

GAIL Asia Pacific Impact Lawyers Journal

ISSUE 2 • FEBRUARY 2023

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

We speak to two lawyers about how they have brought a focus on impact into their careers.

Tools for the Impact lawyer's toolkit

Climate aligned contracting and the role of lawyers in B Corp certification in New Zealand

IMPACT LAW DEVELOPMENTS

Spotlights on Pakistan
and Australia

Is there such a thing as a genuine social enterprise?

Six values that should define social
enterprise

GAIL Annual Summit 2023

Collaboration and Disruption:
Impact Law in a Changing
World

GAIL

Global Alliance of Impact Lawyers

HOW TO BE AN IMPACT LAWYER

Welcome to the 2023 Q1 edition of the GAIL Asia Pacific Impact Lawyers Journal.

In this issue we continue to explore the question What do Impact lawyers do – this time from the angle of day-to-day legal work.

We look at the lived experience of **Tze-wei Ng** from Hong Kong and **Emma Kostas** from Melbourne, Australia, and we introduce a couple of readily available toolkits for Impact Lawyers – the Climate Change clauses

prepared by **The Chancery Lane Project** and the B Corp materials developed by **B Lab**.

We have reports on Impact law in Pakistan from **Ammara Farooq Malik** and Impact law in Australia from **Michael Ryland**, and we have a thought-provoking essay from **Freer Speckley** questioning what is a genuine social enterprise?

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.

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. ■

With thanks to GAIL's founding members:



ABOUT GAIL ASIA PACIFIC

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.

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 Pakistan to the Pacific Islands and north/south from China to Australia/New Zealand. ■



JOIN GAIL!

For membership information see page # and the membership page on GAIL's website

01

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

Steven Moe interviews Tze-wei Ng and Emma Kostas to discover how they have brought a focus on impact into their careers

PAGE 6

02

GAIL ANNUAL SUMMIT

GAIL's Annual Summit will be held on 14-15 March 2023 in London, England with the theme: Collaboration and Disruption: Impact Law in a Changing World. This section gives a snapshot of the Summit with links to the agenda and registration.

PAGE 15

03

MEET THE TEAM – GAIL ASIA PACIFIC REGIONAL BOARD 2023

Introducing the 2023 GAIL Asia Pacific Regional Board and new Chair, Ammara Farooq Malik

PAGE 18

04

TOOLS FOR THE IMPACT LAWYER'S TOOLKIT

Phoebe Roberts explains how Impact lawyers can use the Climate-aligned contract clauses developed by The Chancery Lane Project. Phillippa Wilkie and Kate Wilson-Butler highlight the lawyer's role in B Corp certification in New Zealand.

PAGE 22

05

SPECIAL FEATURE – IS THERE SUCH A THING AS A GENUINE SOCIAL ENTERPRISE?

Freer Speckley, who was among the first to formulate the concept of social enterprise in the UK in the 1970s, shares the six values he believes should define social enterprise

PAGE 28

06

IMPACT LAW DEVELOPMENTS – SPOTLIGHTS ON PAKISTAN AND AUSTRALIA

Ammara Farooq Malik comments on the legal context for impact businesses in Pakistan and Michael Ryland comments on the impact law framework in Australia.

PAGE 33

07

EVENTS AND PROJECTS

A brief recap on GAIL Asia Pacific's events in 2022 and its upcoming projects

PAGE 39

08

JOIN GAIL!

Membership information

PAGE 40

IN THIS ISSUE

A MESSAGE FROM THE APAC REGIONAL CHAIR



STEVEN MOE
Chair of APAC Regional Board for GAIL

I've enjoyed serving as the first Chair of the APAC Regional Board for GAIL. We have held several online events connecting us across this region, some of which are reflected in the content of this journal. We've seen increased exposure with a light shining on the role of lawyers to have impact. I continue to believe that each of us have a role to play as catalysts for positive change.

It is a pleasure to be handing over the role of Chair to Ammara Farooq Malik from Pakistan (who also

contributes an article in this edition). I know she will do a great job and look forward to the coming year. I'll stay on the board and we are joined by several new faces as well – see the new Board [on page 18](#). I am looking forward to their input. Keep an eye out for upcoming events and help us promote them – an organisation like this needs us each to help spread the word.

I hope you enjoy this Journal and think of one person you could tag in or forward it to. The world is full of

uncertainty but perhaps we also live in a time of shifts of paradigms of thinking, as shown by the content here. Let's each do what we can to help progress new ways of thinking. ■

Steven Moe



01

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

Steven Moe in conversation with Tze-wei Ng and Emma Kostas

In March 2022 GAIL's Asia Pacific Impact Lawyers group hosted the second webinar in its series on "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

both now working in the space where philanthropy meets impact investment:



TZE-WEI NG

from Stephenson Harwood in Hong Kong



EMMA KOSTAS

from Prolegis in Melbourne, Australia

and

Brief outlines of the speakers and Steven Moe's careers can be found at [link](#)

We have captured below some of the highlights of that conversation.



Steven Moe:

My name is Steven Moe. I am the Chair of the Asia Pacific part of GAIL, the global alliance of impact lawyers, and it's a real pleasure to welcome you here today.

What we're going to be doing today is we're going to be talking about being an impact lawyer and we're also going to be talking about B Corp social enterprise and impact driven companies.

We are really lucky to have Tze-wei and Emma for our first panel and the two of them are going to be sharing a little bit about their journeys and their stories because ultimately stories is how we connect with each other, it's how we learn from each other.

Maybe Tze-wei do you mind kicking off and sharing a little bit about your journey what brings you here today

Tze-wei Ng:

Yeah sure. Thanks a lot Steven. I'm very happy to be here today, having been involved with esela (one of the founding organisations of GAIL) since late 2019 it's just very gratifying to see how much the community has grown and that we're now having this launch event off the global network that you mentioned Steven.

So a little bit about myself. I am now with the private wealth team at [Stephenson](#)

[Harwood](#) in Hong Kong with a focus on philanthropy and impact and ESG. But I actually only came back to law practice three years ago. Prior to that I was working as a journalist and also with an international NGO focused



IT'S JUST VERY GRATIFYING TO SEE HOW MUCH THE COMMUNITY HAS GROWN

on access to justice and human rights for the bulk of my career.

So why did I come back to law practice? As I was preparing for today I was thinking there were two main things that got me thinking about coming back to law.

First of all the international NGO I was working for is called [PILnet public interest law network](#) and they're like the lawyer version for Doctors Without Borders. I was working with a wide range of law firms and law schools to design legal clinics and to provide pro bono support for a wide range of other NGOs and impact organizations.

So during those four or five years I was at the forefront of seeing how impact organizations evolve. No longer are they just using the format of or the structure of a charity but increasingly we see new structures like social enterprises, social impact bonds and these structures are facing increasingly interesting but also new legal questions. So that got the lawyer part of me interested again.

The other turning point is probably more philosophical I suppose. After working for PILnet, helping them start their Hong Kong and Asia office I joined one of our biggest donors, an inspiring lady who turned

out to be one of the leading strategic philanthropists and impact investors in the region. Her journey is itself a very inspiring story. Since 2008 and the great financial crisis she had been thinking that she and her family had always been active in philanthropy but she started thinking why is her philanthropy separated from her investment. How can she apply her values across everything that she does? How can she apply her capital?

