



GAIL Asia Pacific
Impact Lawyers Journal

ISSUE 1 • JUNE 2022

What does an impact lawyer do?

We speak to two lawyers about what it means to be an impact lawyer

Social housing bonds

And how they can help tackle housing inequality in New Zealand

Impact law news

Reviews of two landmark reports; Legal Innovation in Impact Investing, and A Legal Framework for Impact

GAIL

Global Alliance of Impact Lawyers

What does an impact lawyer do?

Welcome to the first edition of the GAIL Asia Pacific Impact Lawyers Journal.

The Global Alliance of Impact Lawyers (GAIL) is a global community of legal leaders using their careers to have a positive impact on people and the planet.

The goal of GAIL is to bring lawyers together into a community where we can share knowledge and best practices, support our common efforts, and

work for change – all in service of the vision of a sustainable and responsible world economy.

This Journal is a place where impact lawyers can share their experience and expertise, with a particular focus on issues of interest in the Asia Pacific region.

In each issue we are aiming to give some practical tips and

knowhow on how to build a practice or career as an impact lawyer, an update on what is happening in the impact law community, and one or two pieces that delve into a particular legal topic relevant to impact lawyers.

The theme of this issue is:
What does an impact lawyer do?

With thanks to GAIL's founding members:



About this journal

GAIL is organised into various geographic regions so that its activities and programmes can be tailored to local interests and timezones. Currently there are Regional Boards for North America, Latin America, UK, Europe and Asia Pacific.

Membership of a region is open to any GAIL member who resides in that region.

In the case of the Asia Pacific Region the timezones covered stretch east/west from India to the Philippines and north/south from China to Australia/New Zealand.

This journal is edited by the Asia Pacific GAIL membership and aims to include information and commentary of particular interest to impact lawyers in the Asia

Pacific region while still being part of a global movement.

We welcome contributions from any source. Please send your suggestions, comments and contributions to The Editor, GAIL Asia Pacific Impact Lawyers Journal at journal@gailnet.org.

IN THIS ISSUE:

01

WHAT DOES IT MEAN TO BE AN IMPACT LAWYER IN ASIA PACIFIC?

Steven Moe interviews Kate Hodson and Amrut Joshi to discover their journey towards building an impact-focused legal practice

PAGE 6

02

GAIL LAUNCH WEEK – LINKS TO THE GAIL WORLD

GAIL's Launch Week events are outlined with links to the session recordings

PAGE 16

03

IMPACT AT WORK – SOCIAL HOUSING BONDS IN NEW ZEALAND

Steven Moe reports on a recent transaction drawing on impact legal expertise – a New Zealand bond platform targeting NZD100M for social housing

PAGE 18

04

IMPACT LAW NEWS – REVIEWS OF RECENT REPORTS

Michael Ryland reviews a cutting-edge guide on impact investing legal issues and Frederick Alexander reviews Freshfields' new report; A Legal Framework for Impact

PAGE 20

05

SNAPSHOT SURVEY

Our Snapshot Survey will invite you to spend 5 minutes helping map out the legal framework for impact driven business and investment in the Asia Pacific region and connect you with GAIL lawyers in the region.

PAGE 26

Dip into the journal for a quick read or spend a little longer when a topic resonates with your own interests!

GAIL APAC Editors

A MESSAGE FROM THE PRESIDENT OF GAIL



WILLIAM H. CLARK JR.
President of the Global Alliance of Impact Lawyers

Greetings on behalf of the Global Alliance of Impact Lawyers to everyone reading this first issue of the GAIL Asia Pacific Impact Lawyers Journal.

Welcome to the community of GAIL.

GAIL was formally launched in the first quarter of this year. The establishment of GAIL represents an important step in the mobilization of lawyers from around the world who seek to have a positive impact on society and the environment.

The theme of this issue of the Journal is What does an impact lawyer do?

The lived experiences of Kate Hodson, Amrut Joshi and Steven Moe give great insight into what an impact lawyer does in practice and how one becomes an impact lawyer. The articles on impact transactions and the

reviews of the ground-breaking Freshfields and MoFo reports help articulate the substance of impact law and give us legal pathways to pursue.

There are in fact many ways in which a lawyer can have impact.

Some of GAIL's members will support impact businesses, others will develop new financing structures, others will lobby for change in corporation, securities, environmental and other laws. All will share a vision that lawyers can work together in the goal of creating a better world.

To be truly effective, of course, we will need to recognise cultural and legal differences in the societies and legal systems represented by our members. I believe those differences will be a particularly exciting aspect of what we will be sharing and learning from each other.

GAIL represents the combination of esela – *The legal network for social impact*, which began in Europe, and the Benefit Company Bar Association in the USA. Those two organisations are combining with lawyers from the Asia Pacific region, UK and Latin America to create GAIL. Soon we hope to welcome lawyers from Africa and the Middle East as well. Each of those regions will be represented on the global board of GAIL.

To you, the reader, I say – this is your Journal. Engage with it, contribute to it, make it a place where you share your ideas and support the impact law community.

And enjoy reading it!

Bill Clark
President of GAIL

01

What does it mean to be an impact lawyer in Asia Pacific?

