

# Property Funds Association

Design and Distribution Obligations Seminar

14 May 2020

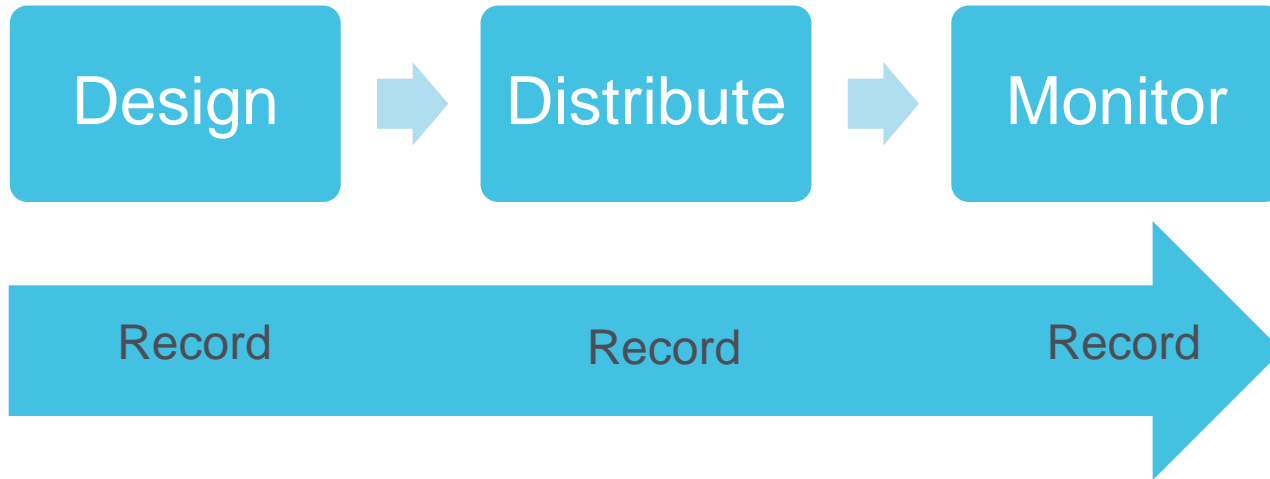
[smarterlaw.com.au](http://smarterlaw.com.au)

# What we will discuss

Topic
DDO overview
Identifying your design and distribution obligations
Learning from European and UK experiences
DDO policy - workshop
Target market determination – workshop
Questions, conclusions and next steps

# DDO overview

# The process



# DDO status

## Act

- *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019*
- April 2019

## Regs

- *Corporations Amendment (Design and Distribution Obligations) Regulations 2019*
- December 2019

## Guidance

- Draft Regulatory Guidance and CP 325 released
- December 2019 – awaiting final guidance

## Implement

- 5 April 2021 statutory commencement date
- ASIC announced will defer commencement until 5 October 2021
- ASIC's final Regulatory Guide promised for mid-2020

# DDO: Products in scope

## In-scope

- Products issued that require the preparation of a PDS or prospectus (issues and regulated secondary sales)
- ASIC Act products e.g. credit facilities
- Regulations – Government intends to extend to:
  - Simple corporate bonds
  - Debentures of an Australian ADI or a life insurer
  - Basic deposit products

## Out-of-scope

- Margin lending facilities
- Shares issued under an employee share plan
- Fully paid ordinary shares (including foreign companies)
- MySuper products

# Recent developments: ASIC draft guidance

- Draft Regulatory Guide sets out ASIC guidance on DDO
- Lots taken from other regulators (FCA, ESMA)
- **Principles-based guidance**
- Generally fairly helpful and not intrusive
- 11 March 2020 was deadline for feedback
- ‘Starting point’ – will evolve
- Final Regulatory Guide due mid-2020 – delay due to COVID