So she started on this journey where she basically used eight years to transition her investment portfolio by asset class into investment for



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impact. She got me thinking about things in a much more integrated approach. I had been working in human rights for the bulk of my career but she got me thinking about how people and planet are interlinked. You can't really think about human rights without thinking about climate change and how we should apply our values across everything we do whether it's business investment or philanthropy.

That got me thinking about how I can perhaps apply my legal skills towards things I care about, causes that I have been passionate about, and also helping create the structures and systems that would provide solutions, better solutions, more effective and impactful solutions for the challenges that we face today.

So here I am. I cannot emphasize enough though along this journey how important it is to have met other like-minded lawyers. Definitely, being involved with esela at an early stage of my coming back to law was so important as the predecessor to GAIL. But also meeting other lawyers like my former law firm boss and several of the lawyers that I work with right now in my current law firm. It is so important and this community showed me the possibilities and also how it is possible to have a career trying to balance profit and purpose, even though I'm still trying but it is possible. I'll stop there for now.

Steven Moe:

That's great, thank you so much. I think it's wonderful to hear different people's

journeys and I'm sure we're going to dive a little bit deeper into yours. If you do have questions don't forget you can use the chat function to add those but Emma we'd love to hear a little bit about your journey, where you are talking to us from and a little bit about what's brought you to this point

Emma Kostas:

Thanks Steven. So I am working for [Prolegis Lawyers](#) based out of Melbourne. Our firm operates across Melbourne and Sydney in Australia.

My journey to this firm and to being an impact lawyer has been fairly direct actually. I was privileged to come across Prolegis Lawyers quite early in my legal career and like Tze-wei mentioned I think I was always interested in impact and in how can I

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I THINK FOR ME EVERY LAWYER COULD BECOME AN IMPACT LAWYER

use my law degree. I also did international relations and social justice law at university and so was interested in how can I actually work in that area.

The answer that I came up with at the end of university was I will be in-house counsel at a charity or a not-for-profit organization. I looked more and more into that and the feedback was that I probably needed a bit more experience to do that and that it is something that lawyers tend to do towards the middle to the end of their career. So people recommended to me that I pursue a corporate commercial career first.

Then it was at that juncture that I came across Prolegis Lawyers and they specialize in charity and not-for-profit law in Australia and they exclusively represent charities not-for-profits and philanthropists. So that was just fantastic as it wasn't something that I knew

existed. It really resonated with me that it focused on that impact and for-purpose sector and really aligned with my values so that was an easy decision for me to join that firm and to build that specialization.

Steven Moe:

That's great. Thank you so much for sharing. So I think

for those of you listening or watching you can realize that there's quite a diverse range of experience here already just from hearing that.

I would like to start with you Tze-wei if it's okay. The word I want to throw out there is "imposter syndrome". What does the word "impact lawyer" mean to you because that's something that I think all of us on this call and the people who are watching the recording later come to with our own images or thoughts about, and we ask what are we even talking about when we say "impact lawyers". Some of us are working in pure corporate mergers and acquisition type firms. Others are more like Emma more on the not-for-profit side. When you are thinking about the term "impact lawyer" what does it convey to you?

Tze-wei Ng:

Yes, when you mentioned "impostor syndrome" I immediately thought "fake

it till you make it". Just really believe that you can do it and then you get there.

But let me share a little bit because I did mention I come from more of a pro bono advocate background so of course I am always aware there are full-time human rights lawyers and then for a while I was really promoting pro bono. The integrated approach that I mentioned earlier on where I was inspired by the philanthropist I worked for was really a turning point for me. No matter what role, what law we practice, we can keep in mind how this interacts with our system as it is and how it can actually contribute to a fairer system, fairer contracts and more innovative structures that would help provide those solutions.

So I think for me every lawyer could become an impact lawyer and maybe when we talk about impact investing, maybe one day that is not a distinction that we need to make. I think to do that there is definitely a lot of balancing and hard work that we need to do in the meantime because the field is still new. We may go into these challenges later but I think it is about really seeing that you can play a role and then find your way to do that, just by starting somewhere and also learning from other people's journeys.





” I LIKE THAT BROAD APPROACH TO WHAT IT MEANS TO BE AN IMPACT LAWYER.

Steven Moe:

That’s really good, thank you. Emma, do you have any reflections on that term?

Emma Kostas:

Definitely, I agree with what Tze-wei said and I like that broad approach to what it means to be an impact lawyer.

The way I see it is I focus on facilitating the work of what my clients are doing and see if I can help them at, for want a better word, the “back end” – the structuring, the tax, the legal aspects of what they’re doing that creates impact – by enabling those clients to have greater impact and to be more effective and efficient in what they are doing on the ground.

I like seeing that there is impact in being a few steps removed perhaps from the actual direct impact that is being done but that’s still a really valuable part of

what we can do as lawyers. Particularly I think in establishing an organization – I work in governance and establishment - I think having that as a focus at a critical stage of establishment means that a charity or a not-for-profit can really focus on the impact that they’re trying to create and are not hampered by systems or structures that actually are not fit for purpose or don’t help them achieve those objectives.

Steven Moe:

Yes, that’s really good. I like the word that you used. I think you said “facilitating” and for me there’s a similar word that I think about and I try to be, which is the word “catalyst “. If we can help to catalyze impact, like a chemical reaction it’s going to take a long time to happen but if we can bring our legal skills then we can help things to happen more quickly. Actually that’s a role that we can play whatever position we have in a law firm or whatever our expertise – to help the client’s journey through to understand the options but of course we need to know what the options are as well.

Sarah has put in the chat a link to some information about what is an impact lawyer so you can check that out.

Tze-wei, I am looking at my watch here and I think you’ve spent at least three billable units on this call. What are the challenges associated with this tension that the legal system, for better or worse, does get tied back to how do we use our time while very often some of the things that we’re doing have this sort of public good aspect to them. Any thoughts or things that you’d like to share about that?

Tze-wei Ng:

Yes, for sure. I think the challenges that we face as a service provider are maybe slightly different if we look at the spectrum of impact work. There is so more required than is billable on just a billable hours basis.

Take for example ESG. Right now there is a lot of interest in ESG and I work a lot with our funds team and corporate team and regulatory team to talk about what are some of the regulations out there.

But there is also a lot of confusion. In the broad universe of ESG there is a



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lot of awareness raising and thought leadership that needs to be done and a lot of this will not be billable hours but they are essential to building that awareness so that is one challenge.

At the same time I think there is a challenge but if you work with a firm and a team that really believe it you can really make a difference. So as we know regulations are quickly catching up and tightening across the world but it still doesn’t apply to all financial products. So recently we worked with one financial product where there are no formal regulations yet but we can explain to client this is where the trends are heading. Whether it is regulators or investors or consumers, their expectations are changing.

Therefore rather than just looking at what are the minimum requirements from the regulatory side, these are the best practices that you can think about and that would put you in a market leadership position down the road and really help contribute to long-term value creation. When you work with a client that is open to that, it is a challenge but it is also where I think we can really add value.

Another challenge which is also finance and billable income related is there is still a mindset that support for charities most of the time should be pro bono. So how do you draw the line when actually work becomes really complex and that for the lawyers it should not be just pro bono so that it can

also be a more sustainable practice for both lawyers and the impact organization. I think there’s quite a bit of awareness raising there too and exploring and learning where to draw that line. All of these impact my ability to balance the for profit and the purpose but it is slowly getting there.

