and Investments Commission v Healey* ('*Healey*') 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.[132]

IV Delegation to and/or Reliance on AI

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?

While our *Corporations Act* does not have a direct equivalent to s 173 of the *Companies Act 2006* (UK) which provides in terms that '[a] director of a company must exercise *independent* judgment',[133] under Australian law, directors must give adequate consideration and retain their discretion in decision-

[131] Ibid [394].

[132] (2011) 196 FCR 291, 298 [20] (emphasis added) ('*Healey*').

[133] *Companies Act 2006* (UK) s 173(1) (emphasis added).

making.[134] A director will be in breach of their equitable duty 'for letting things slide or for improperly acting blindly at the direction of another person'.[135]

Healey has been identified as showing 'how important a role the courts will play in standard settings around the application of the duty of care, and in an AI context and as AI becomes more established, what is expected of directors will inevitably increase'.[136] The power to delegate, to which Middleton J referred in *Healey*, is addressed in s 198D of the *Corporations Act* which provides:

> (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.[137]

There is no power to delegate to AI and whatever else it may be, and notwithstanding the efforts of the Real Estate Institute of NSW, 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.

But what if the board delegates various tasks to management, a committee, fellow director, employee or other person who employs AI to undertake the delegated task? Can the director rely upon the output of that delegation? The answer is, on its face, supplied by s 190 of the *Corporations Act* which provides:

[134] Ian M Ramsay, LexisNexis, *Ford, Austin & Ramsay's Principles of Corporations Law* (online at 19 June 2026) [8.300]–[8.320] ('*Principles of Corporations Law*'). See also Ian M Ramsay, *Company Directors: Principles of Law & Corporate Governance* (LexisNexis, 2nd ed, 2023) 472 [6.70].

[135] Ramsay, *Principles of Corporations Law* (n 134) [8.310].

[136] Ahern (n 50) 425, discussing *Healy* (n 132).

[137] *Corporations Act* (n 14) s 198D (emphasis added).

> (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.[138]

What does 'reliability' and 'competence' mean in this context where the delegate themselves 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 of the *Corporations Act* because it is, in substance, a delegation to AI for which s 190 offers no protection?

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 *Australian Securities and Investments Commission v Adler*, 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 general law principles for directors' responsibilities for the actions of a delegate.[139]

Earlier, in *Daniels v Anderson* ('*Daniels*'), Clarke and Sheller JJA of the NSW Court of Appeal drew substantially upon United States jurisprudence in

[138] Ibid s 190 (emphasis added).

[139] *Adler* (n 128) 347–8 [372].

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:

> 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.[140]

On the application of these principles, a director seeking to rely on the safe harbour in s 190(2) of the *Corporations Act* 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, sycophantic agreement,[141] bias and hallucination. That inquiry will of course depend not only the nature of the relevant decision but also the type and quality of AI used,[142] such as whether it drew only from a closed and carefully curated database or was an open AI-system.

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.

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:

140 *Daniels* (n 127) 503, citing *Francis v United New Jersey Bank*, 432 A 2d 814 (NJ, 1981); *Wilkinson v Dodd*, 7 A 327 (NJ Ch, 1886), affirmed in *Dodd v Wilkinson*, 9 A 685 (NJ, 1887).

141 See, eg, *Fortis* (n 63) 32–7.

142 Professor Godwin draws a distinction between assisted intelligence, augmented intelligence, amplified intelligence, autonomous intelligence and autopoietic intelligence: Godwin (n 12) 178, citing Michael Hilb, 'Towards Artificial Governance: The Role of Artificial Intelligence in Shaping the Future of Corporate Governance' (2020) 24(4) *Journal of Management and Governance* 851, 861–5. See also Möslein, 'Robots in the Boardroom' (n 12) 623.

> 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.[143]

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 sub-s (a)(ii) must be a person and the 'information, or professional or expert advice' must be given or prepared by that person.[144] That is not to say that *that* person may not use AI but, in order to engage the safe harbour,

[143] *Corporations Act* (n 14) s 189 (emphasis added).

[144] Ibid s 9 (definition of 'expert'). But see Locke and Bird (n 12) 26–7: '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.'

the relevant belief by the director as to the person's competence may need to extend into competence in the responsible use of AI.

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*'.[145] 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:

> 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.[146]

V Business Judgment Rule

Section 180(2) of the *Corporations Act* is another important safe harbour provision which recognises the complexity of a company director's role and responsibilities. It establishes 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) *rationally believe that the judgment is in the best interests of the corporation.*

145 *Corporations Act* (n 14) s 189 (emphasis added).