## Recent developments: ASIC draft guidance (cont'd)



Provides clarity



Principles-based



Constructive relationship



## Recent developments: ASIC draft guidance (cont'd)

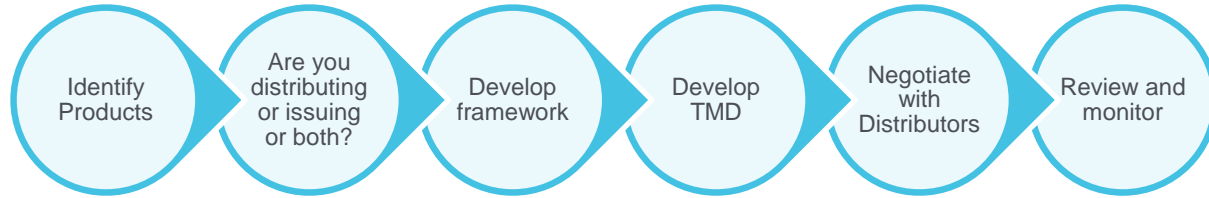
**X** Negative target market

**X** Take into account diversified portfolio

**X** Backwards process?

# Identifying your design and distribution obligations

# Identifying your obligations



# DDO: Some current issues

TMD content – level of detail; standardisation across products; industry collaboration

What are 'reasonable steps' to ensure distribution is in accordance with a TMD? What does 'likely to' mean

Personal advice exemption - Extent to which preparing a TMD (or not distributing a product according to a TMD) would not constitute personal advice

Distribution details: Who are the distributors; working out the details with distributors; amending distribution agreements

Compliance burden and costs – design, compliance, reporting, governance processes

# Product governance framework

## Target Market Determination

Distribution strategy & oversight –  
internal and external

Review process

Record Keeping

Interaction with other  
processes – PDS  
approval, due diligence

Board Oversight

# Interaction with other policies

*Consideration of target market factors should permeate all aspects of product development and distribution, as well as ensuring the selection of appropriate distribution channels and the promotion of the financial instruments are accompanied by sufficient and correct information.*

UK Financial Conduct Authority

# Distribution

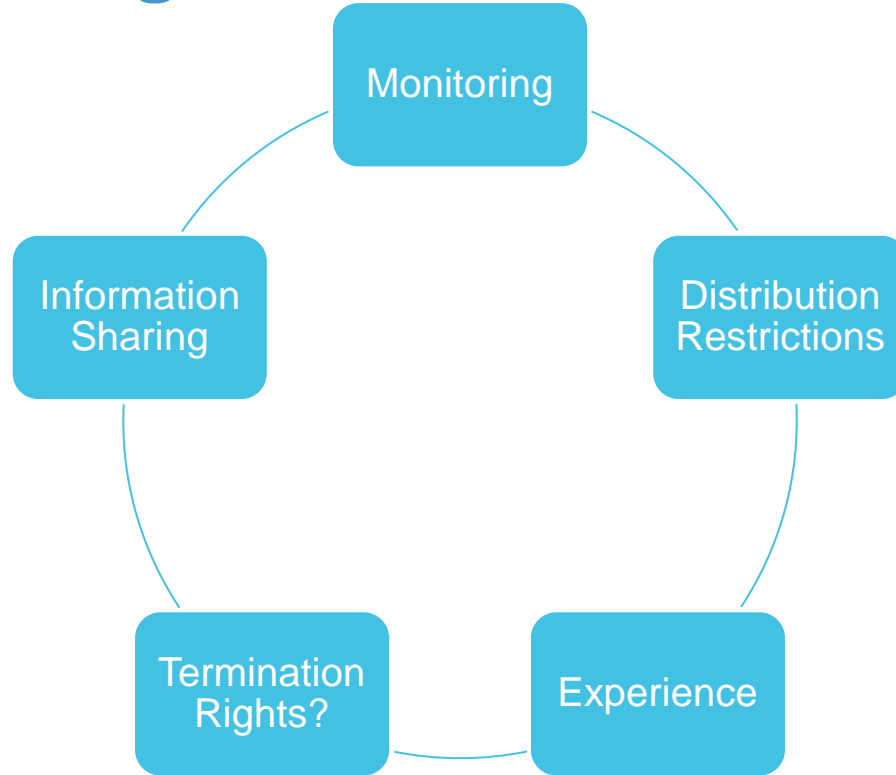
An issuer must take reasonable steps that will, or are reasonably likely to, result in a distribution being consistent with the most recent target market determination