Steven Moe, Chair of GAIL Asia Pacific, interviews Kate Hodson, Partner and Head of ESG (Legal) at Ogier, Hong Kong, and Amrut Joshi, Founder, GameChanger Law Advisors, India, on their experiences guiding their legal careers towards having a positive impact

In August 2021, GAIL's Asia Pacific Impact Lawyers group hosted an Online Gathering to discuss "What does it mean to be an impact lawyer in Asia Pacific?".

The session, which was moderated by the chair of GAIL's APAC Impact Lawyers, Steven Moe, Partner, Parry Field Lawyers (New Zealand), heard from two speakers sharing their own experience in navigating a career to develop environmental, impact investing and profit with purpose practices:

- Kate Hodson, Head of ESG (Legal), Partner, Ogier (Hong Kong), and
- Amrut Joshi, Founder, GameChanger Law Advisors (India).

We have captured some of the highlights of that conversation.



STEVEN MOE
Chair of GAIL Asia Pacific. Partner at Parry Field Lawyers, New Zealand



KATE HODSON
Partner and head of ESG (Legal) at Ogier, Hong Kong



AMRUT JOSHI
Founder, GameChanger Law Advisors, India

Steven Moe:

Before we get into the conversation with our panelists, let me briefly mention my own journey. I have lived in multiple countries and I started my career in New Zealand and then I worked for an international law firm, Norton Rose Fulbright, in London, Tokyo and Sydney for 11 years. I am now based here in New Zealand. For me my journey of impact has really happened over the last six years, through a shift from working where I did to what I do today. During this session we really want to centre in on two stories, two life journeys when it comes to the law, and think about what has been a catalyst, what is it that's shaped people in their journeys, and what can we learn from it, particularly how is this practical for each of us?

Kate, I am going to start with you if that's okay. We would love to find out a little bit about your journey. If you could just describe where you are right now and then also describe a little bit about your background and what it's been like for you to go on this journey of that word we call "impact".

Kate Hodson:

Absolutely, thanks very much Steven.

I am sitting here in Hong Kong where I have been based for about 11 years now. I was actually born in Hong Kong and then spent some years in the UK before coming back here 11 years ago. I am now a partner at a firm called Ogier and my work is focused around investment funds.

The pivot or shift that's taken place in my life in recent years is really trying to focus around this concept of sustainable investing which includes impact investing. I will talk a little bit about how I got to this place.

I started off looking to become a psychologist. I studied psychology and while I was at University I met someone there who was trying to help people in the US get off death row. I was really inspired by the work she was doing and I thought, you know psychology is not for me, I'm going to become a lawyer and I'm going to help people that way. I got into a scheme with Allen & Overy so they helped me convert to a lawyer. That paid for my tuition for two years and I started working there and I got on, I suppose, a conveyor belt of

the corporate commercial world. But it was a fantastic experience because the learning there was amazing.

I worked with some really incredibly bright lawyers and I am very grateful for that journey because I think it's allowed me to be in a position where I can actually use my skills today to do something which for me brings me a little bit more purpose.

I worked as a finance lawyer and then transitioned to become a funds lawyer. I have been a funds lawyer for about 11 years and it was probably around five

years ago that I started questioning what was my purpose, what could I do, how could I feel like I was making the most of my skills but also doing something for the planet.

Initially, I couldn't see how I was going to do that with the work that I was doing and I started focusing on charitable work that I could do outside of the office. But as you know, we spend a huge amount of our time in the office and so it wasn't really enough. Then I watched the film Plastic Ocean which is brought together by Craig Leeson who's based in

Hong Kong and that was a catalyst for a feeling that had been brewing for a few years. I thought this is enough, I really feel that I need to do something.

I started attending and organizing some events, and educating myself and I became increasingly gripped by the situation. Specifically around climate change, and also by the realization of the importance of the role of private capital in terms of finding solutions. It really struck me how clear it was that money through government and philanthropy was just not going



“ I watched the film Plastic Ocean... and that was a catalyst for a feeling that had been brewing for years. I thought this is enough, I really feel that I need to do something. ”

to get us there and we really needed to reorientate public and private funds in a more sustainable manner.

So I suddenly saw a possible role for me in that. As a very small cog in this ecosystem but to shift and reorientate the work that I was doing. I really wanted some credibility around that and I didn't think I could just read around the subject and walk in and so I decided to undertake a Masters. I remember going to our global managing partner and obviously I am a partner so I am responsible for associates and my team and for financial targets. I thought how am I going to make this work – to do a Masters, which I wanted to do full time because I didn't want to be studying forever. How was I going to make that work?

I was actually really, really nervous taking this proposition to our global managing partner

and his immediate response was, and I hope he doesn't mind me sharing this was, “you've made my day” and I just thought wow that's incredible and extremely lucky to have that kind of leadership at a firm. So we set about working how it was going to be possible to continue running my practice but also doing a full-time Masters.

Anyway, safe to say we made it work. I now have a Masters in Energy and Environmental Law and with that I have been focusing on setting up our sustainable investing and impact funds practice.

I have set up a consultancy which sits alongside our firm. We have hired some wonderful people into that consultancy so I now sit side by side with experts in the impact and sustainability world.

We have also started the journey internally for our firm. We pulled

together a Pioneering Audacious Committee – we call it the PAC – and we started brainstorming how we were going to help the firm itself improve its position from an environmental perspective. That has culminated this year with us appointing a Head of Sustainability, an expert with a huge amount of experience under her belt, to come and help the firm on its journey. I have been heavily involved in that process as well.

