

CLAYTON UTZ

Responding to Australian Regulators

Hiroyuki Kano, Partner
Luke Furness, Special Counsel

5 September 2024

Introduction and context

01

PHASE ONE

Preventative Measures

1. How to spot regulatory risks
2. Enforcement priorities
3. Voluntary disclosures

02

PHASE TWO

Regulator first contact

1. How to survive a raid
2. How to react to a regulatory notice – first week
3. How to react to a request for an interview – first week

03

PHASE THREE

Responding

1. Understanding where the regulator could take the matter
2. What to provide and how to provide it
3. What not to provide (privilege)

04

PHASE FOUR

Aftermath

1. Is the matter really finished or do we need to prepare for future actions?
2. What other steps do we now need to take?
3. How do we improve?

Introduction and context

01

PHASE ONE

Preventative
Measures

02

PHASE TWO

Regulator first
contact

03

PHASE THREE

Responding

04

PHASE FOUR

Aftermath



Hiroyuki Kano
Partner – Corporate, M&A & Capital Markets

+61 7 3292 7262
+61 438 647 419
hkano@claytonutz.com

Hiroyuki is the only partner of a major Australian law firm who is a qualified *bengoshi* (Japanese lawyer) practising Australian law in Australia. He offers his clients this unique dual qualification and his expertise in bridging the gap between Australian and Japanese law.

As the Co-Head Partner of the Japan Practice Group at Clayton Utz, Hiroyuki brings over 20 years' experience in Australia advising Japanese corporations on energy and resources projects, joint ventures, mergers and acquisitions, legal due diligence and investigations, contract negotiation and commercial litigation.

He has been a trusted legal adviser for many Japanese companies doing business in Australia. With his own knowledge and extensive experience in various Australian legal areas, he is exceptionally good at identifying, constructing and leading the right team to best serve Japanese clients and accommodate their specific needs and requirements.

Hiroyuki is the author of the Japanese text "Outline of Australian Corporate Law" which provides a comparison of Australian and Japanese law in the context of corporate law.

Prior to joining Clayton Utz in 2002, Hiroyuki practised Japanese law as an associate with Anderson Mori & Tomotsune in Tokyo, Japan. He is also a qualified lawyer in the United States of America (New York).



Luke Furness
Special Counsel – Commercial Litigation

+61 7 3292 7863
+61 438 154 181
lfurness@claytonutz.com

Luke has extensive expertise in a wide range of dispute areas, encompassing tax and duties litigation, bankruptcy and insolvency, energy and resources, as well as general commercial disputes.

Clients consistently applaud Luke for his remarkable capacity to thrive under pressure, adeptly handling demanding court proceedings and client-driven timelines, all while ensuring the team remains well-prepared and highly motivated.

Relevant Experience

Newmont Canada FN Holdings v Commissioner of Taxation: acting in complex income tax disputes involving preparation of technical analysis and submissions and extensive expert evidence.

Racing Queensland Board: Took day-to-day carriage of this superannuation dispute in the Federal Court, Full Federal Court and High Court. The matter was test case funded so involved fostering a cooperative relationship with the regulator.

Confidential family business: Assisted a complex family-owned business negotiating with the ATO and responding to detailed review.

Resource Capital Fund: acting for an overseas fund in complex income tax disputes in the Federal Court, Full Federal Court and High Court.

Case studies on regulatory risks

Regulatory failures can lead to financial penalties/fines, negative publicity and licence suspension. Some examples include:

- **Crown Casino** - inquiry into suitability to hold a casino licence and related penalty proceedings for breach of anti-money laundering laws (\$450 million in penalties)
- **Mercer** – ordered to pay fines for misleading sustainability statements (greenwashing) (\$11.3 million)
- ATO proceedings for research and development rebate scandal of **Mr Paul Bogiatto** and related entities (\$22.68 million in total fines)
- Penalty proceedings brought by the ACCC against **Volkswagen** for breach of the Australian Consumer Law (\$125 million in penalties)



Main corporate regulators in Australia

Australia

- Australian Taxation Office (**ATO**)

- Australian Securities and Investment Commission (**ASIC**)

- Australian Competition and Consumer Commission (**ACCC**)