Steven Moe:

That’s good thank you. It’s really helpful – I think that’s part of the purpose of this call is actually just to legitimize the fact that we probably all are facing these questions. How do we balance and where do we put the time? I have increasingly noticed because I have been practicing law for about 20 years now, I get approached by junior lawyers

or people who are just starting out and the reality is that they have realized that the reason they studied law was to have impact but the practice of law is very much a business. So they can get disillusioned.

I actually did a little short reflection on that called "Dear Junior Lawyer, don't give up yet" and the point of it was basically keep pushing through, keep trying because there are environments out there where you will be able

think that's a big thing in the practice I am working in as well. I think especially when we talk about impact it's important to think of long-term impact as well. It's not the immediate project that perhaps in my case a client is doing but actually what's the long-term impact that we can have on the sector or as a network of lawyers.

So I think especially challenging some of these more traditional approaches and how we structure

perspective is really unique and really important – like you're saying Steven, not to give up but actually to be really mindful and thoughtful about what impacts do we want to create, what impacts do the organizations that we're working with want to create, and how can we pursue opportunities to make that happen.

Steven Moe:

That's really good and I think it's kind of coming through in each of the things that

we're saying about having a bigger picture of the role that we can play. I think that's the key for me. Honestly, six years ago I was not the same lawyer that I am today. Part of it was for me, you know, the midlife crisis "what am I here for" – all those

great questions. But also just how can I play a role in society, how can I have a part to play.

Just as a story to show that it maybe is possible, I was involved in preparing a report about the future of legal structures for companies in New Zealand. It's really good that one of the co-authors, Phillippa, is on this call. So there was a group of us – basically about four or five lawyers – and we came together from different firms, leaving aside traditional ideas of competition, and what we were basically looking

...not to give up but actually to be really mindful and thoughtful about what impacts do we want to create, what impacts do the organizations that we're working with want to create, and how can we pursue opportunities to make that happen.

to have an impact. It might be that you got put into a tax team but really you should be in family law or you might be in the family team and really you should be over here and it's about continuing to push for how you can have an impact through your career and what you do.

Emma, can you just reflect on that as well – any thoughts?

Emma Kostas:

Yes, I liked the word sustainability that you used. I

organizations, traditional approaches to for example charities only using pro bono work, that's something that's really important. It is something that will help us create long-term impact and enable our clients also to – well in my case the charities and not-for-profits that I work with – to create greater change for a more sustainable impact as they continue to operate.

I think like Tze-wei said adding that value that we can because we have that focus or we have that

at was what could the legal structure for companies that are social enterprises look like in a New Zealand context. That report then has gone to Government and it has gone to other places and I think it help to set the groundwork for further change that that hopefully will come. So I guess the point is that there is a bigger picture where can we have a role as well as assisting our clients. Thinking at structural level what changes can there be.

Emma, feel free to jump in.

Emma Kostas:

Maybe I just have an example to add to that great example that you shared. I came across this pro bono project called The Chancery Lane Project. Over a hundred lawyers or law firms came together to help put together these template climate-related clauses into various type of contracts. Again, I think it is about lawyers having sharing a purpose and collaborating for something that we all think is important and that definitely not one single lawyer or law firm can do. So yes, I think being an impact lawyer definitely makes me a better lawyer and part of a community that that gives us a lot of positive hope in times like this.

Steven Moe:

That's great Emma. I am going to put you on the spot in a second because

you've joined the profession more recently than me and we have a question about universities here. A question here I think from Katie and it says on that point what do you think is the role of universities in working with the profession to create impact lawyers and are there any good examples already

And then Michael has expanded on that to ask what is the role of law firms in training their lawyers to identify impact issues that are relevant to their clients eg what would help the board on the impact aspects of a proposed transaction.

Any reflections Emma?

Emma Kostas:

I think at university the biggest thing and one of the reasons we're there is to learn and to be given opportunities. My experience of university was that these kind of impact lawyer roles or ideas of how we can use the law to make impact were thought of in a very traditional way, restricted to things like pro bono work or volunteering or in-house counsel.

I think there is so much good research and engagement happening at universities and to bring students into that and to facilitate them

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THE GREAT THING IS THAT THERE'S SO MUCH OPPORTUNITY

to attend events like this or network with professionals who are already working in the impact space would just be a fantastic opportunity to give them actually a broader understanding of what it means to be an impact lawyer and the areas of impact and broaden their horizons.

I think the great thing is that there's so much opportunity and there are things out there that none of us on this panel have even thought of yet that will be developing that university students could get involved with.

In terms of law firm training to identify relevant issues I think one of the biggest things I have found is actually just really getting along with my clients and finding out who they are and what motivates them and why they're doing the things that they're doing – what they're passionate about. That's something that actually

I could then facilitate the impact. It can perhaps take you in a different direction on a transaction than you might have expected because it is outside just the general commercial or operational aspect of that transaction and it is finding out the purpose and what you can do to help them achieve that.

Tze-wei Ng:

Absolutely, I think speaking to your client and understanding what the purpose means to them is definitely important. A lot of times, especially in my private wealth practice, they're already doing a lot on the philanthropy side and the question is how can this also be translated into their investment and business purpose.

On Michael's question, I find that very interesting. I think that brings it back to what Steven you mentioned earlier on about thinking how we think of lawyers as part of the system. I think this is where we actually also need to be a little bit more aware of what

our role as a lawyer is and how do we work with other experts in the field.

For example, recently I have been working with a client in the plastic industry and he is thinking about how he can be more sustainable. In doing that research actually one of the things that was most helpful is that I introduced him to two actual plastic NGOs. That allowed him to really hear it from those that have expertise in thinking about a sustainable future for plastic. It sounds like an oxymoron but there are definitely ways to make it slightly more sustainable. But what I am really saying is actually to think about how do we also work with other sectors and bring the best knowledge and value to clients.

That comes up a lot and it's actually a challenge on its own because for example when we work with companies and funds now in ESG disclosure and climate-related risk disclosure there are definitely things that

are not within the lawyer's traditional line of work even though we may be expert in corporate governance. That is what we do but there are a lot of other things that we don't do and how do we work with the field in a in a tighter way. That is something that I think is important and also gives room for a more impactful advice to our clients.

Steven Moe:

That's really great. We're getting more people commenting in the chat which is awesome.

So Ammara you've mentioned that in Pakistan this sort of area is an innovative field but that GAIL has helped to legitimize some of these aspects of what you do. That is really awesome to see. I think that's true – that we can feel like we're stuck on our own trying to make a difference or do something but the reality is that there are many other people also doing their bit, as shown by this call. ■

“...recently I have been working with a client in the plastic industry and he is thinking about how he can be more sustainable. In doing that research actually one of the things that was most helpful is that I introduced him to two actual plastic NGOs. That allowed him to really hear it from those that have expertise in thinking about a sustainable future for plastic.”

02

ANNUAL SUMMIT 2023

Collaboration and Disruption: Impact Law in a Changing World

14 – 15 March 2023, London



Join leading impact lawyers from around the world in London at the Global Alliance of Impact Lawyers' Annual Summit on 14 – 15 March 2023, which brings our international community of impact lawyers together in person for the first time.

Lawyers are powerful advocates, champions and gatekeepers. We believe in the ability of lawyers to collaborate – to support the movement towards a more equitable systems – to disrupt entrenched orthodoxies and to rethink legal practice and the role of the lawyer.