I suppose one last point is that I joined WWF (World Wildlife Fund) Hong Kong. I joined their Finance and Audit Committee and have also joined the Board in the last year as well. It has been really amazing to work with WWF and see how they operate in the conservation world.

Hopefully that gives you a bit of an oversight of where I am with my work.

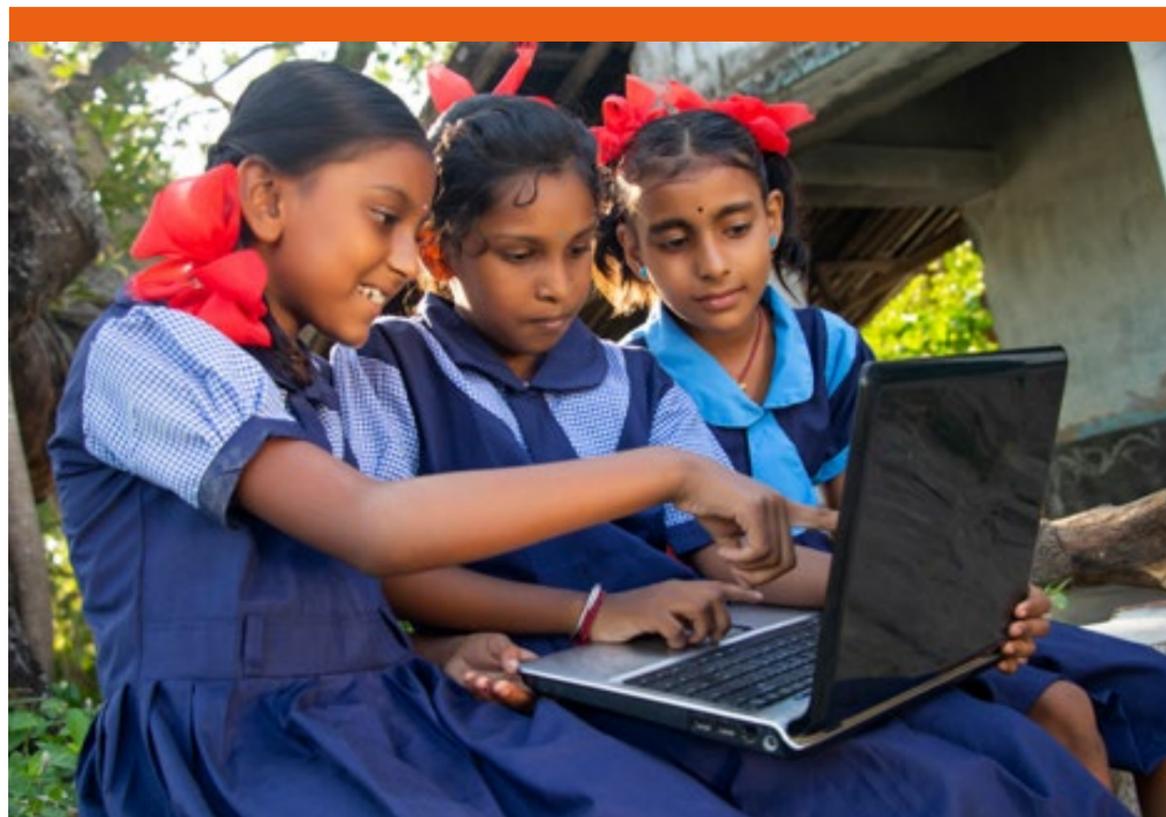
Steven Moe:

Thank you so much Kate. That's awesome to hear your story. I really appreciate it and what we'll do is come back to some of the things that you've mentioned. I would love to learn a little bit more. It sounds like you've got lots of balls in the air, juggling with different initiatives, and so that would be a great thing to talk about in a minute. I am going to turn now to Amrut. Amrut we'd love to hear a bit of your journey so can you describe where you are right now and what it's been like on your journey towards impact.

Amrut Joshi:

Thank you Steven and thank you Kate for sharing that inspiring journey as well. I must confess that everything that's happened to me over the course of the last eight years has largely been serendipitous. I still can't with any conviction say that I am doing this because I have a purpose in life but I think I would say that this journey for me has been driven largely by exposure to some really fascinating individuals and organizations working in the impact sector. I think they are the real heroes and as I have got more and more involved with them I just find

it very stimulating to be working with them and helping people who are solving some of the most pressing challenges that humanity faces today. So it's slightly different from Kate's journey and your journey as well Steven. I spent the first eight years of my career working at a couple of the larger law firms in India and even those larger firms in India are not operating at the global scale of say Norton Rose Fulbright or any of the larger firms outside India, or at least at that point in time they were not. They are progressively growing bigger but what that also gave us was an opportunity to be generalist lawyers.