Japanese Equivalent

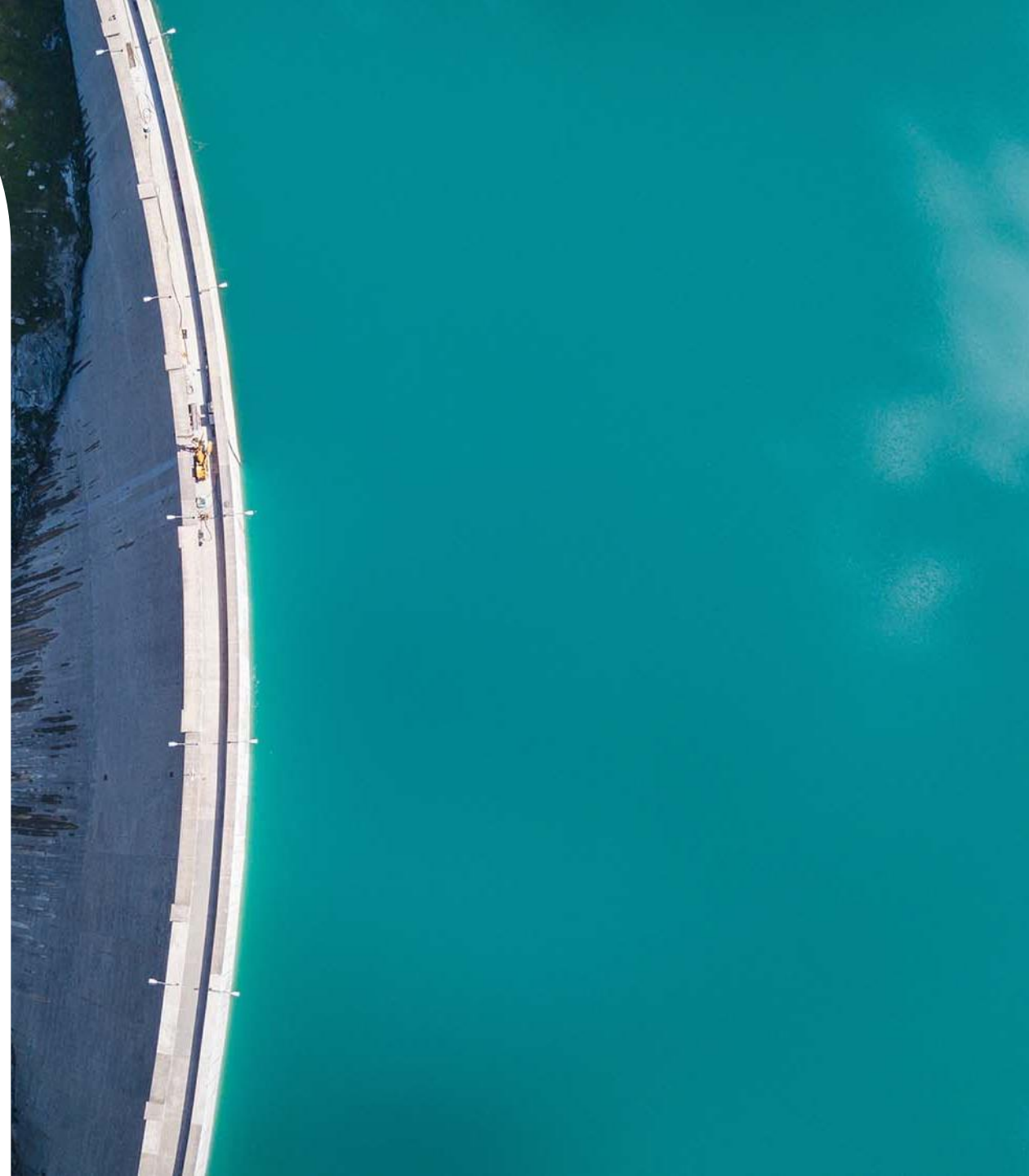
- National Tax Agency

- Japan Financial Services Agency (**JFSA**)

- Japan Fair Trade Commission (**JFTC**)
- Consumer Affairs Agency

Other corporate regulators in Australia

- Australian Prudential Regulation Authority (**APRA**) – prudential regulation of banks, insurers and most super funds
- Australian Securities Exchange (**ASX**) – for companies listed on the ASX
- AUSTRAC – monitors financial transactions for money laundering, terrorism financing and other crimes
- AER / AEMO / AEMO – regulates energy markets
- Australian Federal Police – Federal criminal agency
- State workplace health and safety regulators
- State environmental protection regulators