Selection of Distributors:

- Review resources, knowledge and competence
- Determine how to supervise and monitor
- Impose regulatory obligations in contract to ensure controls

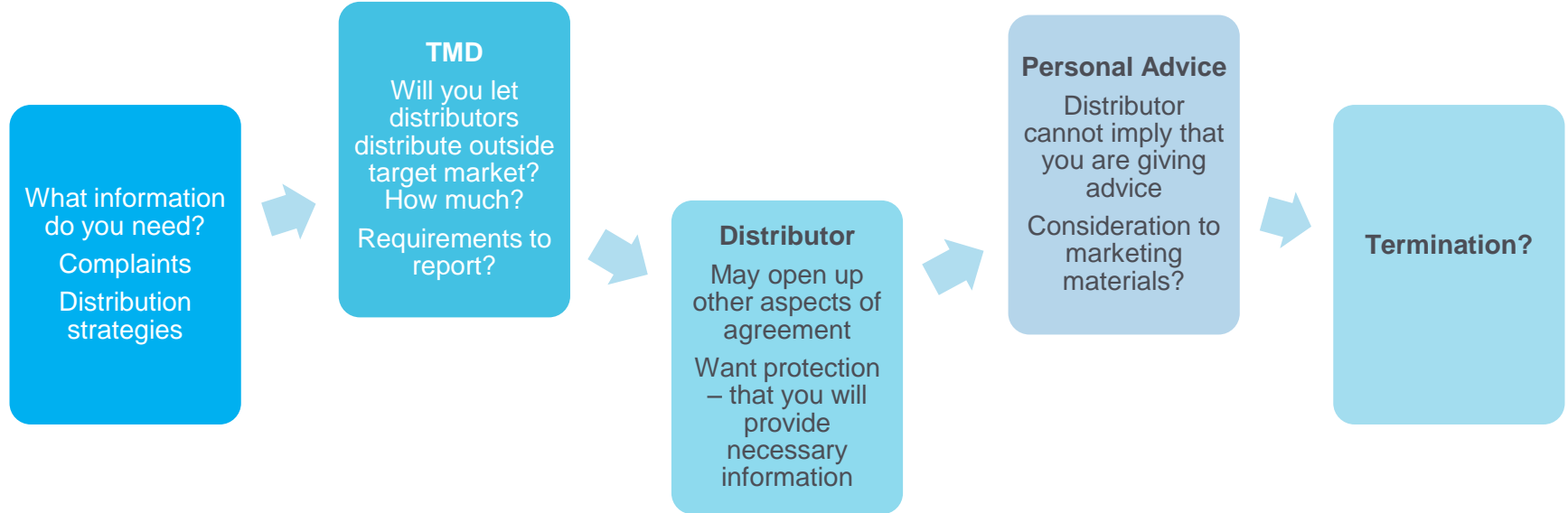
How to control chains of distributors?