Amrut's firm works with domestic incubators and accelerators who support start-ups in education

“ India is a very challenging country for not-for-profit organizations to operate in... It is the only country which to my knowledge has mandated corporate social responsibility by way of legislation. ”

So when I set out on my journey as a lawyer, at first I was largely a transactional corporate commercial lawyer. I started my current firm, Game Changer Law Advisors, in 2011 and it wasn't until 2013 that I actually had my first meaningful exposure to the social impact community. I just happened to meet a client who was working for one of India's larger foundations operating in the education sector and she made a request to do some work on a pro bono basis. My journey began there. One thing led to another. I got introduced by one of the firm's anchor clients who was an angel investor to what was then a young social impact consulting firm in India. At that point they were a team of 10 professionals, today they have grown to be one of the largest impact consulting firms with 200 plus professionals in India. When I started work with them I was doing eight hours of work for them every month. Over the last eight years, that's grown to the firm doing around 25 to 30 hours of work for them every

month and through them we get to see the whole spectrum of players in the impact space. We have ended up working with impact investors primarily from the US and UK but also from some of the other regions in the world who are investing in for-profit social enterprises. We work with domestic incubators and accelerators who have identified start-ups in specific sectors – education, healthcare and agriculture to be precise. Now we are doing some work in the energy space as well. This journey, particularly over the last eight years, has exposed me to a wide range of legal frameworks and instruments. As a lawyer, as a professional, you get to see a wide range of legislation and how they impact organizations on a day-to-day basis. India is a very challenging country for not-for-profit organizations to operate in. There is a bunch of regulation around how you can accept foreign contributions. It is the only country which to my knowledge has mandated corporate social responsibility by

way of legislation. There are a bunch of compliance obligations that come with it but what you also end up realizing is that it is not only about compliance but it is also about structuring meaningful collaborations between investors and social enterprises, enabling access to finance. Also, it is not only about investments but it's also about the purpose of that finance; where is it being deployed and who is it actually reaching. I will stop here but it's been a fascinating journey, something that was unexpected, that I didn't really plan for in any deep manner but as I have gone deeper into the sector I have been exposed to some fascinating global networks, including this community of lawyers (GAIL) that we started working on in June last year, thanks to Sarah and Tze-wei, and the team that put it together. Another network that I have been exposed to, and which has contributed to me going deeper into this sector, is the AVPN – the Asian Venture Philanthropy

Network, and I have just completed one of their fellowships which exposed me to the principles of impact investing. As a lawyer, to learn something outside the law was also fascinating. Finally, I am also working with an organization called Stanford Seed where I provide consultancy services for organizations across the world on legal and business issues as well.

Steven Moe:

That's great. Thank you so much. We all have our unique stories and come from different backgrounds, and that's the purpose of this conversation – to hear these stories from different backgrounds, different firms, different histories, but then realize that there are things that we probably share in common.

Kate, I might ask you to come back and join us as part of the panel. I would love to hear from you. All of us are on a journey, some of us have maybe progressed a little bit further than others, and some of us are at the very early stages, even clicked and signed up to this not knowing what we were signing up for. I would love to hear a little bit more of your story. Can you describe more about what you were feeling as you went into that initial meeting? What gave you the courage to go ahead, because that's quite a big call, to go and say, I want to go do my Masters, can we talk about this.

Kate Hodson:

Absolutely. It relates a little bit to this question that has just been asked about "what is an impact lawyer" because that's a very good point, we are on a journey. I mean, if we are saying an impact lawyer is someone who does 100% impact work then I am probably not an impact lawyer. I am a lawyer who is trying to have an impact in some respects.

For me, when I was going to speak to this global managing partner I was thinking exactly that. I am working in a firm which is a traditional law firm, advising on financial corporate commercial matters. What is the place for this work? Is he going to see the business angle? Is he going to believe in it? Is he going to think that because I am raising it that I am no longer committed to this firm and what its purpose is? Are they going to think I am having a sort of a crisis and that I am not going to be sticking around?

Those were the sort of things going through my mind. Also, to be honest, I didn't really see exactly how it would work. I think COVID has shown us more than anything that we are fixed in this mindset of how things can work and it is not going to be possible to do other things. When you actually just go and step forward you can prove otherwise. That is kind of what happened. They threw their weight behind it, making it work so it was possible.

“For me it started with saying well we have a number of charity clients and actually there's a whole world there – did you know about this word called 'social enterprise' for example – and it has been about expanding what was already there as a seed and growing that into something else.”

Steven Moe:

That's interesting and I think it's encouraging for all of us.

I have a similar story in that I work in a medium-sized law firm of about 65 people. When I first started the firm had acted for many charities in the past but there wasn't a practice area devoted to it. So it was really about framing it in a way that made business sense but also spoke the language of what we were already doing. For me it started with saying, well we have a number of charity clients and actually there's a whole world there – did you know about this word called 'social enterprise' for example – and it has been about expanding what was already there as a seed and growing that into something else.

I am curious about the question "what is an impact lawyer". Amrut, I would be keen for your definition, what do you think? The person who asked the question says "I need to ensure I am not an imposter". I think we all suffer from impostor syndrome, what's your response to that question?

Amrut Joshi:

On the question of what kind of impact are we making as a lawyer or are we impact lawyers, I think it is a tough one. It is something that I would like to believe that through the advisory work that we have done or the representation that we have done, it has had a positive impact on the community of clients, organizations and individuals that each one of us has possibly serviced.

But I think one of the things that I also learned in the course of the fellowship was everything in the impact space boils down to impact measurement. As yet I don't believe there is a framework which can be universally applied within the legal community to say "this is the impact that we have had".