146 Ahern (n 50) 426.

> 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.[147]

This section requires the business judgment *to be made by* the director, that the director *inform themselves about the subject matter of the judgment* to the extent they reasonably believe is appropriate, and form a 'rational belief' as to the merits of the decision.[148] In *United Petroleum Australia Pty Ltd v Herbert Smith Freehills*, 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.[149]

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 Professor Andrew Godwin has pointed out, the rationality of a belief must be that of the director, and as Elliot J pointed out in the passage 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.

Further, in *Australian Securities and Investments Commission v Rich*, 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. 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

[147] *Corporations Act* (n 14) s 180(2) (emphasis added).

[148] 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: *Bekier* (n 72) [410]–[418] (Lee J).

[149] *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* (2018) 128 ACSR 324, 446–7 [626] (emphasis added) (citations omitted).

> should be' has not made a business judgment and accordingly cannot invoke the defence.[150]

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'.

It is in this context that commentators have aptly warned that directors take a 'cautious approach'[151] 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'.[152]

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 'Generative AI Systems and Corporate Governance, Compliance and Liability' as follows:

> 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

[150] *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1, 151 [7277] (citations omitted) ('*Rich*'), quoting *Adler* (n 128) 356 [406] (Santow J), citing *Gold Ribbon (Accountants) Pty Ltd (in liq) v Sheers* [2006] QCA 335, [247] (Keane JA). See also *Rich* (n 150) 154 [7290]:

> [Section 180(2)(d)] is satisfied if the evidence shows that the defendant believed that [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, as defined, whether or not the reasoning process is objectively a convincing one.

[151] Godwin (n 12) 180.

[152] Justin Fox, James North and Jennifer Dean, 'AI in the Boardroom: A Director's Guide' (2019) 22(5–6) *Internet Law Bulletin* 83, 85.

> 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 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*?[153]

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'.[154]

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 data[155] may be captured and used,[156] then, as observed by Professor Möslein, 'the duty to act on an informed basis may well evolve into the duty to obtain such predictions made by artificially intelligent devices'.[157] Thus, although courts are generally reticent to scrutinise

153 O'Malley (n 7) 375 (emphasis added). 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: 'While 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': at 374–5.

154 Godwin (n 12) 182.

155 'Unstructured data' includes emails, texts, social media posts, clickstreams and chat transcripts: Locke and Bird (n 12) 12.

156 Especially through the use of linkage analysis, pattern recognition and natural language processors.

157 Möslein, 'Robots in the Boardroom' (n 12) 626. See also Locke and Bird (n 12) 26–7:

> The 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

the degree of effort put in by directors in processing relevant information,[158] 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?', 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?'

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?'

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'.[159]

> 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.

158 See Möslein, 'Robots in the Boardroom' (n 12) at 627–8, citing *Re RJR Nabisco Inc Shareholders Litigation*, 14(3) Delaware Journal of Corporate Law 1132, 1165 (Chancellor Allen) (Del Ch, 1989): 'the 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'.

159 See Godwin (n 12) 177. 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* (n 14) and *ASX Listing Rules* (n 74) r 3.1. See also *Crowley v Worley Ltd* (2022) 293 FCR 438, 491 [177]–[178] (Jagot and Murphy JJ):

> 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 a relevant company officer'.

VI AI and Board Meetings

I have already made reference to the importance of directors bringing their own minds and judgements 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 [themselves] to be dominated, bamboozled or manipulated by a dominant fellow director where such involves a total abrogation of [the] responsibility' to 'inform [themselves] of the company's affairs and join with [their] fellow directors in supervising them'.[160] AI, with its apparent self-confidence, has the capacity both to 'bamboozle' and, depending on the algorithm, to 'manipulate'.

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'.[161] Thus, the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations* provide: 'The board needs to have an appropriate number of independent non-executive directors who can challenge management and hold them to account'.[162]

That dynamic of healthy debate, disagreement, challenge, dissension and, where appropriate, intensity, might be described as the 'crucible' of the boardroom.

To what extent might that crucible of conflict be melted by the introduction of AI into the boardroom, either to assist the board in its 'judgement tasks' (for example, in an advisory or shadow capacity) or to assist with 'administrative

[160] [2013] EWHC 3147 (Comm), [191], referred in Ahern (n 50) 426.