GAIL's Annual Summit 2023 will showcase examples of some of the most impactful work lawyers across the world are engaged in. It will bring us together to debate, innovate, and share the most cutting-edge ideas and resources to facilitate change and to make sure business can truly be a sustainable force for good. It will highlight work that is capable of replication and multiplication and, by distributing insights and practical learnings, enable lawyers in any part of the world to act on this knowledge.

The Annual Summit 2023 will bring together, in person, GAIL's international community of legal leaders and changemakers, including private practice lawyers, in-house counsel, investors, founders, CEOs and business leaders, entrepreneurs, advisors, policy-makers, trainees and law students, all of whom are using the law to have a positive impact on people and the planet.



DAY
1

14 March 2023

Day 1 of the GAIL Annual Summit is a **Practical Seminar** graciously hosted by McDermott Will & Emery, open to GAIL members-only. This will include a multi-format series of events including workshops, round tables, training sessions, case studies, transactional deep dives and academic discussions designed to provide legal practitioners – both private practice and in-house – with the knowledge, tools and materials they need to maximise their impact.



DAY
2

15 March 2023

Day 2 of the GAIL Annual Summit will be a **Legal Conference** located at the vibrant Kings Place in London, a hub for dialogue, creativity and events in London's Kings Cross. The Conference will include multiple tracks covering topics including impact investing, climate change and the law, sustainable finance, ESG, development finance, benefit corporations & B Corps, public procurement, philanthropy, legislative developments, and innovation and the law.

SPEAKERS WILL INCLUDE:



Professor **Calixto Salomão Filho**, lawyer, professor at University of São Paulo and visiting professor at the Paris Institute of Political Studies (SciencePo) School of Law will focus on lessons from international litigation such

as the Mariana dam disaster claim, concerning the duties of companies and their shareholders regarding the environment, its employees and the community in which its operations take place.

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Academic Keynote

Professor Dr. Calixto Salomão Filho
Professor, University of São Paulo Law School & SciencesPo Law School

International Environmental and Socio-Economic Litigation: Lessons from the Cases and Prospects

14 March 2023
McDermott Will & Emery
London

Charles Conn, Chair of the Board of Directors of Patagonia will present a keynote about the company's recent ground breaking decision to make earth its only shareholder.

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Afternoon Keynote

Charles Conn
Chair of the Board of Directors,
Patagonia

Restructuring Patagonia: Making Earth Our Only Shareholder

15 March 2023
Kings Place | London

Kate Raworth, author of Doughnut Economics and Oxford economist, will set out the features of Doughnut Economics and how this could be put into practice to reimagine the role of lawyers in building a regenerative and distributive economy.

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Morning Keynote

Kate Raworth

Doughnut Economics
Reimagining Legal Practice for a Regenerative & Distributive Economy

15 March 2023
Kings Place | London

REGISTER



To book your ticket, and explore the agenda, register here:
<https://gailnet.org/events/annual-summit-2023/>

03

GAIL ASIA PACIFIC REGIONAL BOARD 2023

GAIL is led by a **global board of directors**, and supported by regional boards across the globe, elected each year. The GAIL

Asia Pacific Regional Board specialise in a variety of areas of impact law and are based across the region. If you'd like to get in touch

with a member of the GAIL Asia Pacific Regional Board, you can reach out to them via GAIL's *Member Directory*.

2023 - 2024

BOARD CHAIR



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SOTARO HOTTA
Associate, Nishimura & Asahi



STEVEN MOE
Partner, Parry Field Lawyers



SUNG-HYUI PARK
Partner, Bates Wells



TZE-WEI NG
Solicitor, Stephenson
Harwood



VIVIEN TEU
Partner and Head of Asset
Management & ESG,
Dentons Hong Kong

PRESENTING THE **NEWLY ELECTED** GAIL ASIA PACIFIC REGIONAL BOARD MEMBERS



New Board Member

Ammara Farooq Malik

Founding Principal Attorney, AFMalik Law

Ammara is a Pakistani corporate and impact lawyer, international social entrepreneur and international development expert with over 23 years of professional experience across various multidisciplinary sectors such as academia, law, social entrepreneurship, international development, gender and green infrastructure development. She is Founder of the Seplaa Group (CEO of Seplaa Canada, Seplaa Enterprises-Pakistan, AFMalik Law, SEPLAA Foundation and Impact World Press).

As Founder Principal Attorney of AFMalik Law- Attorneys & International Development Consultants, she is also the first impact lawyer of Pakistan focusing on the integration of ESG (Environment, Sustainability & Governance) clauses in companies' legal compliance documents and has created the 5 Cog Wheels for Sustainable Business Strategy Tool for impact law, impact investing and policy integration in impact businesses for a transdisciplinary holistic approach towards development.



New Board Member

Brian Tang

Founding Executive Director, LITE Lab

Brian is an innovator, ecosystem builder and educator at the confluence of law, technology, finance and social impact who has held senior leadership roles across three continents in global investment banking, international law firms and now a leading university.

Brian is founding executive director of LITE Lab@HKU, an award-winning interdisciplinary and experiential programme that fosters law, innovation, technology and entrepreneurship (LITE) at University of Hong Kong.



New Board Member

Dr Joseph Chun

Partner, ShookLin & Bok

Joseph is a partner in the Environmental, Social and Governance practice at ShookLin & Bok. He is concurrently an adjunct associate professor and a member of the Asia-Pacific Centre

for Environmental Law (APCEL) at the Faculty of Law in the National University of Singapore (NUS), where he teaches environmental law.



New Board Member

Phillippa Wilkie

Special Counsel, Chapman Tripp

Specialising in private client, trust and charity advisory work, Phillipa advises on all aspects of trust law and operation in the private and charitable sectors as Special Counsel at Chapman Tripp. An expert on trusts, she acts for families in establishing and adapting

trust structures, for trustees, and for counterparties dealing with trustees. Phillipa has a significant for-purpose practice advising charitable and non-profit organisations as well as social enterprises.



New Board Member

Sotaro Hotta

Associate, Nishimura & Asahi

Sotaro currently works as a corporate lawyer, specifically a finance lawyer, in Nishimura & Asahi in Tokyo, Japan. He specializes in, and covers, a wider range of corporate law, such as (a) social impact business, (b) smart city business, (c) asset

management business, (d) fund business including offshore funds, (e) financial regulatory matter, (f) real estate finance business(securitization), (g) global offering of securities, and (h) general corporate matters.

04 TOOLS FOR THE IMPACT LAWYER'S TOOLKIT

CLIMATE-ALIGNED CONTRACT CLAUSES FROM THE CHANCERY LANE PROJECT

PHOEBE ROBERTS

Senior Associate (Climate & Sustainability Risk) at MinterEllison
Director of Implementation & APAC Co-Lead at The Chancery Lane Project



How powerful would it be if every single commercial contract enabled solutions to the climate crisis? If corporate and transactional lawyers, could channel their unique expertise in legal drafting to the net zero transition?

That's what [The Chancery Lane Project](#) is for: bringing climate drafting into the mainstream.

The Chancery Lane Project (**TCLP**) is a non-profit pro bono organisation that brings together lawyers from all over the world to draft contract clauses to tackle climate change. There are a growing range of government agencies, institutions and firms involved in the project, including 75% of global elite law firms.