General differences in approach

Japan

- Litigation against Government regulators is less common.
- Limited scope for leniency for early/voluntary disclosure (particularly in relation to tax matters)
- Similar regulatory tools used in both countries (dawn raids, requests for production and interviews)

Australia

- Litigation against Government regulators is common. Most of Australia's largest companies have had material proceedings against Government entities.
- Reduced penalties associated with early/voluntary disclosure



Introduction
and context

01

PHASE ONE

Preventative Measures

1. How to spot regulatory risks
2. Enforcement priorities
3. Voluntary disclosures

02

PHASE TWO

Regulator first contact

03

PHASE THREE

Responding

04

PHASE FOUR

Aftermath

Phase One: Preventative measures

How to spot regulatory risks

- It is important to remain appraised of the current regulatory environment to understand the current focus of Australian regulators. Press releases and public statements by the regulator will indicate areas of focus.
- Early warning signs:
 - Change in published guidance on enforcement priorities.
 - New laws increasing regulator powers.
 - Change of Government.
 - Complaints against your industry or your activities (eg complaints of greenwashing by consumers or complaints by employees of unpaid wages).
 - Enforcement action taken against your competitors.
 - Enforcement action taken overseas on similar issues.

ACCC enforcement priorities for 2024-25



01

Consumer, product safety, fair trading and competition concerns in relation to environmental claims and sustainability



02

Competition, consumer, fair trading and pricing concerns in the supermarket sector, with a focus on food and groceries



03

Promoting competition in essential services with a focus on telecommunications, electricity, gas and financial services



04

Misleading pricing and claims in relation to essential services, with a particular focus on energy and telecommunications



05

Competition and consumer issues in the aviation sector

ACCC enforcement priorities for 2024-25



06

Consumer and fair trading issues in the digital economy, with a focus on misleading or deceptive advertising within influencer marketing, online reviews, in-app purchases and price comparison websites



07

Improving compliance by NDIS providers with their obligations under Australian Consumer Law



08

Unfair contract terms in consumer and small business contracts



09

Improving industry compliance with consumer guarantees, with a focus on consumer electronics, and also targeting misconduct by retailers in connection with delivery timeframes



10

Consumer product safety issues for young children, with a focus on the safety of nursery products including furniture, infant self-feeding and infant sleep products

ASIC enforcement priorities for 2024



01

Enforcement action targeting poor distribution of financial products



02

Misleading conduct in relation to sustainable finance including greenwashing



03

High-cost credit and predatory lending practices to consumers and small business



04

Member services failures in the superannuation sector



05

Misconduct resulting in the systematic erosion of superannuation balances



06

Insurance claims handlings

ASIC enforcement priorities for 2024



07

Compliance with the reportable situation regime



08

Conduct impacting small business including small business creditors



09

Enforcement action targeting gatekeepers facilitating misconduct



10

Misconduct relating to used car financing to vulnerable consumers including brokers, car dealers and finance companies



11

Compliance with financial hardship obligations



12

Technology and operational resilience for market operators and market participants

ATO enforcement priorities for 2024



01

Capital gains tax and other withholding tax from non-resident companies



02

Fraud and tax avoidance schemes



03

Multinational tax performance including a continued focus on transfer pricing



04

Superannuation compliance and other employment taxes



05

GST compliance – correct reporting and payment, particularly in respect of cross-border transactions