Of course, for pro bono work, the number of hours that a firm dedicates to pro bono work is one possible measure. But I don't believe pro bono work represents all of the work that is being done for the impact community. I think that is also a common misconception that I initially had to dispel when I went over to explain to people why I was building an impact-focused law practice.

I think the broader question of "do I believe I am an impact lawyer", I believe I am a lawyer who

works with impact organizations. They are the real heroes who end up making an impact by moving capital to people and communities that need it. We are enabling them and I guess as long as we are enablers or catalysts of change, we can still look back on what we do with a certain amount of pride and purpose.

Steven Moe:

I love that answer. You used a word there that I often use so I am going to highlight that. You said the word "catalyst". We have all done a lot of study – years of study to get to this position – how are we going to use the knowledge that we have to be a catalyst for our clients to achieve their goals?

So I might have a client come in and they want to set up a new initiative of some kind, maybe



Game Changer Law Advisors work to support start-ups in agriculture

“I think lawyers, no question, are in a position to deliver impact.”

it is charitable or maybe it is non-charitable but let's just say as an example they want to help children in a certain area who are suffering with poverty and lack of education. I like to think that although I can't help the thousand children directly, I can help the one person who can help the thousand children. It is really then being that catalyst and helping them to get to where they want to go.

For me it is an interesting question about impact because I act for a lot of very wealthy clients – in fact, many of my clients would be some of the wealthiest clients in our firm – because sometimes the impact-focused people have succeeded in business and now they're doing something that they want to combine with impact. So for me, it hasn't been a case of just “this is completely pro bono”. It has been a case of balancing having impact through pro bono and then also having the profit with purpose model as well. The image I guess is being a catalyst – how can we as lawyers come in and add value to our clients? Kate, I am curious whether for you there are any images of impact as a lawyer that you come back to?

Kate Hodson:

I think lawyers, no question, are in a position to deliver impact. They can support transformational change.

We push legal boundaries to protect social and environmental issues. We are capable of helping with innovation.

I think when it comes to structuring mechanisms in the financial space where I am working then we have got a whole load of new mechanisms for directing capital in a more sustainable manner. Lawyers have been integral to putting together documentation that provides investors with confidence that there are positive social or environmental outcomes to those investments.

So we have a role to play. I actually don't think we even need to get too caught up about whether we have deserved or earned this label or not. We have a purpose. We just get on with things. There are always going to be lots of different people in this whole ecosystem who are contributing to different types of impact and we all have our role to play. I think part of what is changing is that this is a game for everyone; everyone needs to step up and get involved.

It is exciting being in a place which has not traditionally been associated with impact and seeing how we can make a difference there.

That is the angle for me because I am not a human rights lawyer, I am not doing this day-to-day but I do see a role for me in this whole ecosystem.

Steven Moe:

Thanks, Kate, for your answer and particularly the idea that this is a growing area, the number of people listening and interested in this conversation demonstrates that it is growing. I love the idea that we can encourage each other across borders because sometimes it can feel like you're just there on your own but actually there's a whole cohort of people working and thinking about impact with experience to share.

I think the last thing is to thank Kate and Amrut for sharing. I think we all really appreciated hearing about your personal journeys because I think all of us can probably relate to aspects of what you're doing.

GAIL Membership

Our mission is to grow the next generation of impact lawyers who will advocate for and champion a rapid and just transition towards a truly sustainable and inclusive economy.

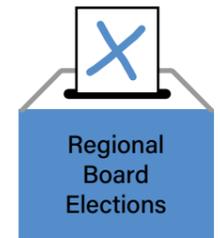
Our work will not end until the just transition has been achieved – and all lawyers are impact lawyers. We cannot do this without you. We are building a community that supports lawyers to have a positive impact on people and planet through their work.

All members will be able to share knowledge and benefit from networking opportunities. Through our programming and member platform, the community shares market intelligence and discusses the latest legal developments affecting businesses in the impact economy.

As a member, you will be connected to your peers across the globe. You will have the opportunity to **attend regular global and regional events** to hear about the innovative, interesting and impactful work lawyers like you are engaging in. At all levels, **members are able to vote for, and be elected to, their regional board.**

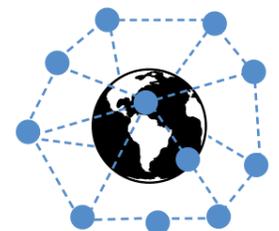
JOIN US TODAY

to be part of our journey to create a culture in which impact lawyers actively support, share and collaborate with each other to multiply the impact of our community. [Visit our website](#)



Regional Board Elections

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JOIN INSPIRING EVENTS

02

GAIL Launch Week Links to the GAIL world



Sir Ronald Cohen delivered a Keynote Address the GAIL Launch Week

At 14:00 GMT on Monday 28 February 2022 GAIL was formally launched.

The President of GAIL, Bill Clark, unveiled GAIL as an organisation dedicated to the growth of a community of impact lawyers who will advocate for and champion a rapid and just transition towards a truly sustainable and inclusive economy.

The Launch Week featured a wealth of other events tailored for the regions and timezones comprised in the GAIL community.

It closed on Friday 4 March with the GAIL Forward Agenda

presented by Sarah Dobson, Executive Director of GAIL, and a Keynote Address from Sir Ronald Cohen, Chair of the Global Steering Group for Impact Investment, on The Impact Revolution and its Implications for the Law and Lawyers.