TCLP's climate clauses have been drafted by expert lawyers and industry professionals and are peer-reviewed by a range of top-tier law firms. They are then published for free on TCLP's website, along with a host of other materials. Use of TCLP's clauses can encourage and inspire lawyers everywhere to draft their own climate clauses and include them in a whole range of agreements. Becoming a climate-literate lawyer is vital to responding to clients' concerns around climate risks and opportunities.

What is a climate clause?

Climate clauses have two broad roles. One is to protect an organisation from the biggest and foreseeable risks to its operations from climate change. A second is to facilitate the global transition to net zero. TCLP's clauses are broadly focused on the latter – to deliver rapid decarbonisation at scale, globally.

TCLP now has over 100 climate clauses from all sectors published on its website. They span a wide range of industry sectors and legal issues, including corporate governance, financing, insurance, corporate transactions, construction, real estate and supply chains. And not just clauses – TCLP's website also has template board papers to bring climate considerations into significant transactions. There are also due diligence questionnaires for both pre-contract tender evaluation criteria and corporate transactions.

One feature of TCLP's work, which perhaps best captures its spirit, is that each climate clause is given a child's name who is connected to one of the lawyers in the drafting teams. It's a symbolic reminder to the team

and all clause users why drafting for the climate is so important – to provide a liveable planet for future generations.

TCLP provides practical guidance in addition to precedent clauses

The TCLP website is a practical toolkit that should be on every lawyer's desktop. All of the TCLP resources are open source. You can take all of the clauses, tools, presentations and communication materials and use them to accelerate climate contracting worldwide.

TCLP recently updated its [Net Zero Dashboard](#) and [Net Zero Drafting Checklist](#) (both in the [Net Zero Implementation Tools](#) on TCLP's website). These practical tools are two of the most powerful tools in the climate drafting armoury as they help you stand your ground when negotiating the clauses!

The new [Just Transition Resources](#) provide a practical starting point for professionals to ensure that the burden of responding to the climate crisis is not placed onto those least able to bear it. The resources align climate transition plans and actions with just transition principles.

How can you as a GAIL lawyer in the Asia Pacific region get involved in this project?

The biggest impact you can have is to start using the clauses in your contracts and sharing with the TCLP

community how you are using the clauses. To have an impact, the climate clauses must be used in commercial transactions, not just drafted in precedents. That is how real emissions reduction will be achieved. The main task now is to drive uptake in our

entire region by leading by example. So if you use any of the clauses, let TCLP know so that they can not only improve the content but also share the story and inspire others to do the same.



JOIN OUR TRANSPOSITIONS TEAMS IN YOUR JURISDICTION!

There is also an opportunity to join and lead adaptations of the TCLP clauses in high impact sectors in APAC. TCLP is currently adapting high impact clauses (we call it “transposed”) in other jurisdictions and languages. If you are interested in taking part in your local jurisdiction, you can sign up [HERE](#).



SIGN UP TO OUR FORTNIGHTLY NEWSLETTER

If you would like to get involved, hear updates about new clauses and case studies, sign up to The Chancery Lane Project’s newsletter [HERE](#).

B CORPS IN AUSTRALIA AND NEW ZEALAND AND THE RISE OF FOR-PURPOSE BUSINESS

KATE WILSON BUTLER

Director, Climate, Sustainability and ESG, Chapman Tripp

PHILLIPPA WILKIE

Special Counsel, Chapman Tripp



The rise of purpose-led business globally is also reflected in our region. Businesses are subject to ever-increasing scrutiny on their management of

ESG factors from a range of stakeholders. B Corp certification is the leading accreditation for businesses who are walking the talk on balancing profit with

environmental and social factors, creating long-term value for all stakeholders. Established in 2013, B Lab Australia and Aotearoa New Zealand (B Lab AANZ) has

overseen huge growth in the number of B Corps in New Zealand from 1 in 2014 to 93 as of January 2023. B Corp accreditation involves extensive due diligence into a business's past and present operations, business practices and corporate governance and requires an ongoing commitment in governing documents to purpose and stakeholders.

In this article, we examine the role for lawyers in relation to existing and potential B Corps, discuss how two leading New Zealand companies navigated the transition to B Corp accreditation and list key resources for GAIL members in the region interested in learning more.

Becoming a B Corp: the requirements

To achieve B Corp certification, a company must fulfil the key criteria of [performance, transparency and accountability](#) by:

- Achieving an 'Impact Score' of 80 or above in the B Impact Assessment across five environmental and social impact areas, which is reassessed every three years;
- Publishing a profile with the company's Impact Score and any disclosures on the B Corp Directory; and
- Meeting "the legal requirement" by committing to purpose

and stakeholders in the business's governing document.

The B Impact Assessment rewards businesses for stakeholder governance practices including regular materiality assessments and stakeholder mapping, stakeholder representation on the board, formalised stakeholder engagement, clear KPIs for ESG factors with regular progress updates and employee training on these matters. Stakeholders include staff, customers, suppliers and the environment.

We spoke to two prominent New Zealand B Corps in preparing this article - **Kiwibank**, a 100% New Zealand-owned bank, and **Sharesies**, a wealth management platform used by more than 10% of New Zealanders. For those companies the B Corp accreditation provides an external endorsement of their focus on purpose, keeps them accountable to their stakeholders and gives them a framework to measure the impact they are having towards their company's goals over time.

Irene Peter, Acting General Counsel at Sharesies, highlighted the ethical filter required for all company strategic decisions – the questions for the company are not just 'Can we do this?' but "Should we do this?". Sharesies has implemented various practices including

appointing a Future Director to include more diverse views at board level and more structured engagement with customers to measure the impact of its work.

Legal considerations when seeking B Corp status

Where legal advisers can contribute is reviewing the business's contractual arrangements to ensure they reflect the values of the business, advising on changing (or adopting) governing documents, resultant impacts on directors' duties and accountability and how the organisation's corporate governance, strategy setting and implementation must adapt.

Amending (or adopting) a constitution

Many New Zealand companies seeking B Corp accreditation may need to first adopt a constitution. Unlike many jurisdictions in the U.S., where the B Lab movement was founded, the New Zealand Companies Act does not require companies to have a constitution (see s 26 of the Companies Act 1993). That means in order to seek B Corp accreditation, some companies may have to adopt a constitution for the first time.

Where a company already has a constitution,

the Companies Act provides a mechanism for amendments through exercise of shareholder vote (s 32). Legal advisors may be asked to tailor B Lab AANZ's legal requirement to the company's specific circumstances (within the boundaries acceptable to B Lab) or to consider further amendments to the constitution in respect of corporate governance or shareholder rights. Some advisers may be asked to record the understanding between shareholders in respect of the ongoing maintenance of B Corp accreditation, for example to maintain the purpose throughout shareholder changes.

Possible impact on directors' duties

Lawyers advising boards of potential B Corps may need to advise on how the required changes to (or adoption of) the company's constitution affect how directors discharge their duties and the interpretation of what is in the best

interests of that particular company. What is in the best interests of a company has no legislative definition in New Zealand and is a subjective test which is likely to be coloured by a company's purpose as stated in the constitution, as well as the constitution's contents (such as the stakeholder governance clause that B Corp accreditation requires).

Plan for legal support in embedding B Corp requirements

In addition to the corporate governance changes, changes will likely be required across the business to meet B Lab AANZ's impact criteria. Kiwibank, for example, engaged with all internal stakeholders from Procurement and Customer Support to Human Resources. Various departments may need support with policy and contract review to reflect the required social and environmental expectations of a B Corp business. In addition, the board will likely need support to embed

the accountability for the purpose and stakeholder governance clauses, such as through expanded mandates for committees, management reporting and stakeholder engagement.