Phase One: Preventative measures

Considering voluntary disclosures

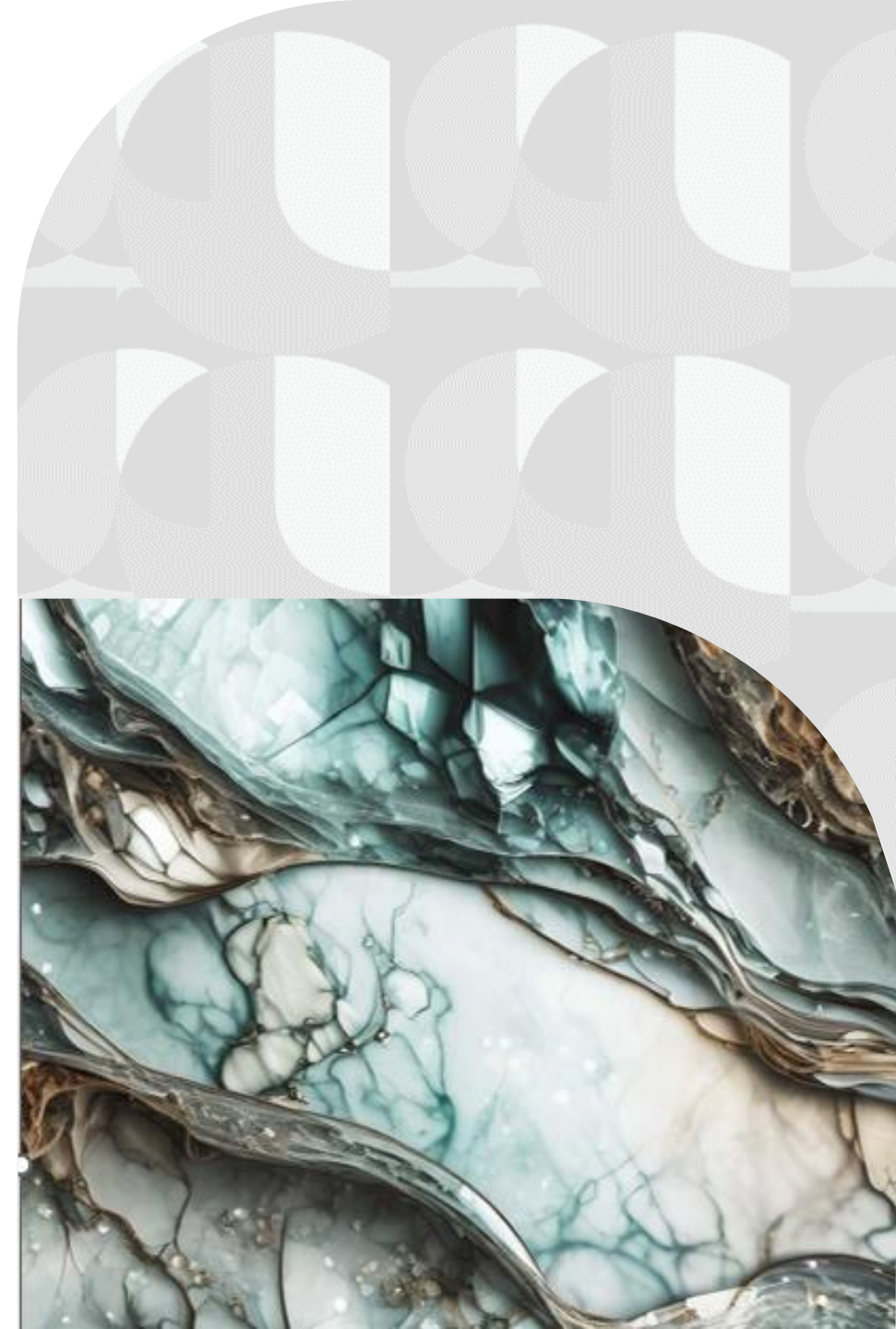
- Consider whether you are under a mandatory reporting obligation:
 - mandatory data breach notification regime under the Privacy Act
 - "*reportable situations*" under the Corporations Act and National Consumer Credit Protection Act in relation to the provision of financial services (including for misleading and deceptive conduct)
 - breaches of the terms of an environmental authority
- In these situations, failing to report to the regulator may compound the issue or alternatively, create a 'fresh' offence