Launch Week events that can be revisited on the GAIL website [link to recordings page] include those addresses noted above and the following panel discussions:

Launch week panel discussions:

Regulatory Endgame for the Just Transition

Moderated by Simon Mundy, Moral Money Editor at the Financial Times, exploring the imperative to change the economic system and the role of impact lawyers and businesses.

Capital Markets, Externalities, Benefit Corporations and Universal Ownership

Moderated by Rick Alexander, CEO of The Shareholder Commons, a session that looked at why fiduciaries need to concern themselves with the performance of markets overall (beyond idiosyncratic company risk) and presented recent research suggesting that many current approaches to shareholder activism for sustainability are ineffective.

GAIL Latin America

“How can lawyers be strategic allies of impact businesses?” and “Legal practice for the common good”. Note: This event is in Spanish

GAIL North America

“B Corps, Benefit Corporations and IPOs” and “Hybrid Structures – Combined For-Profit, Non-Profit Ventures”.

GAIL Europe

“Reimagining Business in the New Economy”, “Anchoring Impact in Investment Term-Sheets” and “The Position of Non-Profit Organisations in the EU”.

GAIL Asia Pacific

“Being an Impact Lawyer” and “B Corps, Social Enterprise and Impact-Driven Companies”.

There were also a couple of special Global sessions on:

ESG Disclosures, Regulation and Greenwashing

looking at the changing landscape in key markets, including Europe, the US and the UK.

Practising Law in a Climate and Ecological Emergency

With perspectives on the lawyer-client relationship, new mindsets and systemic shifts.

The markers have been laid. GAIL’s journey has begun.

[You can watch the recordings from Launch Week here](#)

03

Impact at Work - Social Housing Bonds in New Zealand

Community Finance creates social bonds to securitise impact investment targeting \$100 million to address housing inequality in New Zealand

STEVEN MOE
Partner, Parry Field Lawyers Ltd

It may seem theoretical to talk about impact investing. It is a way of thinking about investing that combines financial return with social or environmental impact. What role can we as lawyers play in making it a reality? Well, in New Zealand there are some real-life examples which point the way that the future is headed. Started just two years ago, Community Finance is a social enterprise on a mission to tackle growing housing inequality. It does this by connecting community housing projects (which struggle to get mainstream investment) with investors who want to receive a financial return and have impact (they have the money, but don't know how to build houses).

Community Finance has embraced the concept of impact investing by creating social

bonds that the investors enter into and receive repayment and a financial return. The money then flows to established providers of housing such as The Salvation Army or other community housing providers by way of a loan from Community Finance. A key factor has been that some 'Kiwisaver' superannuation funds have gotten onboard with this, resulting in a total of \$93 million invested so far. This has resulted in houses being built and flow on impacts on secure employment, children in stable homes and more environmentally friendly buildings.

The way the model works is that Community Finance works with Community Housing Providers to undertake financial modelling, social impact assessments and credit analysis and if the project stacks up, the loan is approved.



Community Finance acts as an intermediary with loans secured and managed through securitisation, to create the social bond. Community Finance charges less than 1% pa to manage both the investments and lending. Investors receive regular reports on the direct social impact of their investment as well as a financial return of between 2% pa and 2.50% pa, which is similar to

the financial returns on corporate bonds and term deposits.

With seven cornerstone investors Community Finance has launched **The Aotearoa Pledge** – a bold vision to raise \$100 million in 2021 to tackle New Zealand's housing shortage. It has been a journey to go on and see this area of impact investing grow and be more accepted in the mainstream.

As lawyers we can help develop such arrangements for our clients, and also raise it for our clients to consider as an option, particularly if they have a purpose driven element to their business. There is definitely a growing willingness of investors to consider it. What might this example of impact investing look like in your jurisdiction?

04 Impact Law News

Review of Recent Reports Legal Innovation in Impact Investing

Issued by Morrison & Foerster LLP and Impact Capital Managers, January 2021

MICHAEL RYLAND
Centre for Social Finance Law

Lawyering is a practical trade. Impact clients want practical answers on what ownership arrangements they can put in place, how they can organise their decision-making, and what their financiers will be looking for in terms of undertakings and conditions.

The [MoFo/ICM 2021 report on Legal Innovation in Impact Investing](#) is a treasure trove of practical insights for impact lawyers. It is a report from the frontline of impact investing, detailing a wide range of legal techniques that are being developed for effective investing by impact fund managers.

The report highlights the latest ideas and best practice examples both for the formation of a new impact fund and for the lifecycle of the fund's investments – from sourcing, due diligence, negotiation and value creation through to exit.

The data has been collected by Impact Capital Managers (ICM) and law firm Morrison & Foerster LLP (MOFO) from ICM's membership.

ICM is a non-profit membership association for North American based private capital funds investing for positive impact and seeking superior returns.

MoFo is a global commercial law firm with offices across the Americas, Asia and Europe, and a specialist team focussed on Social Enterprise + Impact Investing.

The report is divided into 4 sections:

Designing Fund Structures for Impact

This section surveys investor (LP) arrangements, compensation mechanics for the manager (GP) and executives, fund duration and other key fund terms,

Deploying Capital for Impact

Covering the initial investment, managing portfolio companies, and exit,

Connection to Current Events

Looking at the roles being played by impact funds on issues of immediate concern, particularly racial justice and COVID19 as experienced in North America, and

Discussion of the Impact Label

Reflecting on how the breadth of the term "impact" as it is now used has both helpful and unhelpful aspects, particularly the association in some investors' minds with concessionary returns.