In-house counsel looking at B Corp accreditation should consider whether external support may be required. B Lab will provide a team of assessors through the application process. In addition, B Lab Consultants can provide independent support. On the legal side, B Corp recommends each company seeks legal advice for its specific circumstances, particularly for public companies or those with complex shareholdings.

The authors thank Macayla Hughes, Head of Legal, Corporate; Julia Jackson, Head of Purpose and Sustainability, both of Kiwibank, Irene Peter, Acting General Counsel at Sharesies, and Andrew Davies and Qiulae Wong at B Lab AANZ for their assistance and time in preparing this article.



KEY RESOURCES/FURTHER READING

<https://bcorporation.com.au/become-bcorp/guide/overview/>

<https://bcorporation.com.au/legal-requirement/>

<https://bcorporation.com.au/wp-content/uploads/2022/09/B-Corp-Legal-Requirement-AANZ-Guide-for-Directors-Aotearoa-NZ-Sep-2022.pdf>

<https://bcorporation.com.au/wp-content/uploads/2022/09/B-Corp-Legal-Requirement-How-to-Guide-AUNZ-September-2022.pdf>

05

SPECIAL FEATURE

IS THERE SUCH A THING AS A GENUINE SOCIAL ENTERPRISE?¹

In his 2021 book *Essential Social Enterprise – a Just Transition to a Regenerative Fair Future*², Freer Speckley, who was among the first to formulate the concept of social enterprise in the UK in the 1970s, revisits social enterprise's short history and ideas. Here he shares the six values that he believes should define social enterprise.

- Common ownership
- Democratic governance
- Financial viability
- Environmental responsibility
- Social wealth
- Social accounting and audit

Social enterprise has become a worldwide phenomenon without it being clear what it is. I would say that this is because there is an awareness of the rotten way corporations behave, how dangerous they have become in degrading the planet, and how they have created such appalling inequality. Modern corporations have become as powerful as governments without accountability or stakeholders' opportunities to change their leadership. Don't be fooled by the talk of "stakeholder capitalism"; stakeholders don't have any power, voting rights, influence or a voice. Only large shareholders have such authority, who are themselves capitalist corporations.

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1 - Reproduced with thanks to Pro Bono Australia which first published this article in [Pro Bono News on 22 February 2022](#)

2 - Freer Speckley *Essential Social Enterprise* published by Local Livelihoods 2021 ([Local Livelihoods](#)).



GAIL

Global Alliance of Impact Lawyers

People want a different corporate structure. One that behaves with integrity, is environmentally regenerative by design, and whose purpose is to help facilitate an equal society. But, many variations of social enterprise avoid the structural transformation needed to create a genuine alternative. Without an agreed definition or legal structure, social enterprise cannot progress beyond the point of good intentions.

Social enterprise is about system change. Not tinkering around with mission, impact investment, non-profit versus for-profit, entrepreneurship, social business, or any other interpretations used. Social enterprise is about changing the way business is owned, who is in control, the purpose, and responsibility for society, people, and the environment. This also means changing the way success and failure are

measured – from solely profit maximisation to broader social and ecological considerations.

For social enterprise to be an alternative that works and is efficient, it needs structure, legal independence and operational integrity. Below are what I think are the key values that need to be enshrined in a social enterprise definition and constitution to affect genuine system change in commercial organisations.



Workers and managers are responsible for coordinating and implementing the governance body's plans, day-to-day decision-making, and daily financial and administrative operations.



COMMON OWNERSHIP

Who owns controls and decides how commerce is run and how wealth is distributed. Spreading ownership more equally, where workers and other prominent stakeholders have an equal share and control, will ensure interests other than profit will influence how and why commercial enterprises are run. In social enterprise, common ownership by the workers and sometimes local residents has always been a fundamental part of the legal structure. To move from elite shareholders to broad-based stakeholders needs a change from private to common ownership. It influences responsibility and status for co-owners, builds self-esteem and equality, shifts control on decision-making, and is more inclusive when considering and deciding purpose, mission, and investment.



DEMOCRATIC GOVERNANCE

Social enterprises need organisational strategies that align with democratic principles and practices to reflect the common ownership system and co-owners' rights. If there are co-owners, they are engaged in all tiers in some capacity, from the governance body to the individual worker on the shop floor.

A commonly owned and democratic enterprise will have three main organisational tiers, governance, management and work teams, and individual workers who are self-managed co-owners. These tiers create a circular organisation rather than a hierarchical one in a general sense, but each enterprise may have varying degrees of hierarchy. These may range from those who pay themselves equal salaries and rotate most, if not all,

work tasks to those who pay deferential salaries and practice degrees of hierarchy authority.

Through the governance body, all co-owners can set the mission and long-term plans, policy formulation and salary levels. Being part of senior management makes co-owners not only part of the decision making but also fully appraised of all aspects of the enterprise. The benefits are many and lead to an open and transparent organisation.

Workers and managers are responsible for coordinating and implementing the governance body's plans, day-to-day decision-making, and daily financial and administrative operations. With the democratic level of equality and being fully aware of what is going on, everyone is a self-managed co-owner who controls their enterprise.



FINANCIAL VIABILITY

For most of economic history, maximisation of turnover, sales, and profit have been the dominant assumption: within a balanced economic environment, this more or less works, but when we move to globalised capitalism, as we see today, profit maximisation becomes anti-social and causes untold poverty and environmental stress. No rule says you must maximise profit; it's just the default assumption expressed and justified using the single bottom-line measurement.

Social enterprise focuses on the triple bottom line and therefore should assume financial viability as the fundamental economic assumption, defined as "to generate sufficient income to meet operating payments and debt and invest in commercial, social and environmental benefits". By shifting the emphasis from profit maximisation to financial viability as the driving motive for enterprise, we also change the way economics is measured from GDP to society and ecological wellbeing.



ENVIRONMENTAL RESPONSIBILITY

Because co-owners decide strategy, policy and investment and work on the shop floor, their understanding and knowledge of how any waste and pollution is generated give them a more comprehensive grasp of the problem. Consequently, they are in a good position to find practical and workable solutions to transform their enterprise into an environmental regenerative organisation.

There is no greater urgency now than to create financially viable zero-emission organisations driven by technological innovation and human behavioural change.

Commercial and non-commercial organisations emit disproportionate amounts of pollutants compared with individuals, families and communities. While we must all reach net-zero emissions, organisations are able to achieve substantial reductions with greater impact. Social enterprises are well placed to make strategic decisions to support this: such as

evaluating every investment, process and material used to eliminate waste and emissions wherever possible. Unfortunately, sustainability is no longer the mission; we cannot sustain a broken system. Organisations have now to make good. It's about being proactive and regenerative in design and implementation.

Measuring and reducing emissions and waste is complex, and for many enterprises doing something rather than being flummoxed by the complexities can be very powerful and achieve surprising results. A small intervention is sometimes the tipping point for considerable positive change in the future.



SOCIAL WEALTH

Social wealth is the ability to connect with others to do things you can't do independently, enabling opportunities for co-owners to engage with and connect to a wide range of initiatives, both internally and externally.

To have supportive and meaningful human

connections in all spheres of life builds physical and psychological health that helps us live whole and fruitful lives in the workplace, family and community.