# Distribution agreements



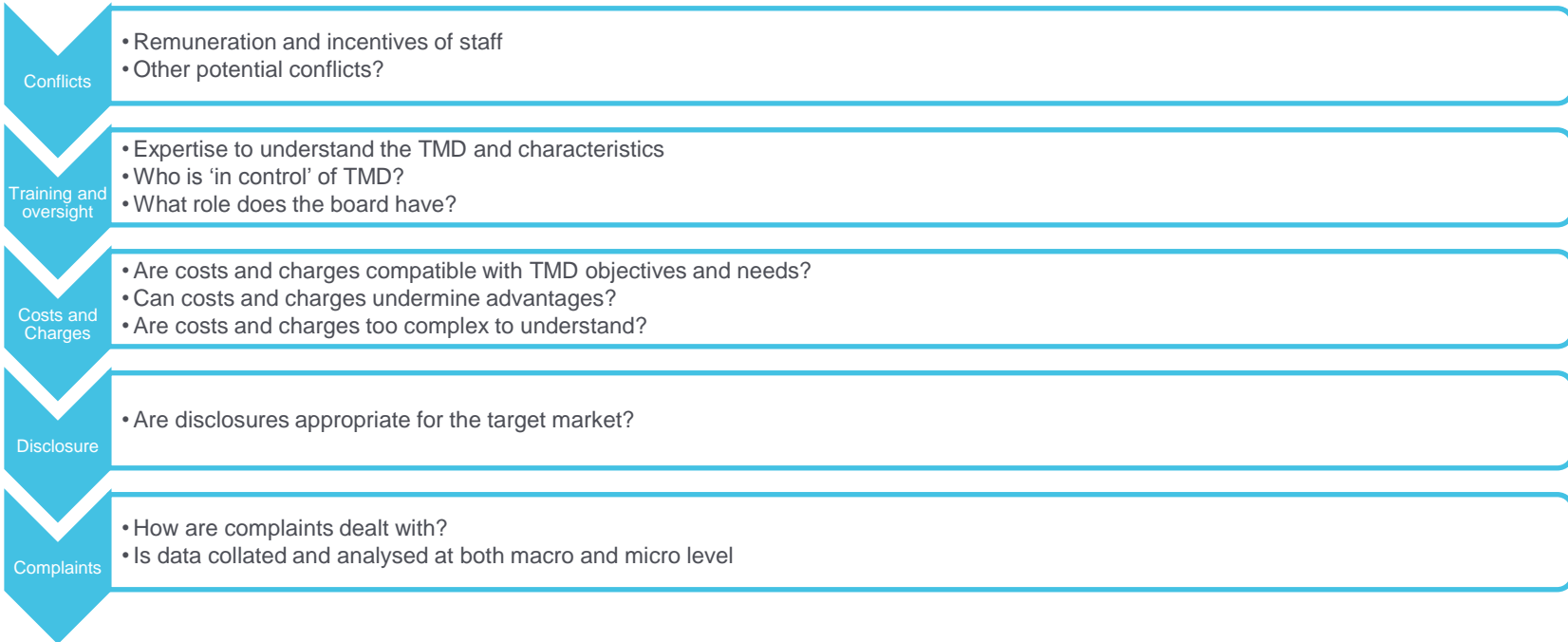


# Things to consider



# Learnings from Europe and UK

# Interaction with other policies



# Some experiences from Europe



# Learning from EU market participants

## Industry criticism

- unnecessary to review when payment profile does not change
- reduction in products being offered (too burdensome to comply)
- little benefit where advice is being provided

# Learning from regulators

- Sale of products outside the actual target market is possible in so far as this can “be justified by the individual facts of the case”
- Firms must consider the needs of their consumers carefully
- Alternative products are not to be sold that do not meet needs and demands of consumers
- Changing policies at renewal for existing customers still requires consideration of the product governance regime
- It is important to ensure disclosure is fair clear and not misleading

# Henderson

- Pre “product governance” however instructive
- **Fined** GBP 1.9million (approx. AUD 3.75) million for failing to treat retail investors fairly. Early resolution reduced from initial GBP 2.7million
- In addition compensation paid to investors
- Reduced the level of active management in a number of retail funds
- Informed institutional investors and reduced fees – did not for retail
- Retail investors paying ‘active’ fees for closet trackers
- “I can’t see how we could continue to charge this [active fees] if we are telling everyone this is a tracker product”.

# Henderson

- Henderson “did not have any documented policies or procedures in place to assess whether any changes to funds required the amendment of fund documentation or communication to investors”
- “Did not communicate... to any retail customers”
- “The governance committees that [Henderson] relied on to oversee... management of its funds failed adequately to identify and address in a timely manner the treatment of retail investors”
- “no governance forum with the dedicated remit to assess the ongoing impact of changes in investment strategy for existing funds on relevant investors, such as the level of fees charged”