The overall conclusion is that there is a wide variety of legal strategies and tools being used to achieve impact goals, reflecting the tailoring or invention of legal techniques to match impact requirements.

A key theme is that there are differing investor appetites for enforceable requirements as against aligned principles.

For example, most impact funds will include impact orientation in their fund purpose and require impact reporting to investors. Many funds will take that a step further and select target companies that have a corporate form intended to protect impact and will subject the impact reporting to third party audits or other independent verification. Only a few funds tie management compensation to achievement of impact goals and investor remedies to the fund's adherence to impact goals.

What is also clear is that there are many different innovative techniques being tried out, and honed in successive iterations.

There are many gems in this report. Highlights for this reader included:

- the insights on the mechanisms that can be used in side letters to make the fund fit for the impact requirements of an investor, and equally to make an investor fit for the fund, including exit techniques,
- structuring compensation mechanics to maximise impact and return by compensating at each stage of the investment process, and by allocating to an aligned (but uninvolved) institution (such as a charity) any carried interest received but not payable due to impact shortfalls, and
- recognising in tailoring the fund's duration the different flexibility required for "front stage" impact (the impact embedded in a company's product or services, ie what it does) as against "back stage" impact (the social or environmental performance of a company's operations, ie how it does it) – where unlocking its financial value may take longer.

For those of us in jurisdictions where the idea of a corporate form designed for impact is yet to take hold, there is a particularly helpful section comparing six new corporate forms (or more accurately 5 new forms and one certification) available in various US States. We can but sigh and hope for such choice.

This report is a landmark industry contribution pulled together by ICM's Marieke Spence, ICM Fellow Daniel Irvin at Stanford Law School and Suz Mac Cormac, Kaela Colwell and the Social Enterprise + Impact Investing Group at Morrison & Foerster LLP.

It is a must-have reference tool for anyone working on the structure and documentation of impact funds or their investments, whether as external counsel, in-house lawyer, fund executive or in any other professional role.

This report has a place on every impact lawyer's shelf

A Legal Framework for Impact

Issued by [Freshfields Bruckhaus Deringer](#), commissioned by [The Generation Foundation](#), [UNEP FI](#), and [PRI Association 2021](#)

FREDERICK ALEXANDER
CEO, The Shareholder
Commons¹

A REFRESHING LOOK AT FIDUCIARY DUTIES – THIS SIGNIFICANT REPORT SHOWS THAT ALL INSTITUTIONAL INVESTING MUST BE RESPONSIBLE INVESTING

In 2005, powerhouse law firm Freshfields Bruckhaus Deringer shook up the investment world with [A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment](#) (Freshfields I), which explained the need for fiduciaries to integrate social and environmental concerns into their analyses of company performance.

Their new report, [A Legal Framework for Impact](#) (Freshfields II), should have even greater seismic effect.

The new report shows why investment professionals around the world are legally compelled to prioritize systemic issues such as climate change, inequality, and biodiversity loss over the financial performance of individual companies.

For the diversified investors they serve, ESG engagement focused on individual company financial performance is less important than efforts to preserve important social and environmental systems.

Fiduciaries have a duty to mitigate systemic sustainability risks using stewardship powers, even when doing so will not cause a particular company to gain in value—and even if it might cause the individual company to lose long-term value—if the potential for positive portfolio value outweighs the risk of loss to the particular investee.

Fiduciaries who fail to absorb the lessons of *Freshfields II* face considerable legal risk as these principles become understood and as the systemic impacts of irresponsible corporate behaviours mature.

¹This is an edited version of an article first published by [The Shareholders Commons](#)

“The new report shows why investment professionals around the world are legally compelled to prioritize systemic issues such as climate change, inequality, and biodiversity loss over the financial performance of individual companies.”

FRESHFIELDS I: ESG INTEGRATION

Once upon a time, fiduciaries who managed other people's money were told that they should not consider “non-financial” issues—such as society or the environment—because their sole obligation was to optimize financial returns.

Freshfields I exposed the ludicrous nature of this “rule” in 2005. The report explained that the effect a company has on society and the environment is often closely tied to its financial performance, and that therefore fiduciaries are permitted—even required—to pay attention to a company's social and environmental performance.

Since the publication of *Freshfields I*, investment management that leverages the connection between a company's impact on society and the environment and its financial performance is often called “ESG integration,” and it has emerged as an important facet of investing.

THE REMAINING GAP: ESG INTEGRATION VS. SYSTEMS-FIRST INVESTMENT

Despite its success in focusing fiduciaries on social and environmental issues, ESG integration has failed to adequately address the impacts that individual companies may have on critical systems that undergird the economy, and correspondingly on the financial results of other companies in an investment portfolio.

The systemic impact of an individual company decision on overall portfolio performance can far outweigh the impact of the decision on the financial performance of the company itself.

Yet many investment professionals believe that the ideas behind *Freshfields I* did not support investment decision-making that accounted for system-wide effects on portfolios. The trustees of fiduciary institutions have been told that it is a breach of fiduciary duty to give greater weight to the health of the environment than

to the financial performance of a single company threatening that health.