Being a co-owner of your enterprise; participating in decision-making – listening and voicing opinions freely; being responsible for initiating work and being led by others rotating these tasks; and building connections with colleagues, partners, suppliers, and customers leads to connected individuals enhancing positive self-esteem and wellbeing.



SOCIAL ACCOUNTING AND AUDIT

The term social enterprise originally came about as the description of an enterprise owned and controlled by its workers and/or community stakeholders and measures its performance using the triple bottom line of financial viability, social wealth creation, and environmental responsibility.

The social accounting and audit system is an annual, or biennial, planning and accounting system alongside the annual financial accounting. The system comprises three methods: checking against

external indices for social and environmental good practices. The second uses an internal and external stakeholder question set. The third is planning and monitoring changes to achieve social and environmental impact. I don't think they all need to apply every year. It will depend on the state of the previous audit and how the enterprise scored using the external indices.

It's essential, though, that the process is carried out honestly and transparently and would benefit from being enshrined in law as part of a Social Enterprise Act.



SOCIAL ENTERPRISE ACT

The six values represent a new model of enterprise that combines old practices from the cooperative movement on ownership and control, new ideas about financial viability and recommendations on social and environmental responsibilities. To manage social enterprise, the assumption of profit maximisation has to be replaced with financial viability using the social accounting and audit methods of measurement and accountability. I suggest, in the book, that it is time for an agreed social enterprise

definition, a legal model rule and an Act of Parliament. The Social Enterprise Act would underpin a system change to alter the responsibilities and benefits of commercial enterprises.



IT'S ESSENTIAL THAT THE PROCESS IS CARRIED OUT HONESTLY AND TRANSPARENTLY AND WOULD BENEFIT FROM BEING ENSHRINED IN LAW AS PART OF A SOCIAL ENTERPRISE ACT.

IMPACT LAW DEVELOPMENTS

06

IMPACT LAW DEVELOPMENTS IN PAKISTAN

AMMARA FAROOQ MALIK
Founder Seplaa & AFMalik Law



In Pakistan, environmental and social impact creators need a modified Company Law entity or a new form of legal identity to create sustained social or environmental impact without the continued

dependency on aid. Such a tool for development is the social enterprise or impact business model. However, there are no laws presently available for social enterprises, apart from the NGO laws and Companies

Act 2017, which do not support for-profit social enterprises or larger impact businesses that can include the much needed circular economy.

In the case of listed companies in Pakistan, corporate directors have a statutory duty to promote the objects of a company and the benefit of its shareholders. Apart from this, under section 10 (4) (xiv) of the Listed Companies (Code of Corporate Governance) Regulations, 2019 the Board is required to ensure the complete record of the particulars of the 'significant policies' which 'may include but is not limited to the following....(xiv) environmental, social and governance (ESG) including but not limited to health and safety aspects in business strategies that promote sustainability, corporate social responsibility initiatives and other philanthropic activities, donations, contributions to charities and other matters of social welfare;'

Another provision is provided further at section 14 (xvii) that lays down the issues to be placed for decision of the board of directors. These include "implementation of environmental, social & governance; and health & safety business practices including report on corporate social responsibility activities and status of adoption/ compliance of the Corporate Social Responsibility

(Voluntary) Guidelines, 2013 or any other regulatory framework as applicable;'

In short, the emphasis on the word 'may' does not make it mandatory for Pakistani company directors to make and maintain significant policies related to ESG and therefore by analogy, such matters may or may not be deemed to be 'significant' to be placed before the board of directors of listed companies for further deliberation as well.

The Ministry of Human Rights, Government of Pakistan initiated the 'Business and Human Rights Project' in 2020 which has been developed in line with the United Nations Guiding Principles on Business and Human Rights (OHCHR, 2011)³, which are a set of guidelines to prevent, address and remedy human rights infringements in business operations. The main objectives of the project are (i) to improve human rights in the business context in Pakistan through the "Protect, Respect and Remedy" framework highlighted in the UNGPs on Business and Human Rights; (ii) to conduct a National Baseline Assessment to analyse the current situation on human rights in the business sector in Pakistan

in line with the Danish Institute of Human Rights Toolkit; and (iii) to develop a National Action Plan on Business and Human Rights through a transparent and inclusive process of all stakeholders including business entities, employees, labour unions, government stakeholders, etc.(MOHR, 2022)⁴.

Much work still needs to be done to mainstream ESG and Business and Human Rights in business operations in Pakistan where general discourse on the issues are still at their nascent stages. However, law firms such as AFMalik Law have initiated training programs for young lawyers to introduce them to the concept of Impact Law and the urgency of its development in Pakistan where recently more than 33 million people were affected by the severe impacts of climate change through the Pakistan Floods. Impact Law development in Pakistan has the potential to support the government in climate change adaptation by guiding the business sector to streamline their operations for the benefit of people and planet with a purpose, through profit with the support of targeted policy.

IMPACT LAW DEVELOPMENTS IN AUSTRALIA

MICHAEL RYLAND
Director, Centre for Social Finance Law



Australia has an active and established impact finance sector with lawyers engaged across the range of GAIL's impact disciplines⁵. The business and investment

law framework continues to be defined by the for-profit/not-for-profit divide and underpinned by the principles of shareholder capitalism and modern

portfolio theory. At both a finance sector and government policy level, this legal framework is being challenged.

3 - UN Office of the High Commissioner on Human Rights (OHCHR), 2011, 'Guiding Principles on Business and Human Rights- Implementing the United Nations' "Protect, Respect and Remedy" Framework' (as at 19 January 2023).

4 - Ministry of Human Rights (MOHR), Government of Pakistan, Business and Human Rights (as at 19 January 2023).

5 - <https://gailnet.org/about/#about-impact-law>

DRIVERS OF IMPACT LAW REFORM

It is the finance sector that has led impact law development in Australia, responding in particular to climate change and environmental expectations of investors. In its 2022 Benchmark Report for Australia RIAA - Responsible Investment Association Australasia⁶ – noted that:

- Australia's responsible investment market has reached A\$1.54 trillion in assets under management, representing 43% of total professionally managed funds;
- the top three responsible investment approaches are ESG Integration (A\$752B), Corporate Engagement and Shareholder Action (A\$726B) and Negative/Exclusionary Screening (A\$705B); and
- Climate continues to be a strong theme for both positive and negative screening with Gender Diversity and Women's

Empowerment jumping in priority from 10th place in 2020 to 6th in 2021.

Australia's social enterprise sector has grown in parallel. It is predominantly mission-led, active across all sectors and weighted towards smaller enterprises working in the service sector⁷. Legally, social enterprises have generally been structured as not-for-profit enterprises, although recently there has been more interest in hybrid or blended finance models.

This finance sector and social enterprise activity has led to impact law reform focusing primarily on legal structures, governance and fiduciary duties, while day-to-day impact legal practice has been occupied with debt financing (including green financing and sustainability bonds), investment funds and reflecting ESG requirements.

FIDUCIARY DUTIES

While there has not been any relevant statutory reform of directors' duties, the legal debate has shifted over the last few years. It is now generally accepted, based on the Walker/Ng

opinion (2022), that directors should take into account stakeholder interests – including employees, customers, suppliers, creditors, Traditional Owners, the environment and broader community – as part of their consideration of the long-term interests of the company, including its interest in avoiding reputational harm⁸.