**DDO policy**

# Policy template



## Design and Distribution Obligations Policy

Date of this document: **[insert date]**

Draft no. 1: 14 May 2020

## Contents

<b>Purpose and use of this policy</b>	
<b>1</b>	<b>Purpose of this Policy</b>
<b>2</b>	<b>Outline of this Policy</b>
<b>3</b>	<b>To whom is this Policy relevant?</b>
<b>4</b>	<b>Dissemination of this Policy</b>
<b>5</b>	<b>Policy owner</b>
<b>6</b>	<b>Glossary</b>
<b>Legislative background</b>	
<b>7</b>	<b>Background</b>
<b>8</b>	<b>Outline of the design and distribution obligations</b>
<b>9</b>	<b>What financial products are covered by the DDO regime?</b>
<b>10</b>	<b>Legacy Products and secondary sales of Products</b>
<b>11</b>	<b>What the DDO regime means for us</b>
<b>12</b>	<b>Why is this important?</b>
<b>13</b>	<b>Other regulatory obligations</b>
<b>14</b>	<b>Regulatory guidance</b>
<b>Our Product governance framework</b>	
<b>15</b>	<b>General principles relating to our governance framework</b>
<b>16</b>	<b>Three interconnected phases of Product manufacturing and distribution</b>
<b>17</b>	<b>Relationship with other policies</b>
<b>18</b>	<b>Link with personal advice</b>
<b>Product design phase - Initial steps</b>	
<b>19</b>	<b>Outline</b>
<b>20</b>	<b>Principles for designing a new Product</b>
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## Product design phase - Target market determinations

- 23 General principles
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- 25 Formulating a TMD
- 26 Formulating the target market
- 27 Determining the conditions and restrictions
- 28 Determining the TMD review period
- 29 Determining the review triggers
- 30 Determining the complaints reporting period
- 31 Determining reportable information
- 32 Making TMDs publicly available

## Product distribution phase

- 33 Outline
- 34 When does this Policy apply to distributors?
- 35 Who are our distributors?
- 36 Taking 'reasonable steps'
- 37 Relationship with third party distributors
- 38 Ongoing relationship with distributors
- 39 Promotional material and marketing campaigns

## Product monitoring and review phase

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- 41 Monitoring
- 42 Reviews based on review triggers
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- 44 Record-keeping
- 45 Reports of significant dealings
- 46 Reports of significant breaches of AFSL obligations

## Review of this Policy

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## 48 Regular review

## Glossary

## Schedule 1 - List of Products

## Schedule 2 - Pro forma TMD

## Schedule 3 - TMD criteria

## Schedule 4 - DDO Schedule

# Target market determination

# Target Market Determination

## XYZ Property Fund (Fund)

14 May 2020

### Important information about this document

This target market determination (TMD) is made by **[insert name of product issuer]** (ABN **[ ]**, AESL **[ ]**) (Issuer). The Issuer is the trustee of the Fund, and the product in relation to which this TMD is made is interests in the Fund (Product).

This document is not a summary of the Fund or the Fund's Product Disclosure Statement (PDS). It does not (and is not intended to) describe the terms or features of the Fund.

This document does not (and is not intended to) provide or constitute financial product advice. The target market described in this TMD is general in nature only. This TMD does not take into account the objectives, financial situation and needs of any particular person and the Issuer makes no representation as to whether or not the Fund is suitable for any particular person.

Prior to making any decision in relation to the Fund, investors should obtain and consider the PDS for the Fund, and obtain financial product advice if necessary.

### Details

TMD requirement	Determination
Class of retail clients that comprises the target market for the product	<p>This Product is designed for investors who:</p> <ul style="list-style-type: none"><li>are Australian citizens and Australian permanent residents who are residing in Australia;</li><li>have knowledge that constitutes:<ul style="list-style-type: none"><li>'Average'<sup>1</sup> knowledge and where the Product is distributed to the client through a financial advisor; or</li><li>'High'<sup>2</sup> knowledge;</li></ul></li><li>seek to invest in the Product for one or more of these purposes:<ul style="list-style-type: none"><li>regular and reliable income;</li><li>considerably tax deferred income;</li><li>potential capital growth;</li></ul></li><li>seek to invest in the product for a minimum holding period of six years and invests on a long-term basis;</li><li>expect restricted access to their investment in accordance with the following requirements:<ul style="list-style-type: none"><li>they will be unable to withdraw their investments within six years of investment; and</li></ul></li></ul>

<sup>1</sup> The retail investor has one or more of: average understanding of the relevant financial products and transactions; is currently (or have previously) invested in similar products; some financial industry experience; some investment holdings; or fairly frequent trading/investment activity.