[161] Eelke M Heemskerk, Klaas Heemskerk and Margrietha M Wats, 'Conflict in the Boardroom: A Participant Observation Study of Supervisory Board Dynamics' (2017) 21(1) *Journal of Management and Governance* 233, 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': Daniel P Forbes and Frances J Milliken, 'Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups' (1999) 24(3) *Academy of Management Review* 489.

[162] ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (Report, 4th ed, February 2019) 12 <https://www.asx.com.au/about/regulation/corporate-governance-principles-and-recommendations>, archived at <https://perma.cc/F763-2LZY>.

tasks'[163] (for example, for transcription, recording and the drafting of board minutes).[164]

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'.[165] 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'.[166] Similarly, overdependence may lead to a decrease in the skill and expertise of directors, a concern I also share for lawyers.[167]

The threat of groupthink is particularly pernicious in large, multinational 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:

> There 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 …

[163] For the distinction between 'administrative' and 'judgement' tasks in corporate governance, see Petrin (n 12) 118.

[164] See generally *Effective Board Minutes* (n 91).

[165] Chief Justice AS Bell, 'Truth Decay and Its Implications for the Judiciary: An Australian Perspective' (Speech, 4th Judicial Roundtable, Durham University, April 2024) 36 [95] ('Truth Decay').

[166] Ahern (n 50) 429.

[167] Bell, 'Truth Decay' (n 165) 33 [89]:

> [O]ne of my 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.

> 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.[168]

The emergence of groupthink engendered by AI is no doubt already underway. Pippa Begg, the Chief Executive of Board Intelligence, the company 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"'.[169] 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 '[a]s a board, we agreed that we would not make positive investment decisions without corroboration by Vital'.[170] It is difficult to reconcile what appears essentially to be a veto power with the collective decision-making function of a healthy boardroom.

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.[171]

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 director's contributions'.[172] Notwithstanding the need for regulatory compliance, overly detailed minutes, or indeed

[168] *Daniels* (n 127) 500–1 (Clarke and Sheller JJA).

[169] Munnangi (n 118).

[170] Alissa Kole, 'A New Governance Paradigm Is Necessary for AI-Powered Boards', *Harvard Law School Forum on Corporate Governance* (Forum Post, 21 April 2024) <https://corpgov.law.harvard.edu/2024/04/21/a-new-governance-paradigm-is-necessary-for-ai-powered-boards/>, archived at <https://perma.cc/64V2-MLEZ>; Nicky Burridge, 'AI Takes Its Place in the Boardroom', *Nikkei Asia* (online, 25 May 2017) <https://asia.nikkei.com/business/ai-takes-its-place-in-the-boardroom>, archived at <https://perma.cc/WGK4-78U6>.

[171] *Effective Board Minutes* (n 91).

[172] Ibid 2.

recordings or complete transcripts of minutes, risk stifling, chilling or even freezing discussion. As one partner at a leading law firm has warned:

> 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. 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.[173]

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.

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: '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.'[174]

[173] *AI Use by Directors* (n 15) 8.

[174] 'Gabii: The First AI Governance Tool', *Govenda* (Web Page) <https://www.govenda.com/gabii/>, archived at <https://perma.cc/G3NU-H8NP>.

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.

The responsibility lies with the board, and especially the chair and the company secretary,[175] 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 AI would assist.

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.

VII Conclusion

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.

Regulatory lag is inevitable. Company directors, while not regulators in any traditional sense, have corporate governance responsibilities which are, in some respects and vis-a-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.

The following matters are clear.

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.

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.

175 See above n 131 and accompanying text.

Thirdly, directors must be vigilant and disciplined in their use of AI. Apart from the confidentiality, data governance and proprietary concerns, none of which are 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 boardroom is not undermined or supplanted by AI.

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.[176] The recent trend of boards leaning into AI education seminars for directors is salutary.

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.[177] Internal controls may go some way to managing 'shadow' AI use through establishing visibility mechanisms and guardrails.

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 or non-use and abuse of AI.

[176] The failure of directors to ask probing questions was a recurring theme of Lee J's judgment in *Bekier* (n 72).

[177] Van der Muelen et al (n 8) 2. The Director-General of Security has warned: 'Espionage and foreign interference will be enabled by advances in technology, particularly Artificial Intelligence and deeper online pools of personal data vulnerable to collection, exploitation and analysis by foreign intelligence services': Mike Burgess, 'ASIO Annual Threat Assessment 2025' (Speech, 19 February 2025) <https://www.oni.gov.au/news/asio-annual-threat-assessment-2025>, archived at <https://perma.cc/U6Z8-UXDY>.