FRESHFIELDS II: SYSTEMS-FIRST INVESTING

Freshfields II addresses this gap. The main portion of the document summarizes the law of eleven critical jurisdictions respecting the duties of institutional investors to address sustainability concerns.

It explains that under the law of each of these jurisdictions, fiduciaries can and should steward companies to ensure that social and environmental systems are maintained in order to protect portfolio value. The document makes it clear that such stewardship may result in engagements that reduce long-term financial return at one or more individual companies.

In short, just as *Freshfields I* triggered the era of ESG integration, *Freshfields II* foreshadows the era of systems-first investment.

INVESTING FOR SUSTAINABILITY IMPACT

Freshfields II calls responsible investment “Investing for Sustainability Impact” (IFSI) and breaks it into two categories:

Instrumental IFSI is where achieving the relevant sustainability impact goal is ‘instrumental’ in realising the investor’s financial return goals.

Ultimate ends IFSI is where achieving the relevant sustainability impact goal, and the associated overarching sustainability outcome, is a distinct goal, pursued alongside the investor’s financial return goals, but not wholly as a means to achieving them.

Freshfields II explains that the purpose of instrumental IFSI (but not ultimate ends IFSI) tracks the universal obligation of fiduciaries to protect the financial value of managed assets, by addressing system-wide concerns to optimize financial performance.

NON-DIVERSIFIABLE RISK: INSTRUMENTAL IFSI REQUIRES BETA STEWARDSHIP

Freshfields II recognizes that modern investment techniques—Modern Portfolio Theory (MPT) in particular—require broad diversification of portfolios to mitigate

company-specific risk, but that some risks cannot be diversified, requiring fiduciaries to reduce those risks, when possible, by other means.

Importantly, *Freshfields II* explains that such stewardship is not designed to improve “alpha,” the part of a portfolio’s financial return above or below a particular benchmark. Instead, it is designed to improve the return of those benchmarks, or “beta”.

A PURE MODERN PORTFOLIO THEORY APPROACH, WITHOUT MORE, IS A BREACH OF FIDUCIARY DUTY

The report then takes the logical next step, and explains why using solely MPT, which focuses on improving alpha without trying to control beta, is itself a breach because it fails to address the most important aspect of financial return—the performance of the market itself.

With this in mind, it becomes clear that for diversified investors, ESG engagement focused on individual company financial performance and tracking or beating benchmarks is less important than efforts to preserve important social and environmental systems as part of a program of instrumental IFSI.

CONCLUSION

Freshfields II provides compelling legal authority for investors to actively counter a dangerous and long-understood economic reality: companies can and do create costly externalities even while creating value and financial return for their shareholders.

The risk that individual companies will maximize their own returns without regard to systemic impact renders investment professionals around the world critical gatekeepers with the voting and investment power to mitigate that risk.

With this new report in hand, fiduciaries will understand that they must use their stewardship powers to oppose risky corporate behaviour, even if doing so might cause the individual company to lose long-term value, keeping their eyes on the prize of optimizing overall portfolio returns and the systemic health such optimization requires.

“...fiduciaries will understand that they must use their stewardship powers to oppose risky corporate behaviour, even if doing so might cause the individual company to lose long-term value...”

MEET THE TEAM ASIA PACIFIC REGIONAL BOARD

GAIL’s Asia Pacific regional board specialise in a variety of areas of impact law and based across the region. If you would like to get in touch with one of the Asia Pacific team, please [email us](#).



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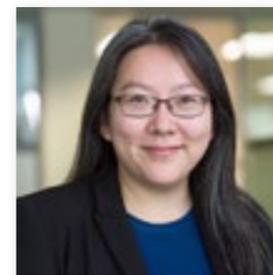
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05 SNAPSHOT SURVEY

The Snapshot Survey aims to generate a quick overview of the legal framework for impact-driven business and investment in the Asia Pacific Region.

In each issue of the Journal we will ask 5 questions. They will all allow for a Yes/No answer, and also for any comments or information you want to add. You can complete the survey through the online form linked opposite.

We will build up the survey with new areas of focus in each issue. Let us know any questions you would like included in the survey.

The survey below starts us off with some broad overview questions. Later issues will focus on business and human rights, climate change and other more specific topics.

1. *Is there a specific legal entity in your jurisdiction designed for purpose-driven businesses? (eg: community interest companies, benefit corporations, etc)*
2. *Are for-profit corporations in your jurisdiction required to give priority to the interests of shareholders over social purpose?*
3. *Are there any tax or regulatory incentives in your jurisdiction to be a purpose-driven business?*
4. *Are there any corporate reporting requirements in your jurisdiction on companies in relation to their ESG performance?*
5. *Are there any corporate reporting requirements in your jurisdiction on investors in relation to their ESG performance?*

[Please complete the survey here](#)

Want to be connected for a virtual tea or coffee with another GAIL lawyer in the APAC region? Complete the survey, confirming you want to be connected and add your LinkedIn or other contact details through this link. We will be in touch in the next few weeks to connect you.

Thank you for reading the GAIL Asia Pacific Impact Lawyers Journal

If you have enjoyed reading this magazine please visit the GAIL website for more news and insights, consider joining us for a future event or becoming a member at gailnet.org

If you would like to suggest content or contribute to a future issue of the Journal, please get in touch with us [here](#).



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