<sup>2</sup> The retail investor has one or more of: high understanding of the relevant financial products and transactions; is currently invested in similar products; extensive financial industry experience; extensive investment holdings; or high trading/investment activity.

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TMD requirement	Determination
	<ul style="list-style-type: none"><li>they may only transfer units at the Issuer's discretion;</li><li>have the following risk profile:<ul style="list-style-type: none"><li>the investor can tolerate loss up to but not exceeding their entire investment or initial amount; and</li><li>the investor falls within the SRM risk band 3 or 'Medium' (or higher);</li></ul></li><li>seek to invest on the basis that the Product concentration in their portfolio is less than 30%; and</li><li>are considered affluent or high net wealth investors.</li></ul>
Distribution conditions	<p>This Product may only be distributed:</p> <ul style="list-style-type: none"><li>directly by the Issuer;</li><li>through platforms/wraps, brokers, and our authorised representatives where the investor has a financial adviser; or</li><li>through our authorised representatives where we have supplied scripts, where the investor does not have a financial adviser.</li></ul>
Review triggers	<p>The following events and circumstances are considered likely to indicate that this TMD may no longer be appropriate:</p> <ul style="list-style-type: none"><li>where the Issuer considers that there has been a material change to the investment strategy or risk profile of the Fund;</li><li>a significant number of complaints about the Product's design or cost;</li><li>a significant number of transfer requests;</li><li>significant dealing in this Product in relation to a retail clients that is inconsistent with this TMD; and</li><li>changes to the costs and charges of the Product that may affect the return of the Product.</li></ul>
First review date	<p>The first review of this determination will be completed no later than 6 months from the date on which this TMD was originally made.</p> <p>Date of issue of this TMD: 14 May 2020.</p> <p>First review of this TMD to be completed by: 14 November 2021.</p>
Subsequent review	<p>After this TMD has first been reviewed, and if the TMD is not replaced, it will be reviewed again at least every 12 months from the date on which the previous review was finished.</p>
Reporting complaints	<p>The reporting periods are:</p> <ul style="list-style-type: none"><li>1 January to 30 June, and</li><li>1 July to 31 December</li></ul> <p>where this TMD remains current during those reporting periods.</p>

TMD requirement	Determination
Information to be provided to the Issuer	<p>The report must be made within ten business days after the end of the reporting period.</p> <p>The reporting periods for this information are:</p> <ul style="list-style-type: none"><li>▪ 1 January to 30 June, and</li><li>▪ 1 July to 31 December</li></ul> <p>where this TMD remains current during that reporting period. The report must be made within ten business days after the end of the reporting period.</p> <p>All distributors must report the following kinds of information:</p> <ul style="list-style-type: none"><li>▪ particulars of complaints they receive about the Product's design and cost from retail clients;</li><li>▪ particulars of complaints that any retail client may make about the distribution conditions that apply to the distribution of this Product;</li><li>▪ particulars of any dealing outside the target market described in this TMD;</li><li>▪ the reasons why any dealing to retail clients who are not in the target market occurred.</li></ul> <p>Platforms and brokers must additionally report the following kinds of information:</p> <ul style="list-style-type: none"><li>▪ samples of recorded sales calls; and</li><li>▪ web analytics (eg click data and website paths).</li></ul>

Draft for discussion  
Private & Confidential

**Questions, conclusions and next steps**



**Harry New**  
Partner  
+61 3 9603 3559  
[harry.new@hallandwilcox.com.au](mailto:harry.new@hallandwilcox.com.au)



**Vince Battaglia**  
Special counsel  
+61 2 8267 3223  
[vince.battaglia@hallandwilcox.com.au](mailto:vince.battaglia@hallandwilcox.com.au)



**Greg Patton**  
Foreign Qualified Lawyer  
+61 3 9603 3328  
[greg.patton@hallandwilcox.com.au](mailto:greg.patton@hallandwilcox.com.au)



# Thank you

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