This builds on the Hutley/Davis opinion (2016, updated 2019) on directors' duties and climate risk which commented, in relation to developments between 2016 and 2019 in regulator policy, new reporting frameworks, investor and community pressure, advances in scientific knowledge, and increased litigation risks:

*these matters elevate the standard of care that will be expected of a reasonable director. Company directors who consider climate change risks actively, disclose them properly and respond appropriately will reduce exposure to liability. But as time passes, the benchmark is rising.*⁹

The fiduciary duty framework for institutional investors has statutory overlays which emphasise financial returns but there is regulatory recognition that investments can be selected for their sustainability impact so long as they offer an appropriate risk adjusted return¹⁰.

Overall, there is growing acceptance of "Instrumental IFSI" (adopting the language of the Freshfields Report *A Legal Framework for Impact*¹¹) but more scepticism about Ultimate Ends IFSI.

LEGAL AND TAX STRUCTURES

Australia does not have a Benefit Corporation of the kind available in US jurisdictions nor a Community Interest Corporation of the kind available in England. Over the last 10 years there have been several unsuccessful attempts to lobby for the introduction of a vehicle of that kind.

In light of that policy vacuum, impact lawyers have found ways to support the BCorp movement and the social enterprise sector by tailoring existing legal structures to embed "for purpose" requirements and governance arrangements

that support their objectives. That work also extends to finding innovative ways of overcoming the *for profit/not-for-profit* silos to help enterprises raise suitably aligned capital.

Similarly, there is no social impact-specific tax relief available in Australia. Instead, social entrepreneurs and their lawyers have been developing bespoke arrangements that blend philanthropic and commercial funding, and that identify opportunities through other types of vehicles, including venture capital structures.

REGULATORY FACTORS

International regulation and industry codes, like the EU Sustainable Finance Taxonomy and the UK Stewardship Code, are major drivers of the finance sector in Australia and, as a result, define much of the legal framework for implementation of sustainability expectations in Australia.

They are now starting to intersect with corporate regulation as benchmarks for identifying market issues such as greenwashing which may amplify their legal effect¹².

6 - <https://responsibleinvestment.org/wp-content/uploads/2022/09/Responsible-Investment-Benchmark-Report-Australia-2022-1.pdf>, p8

7 - <https://assets.csi.edu.au/assets/research/Finding-Australias-Social-Enterprise-Sector-2016-Final-Report.pdf>

8 - <https://www.aicd.com.au/board-of-directors/duties/liabilities-of-directors/directors-best-interests-duty-in-practice.html>

9 - <https://cpd.org.au/wp-content/uploads/2019/03/Noel-Hutley-SC-and-Sebastian-Hartford-Davis-Opinion-2019-and-2016.pdf>, para 4, pp2/3.8

10 - <https://www.apra.gov.au/sites/default/files/prudential-practice-guide-spg-530-investment-governance.pdf>, paras 34-36

11 - https://gailnet.org/wp-content/uploads/2022/06/GAIL-APAC-Journal_Final_080622.pdf, p24

12 - <https://www.accc.gov.au/media-release/accc-internet-sweeps-target-greenwashing-fake-online-reviews>





GOVERNMENT SUPPORT

Government support for social impact in Australia has been patchy.

Australia is a federation. Much of the practical support has been from State Governments since this is the level of government that has primary responsibility for delivery of health, housing, education and other social services.

New South Wales launched the first two social impact bonds in Australia in 2013, both dealing with reuniting families or preventing the removal of children into the State care system. Since then it has set up 6 other impact investing projects, some SIBs and some in other formats, as well as setting up a Social and Affordable Housing Fund to attract private sector investment.

Queensland, South Australia, Victoria and the Australian Capital Territory have also launched or worked on SIBs or Payment by Outcomes (or PBR) contracting. Most also have procurement policies that support accredited social enterprises.

At a national level there was initial impetus given to

social impact by the *Social Enterprise Development and Investment Funds* established by the Federal Government in 2011. These three funds were a significant catalyst of the impact investment market in Australia, having strong direct effects on capacity building and scaling social impacts¹³. The legal structure of each fund involved some innovation to enable the impact objectives to be achieved.

Subsequent Federal Governments undertook various inquiries into social impact investing but without any significant reforms. The new Government elected in May 2022 has indicated a higher level of interest. It is encouraging more investment by pension funds into social infrastructure, particularly housing, and has raised the prospect of establishing, jointly with major commercial banks, a social impact investment wholesaler, similar in concept to the UK's Big Society Capital¹⁴.

If this comes to fruition it can be expected to be a significant step forward in the development of impact investing in Australia.

07

EVENTS AND PROJECTS

A BUSY FIRST YEAR FOR GAIL ASIA PACIFIC

The Asia Pacific regional group was newly formed when GAIL was established in early 2022. We had a

busy first year! As well as publishing this Journal we convened a number of gatherings and events as

illustrated below. Recordings and written materials are available on the GAIL website [HERE](#).

Global Alliance of Impact Lawyers
Has anyone got a precedent for this? Climate Clauses & Fostering Legal Innovation
 07 July 2022 | Hosted by GAIL Asia Pacific

 Phoebe Roberts Senior Associate at Minter-Ellison Director of Implementation & APAC Co-Lead at The Chanocry Lane Project	 Ian Mackenzie I lead of Legal at New Zealand Green Investment Finance	 Brian Tang Founding Executive Director, Law, Innovation, Technology and Entrepreneurship (LITE) Lab at Hong Kong University	 Jeremy King Partner, Pinsent Masons	 Michael Ryland GAIL Board Member Director, Centre for Social Finance Law, Australia	 Steven Moe GAIL APAC Chair Partner, PARRY FIELD Lawyers Limited, New Zealand	 Tze-wei Ng GAIL APAC Board Member Solicitor, Stephenson Harwood
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GAIL
Global Alliance of Impact Lawyers

GAIL Mid-Year Global Event:
Gender Finance - How Lawyers Can Help Break Barriers
 28 September 2022
 11:00 PKT | 11:30 IST | 14:00 HKT | 16:00 AEST | 19:00 NZST

 Tze-Wei Ng (Moderator) Associate, Stephenson Harwood	 Ammara Farooq Malik Founder & Principal Attorney AFMalik Law & Seplaa Group	 Professor Rosemary Addis AM Chair of SWEFF Capital Board of Advisors	 Maud Savary-Mornet Senior Advisor, South East Asia, The Global Impact Investing Network (GIIN)	 Sukhvir Basran Senior Legal Director and Co-Head of Sustainable Finance and Investment, Hogan Lovells
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13 - <https://www.dewr.gov.au/sedif>

14 - <https://www.afr.com/policy/economy/chalmers-taps-banks-and-super-to-fix-social-disadvantage-20230129-p5cg9w>

Global Alliance of Impact Lawyers Asia Pacific Presents:

Wednesday 2 March, 04:00 - 05:45 GMT

09:30 IST | 12:00 SGT | 15:00 AEDT | 17:00 NZDT

Panel 1: Being an Impact Lawyer

Panel 2: B Corps, Social Enterprise and Impact-Driven Companies



Steven Moe
Partner
Parry Field Lawyers
Chair
GAIL Asia Pacific



Emma Kostas
Solicitor
Protegis Lawyers



Tze-wei Ng
Associate
Stephenson
Harwood LLP



Michael Ryland
Director
Centre for Social
Finance Law



Andrew Davies
CEO
B Lab Australia



Nina Yousefpour
Head of Certification
and Impact
Social Traders



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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.

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.

Thank you

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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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