Phase One: Preventative measures

Considering voluntary disclosures

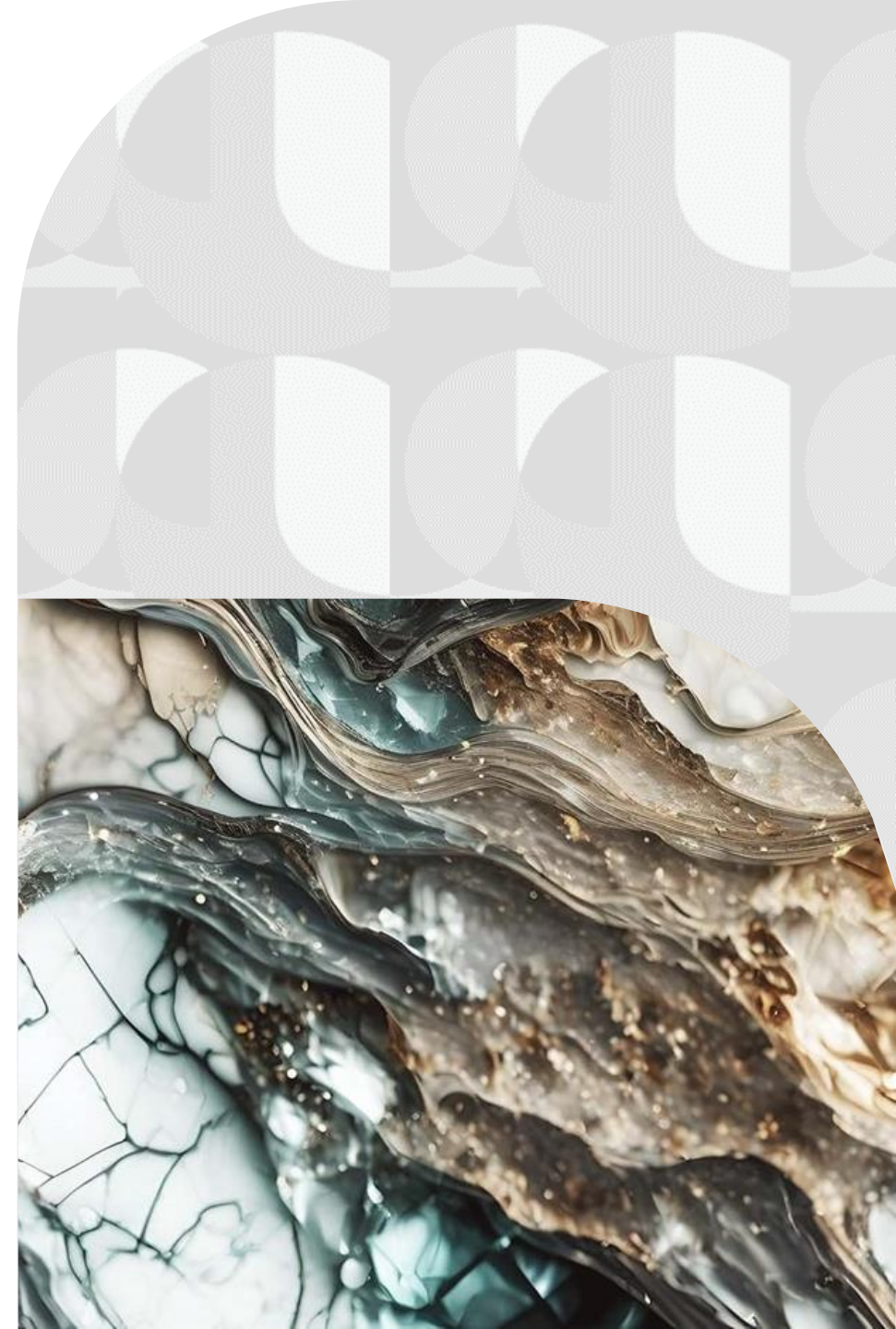
- Early and/or voluntary disclosure may lead to a better outcome (for example, a reduction in administrative penalties and interest charges by the ATO).
- Communications with the regulator should be managed by your lawyers and other professional advisers (ie accountant).
- Ensure you consider your insurance position and if appropriate, notify your insurer of the intent to make voluntary disclosure.



Phase One: Preventative measures

Examples of opportunities for voluntary disclosure

- **ATO** – voluntary disclosure regime includes an ability to correct previous lodgments. If the disclosure is made prior to an ATO-initiated review of your tax affairs, this will generally result in a reduction to the administrative penalties and interest charges levied (further information [here](#))
- **ASIC** – it is ASIC's policy to "encourage and fully recognise cooperation", with early notification of misconduct and/or a cooperative approach during an investigation relevant to the type of action and remedy sought (further information [here](#))
- **ACCC** – can provide immunity/cooperation agreements available in relation to anti-competitive/cartel as well as enforcement matters. The ACCC has published a policy which confirms that voluntary disclosures will result in leniency where disclosures are full and frank, made promptly and the disclosing party otherwise fully complies with the ACCC investigation (if any).



Introduction
and context

01

PHASE ONE

Preventative
Measures

02

PHASE TWO

Regulator first
contact

1. How to survive a raid
2. How to react to a regulatory notice – first week
3. How to react to a request for an interview – first week

03

PHASE THREE

Responding

04

PHASE FOUR

Aftermath

Phase Two: Regulator first contact

How to survive a raid by a regulator

A regulator may attend your business premises to carry out an investigation or serve a warrant for the seizure of documents (also called a "raid"). It is rare, but serious.

Practical tips:

- Inspect and take a copy of the warrant – confirm the date, address and subject matter of the warrant.
- Limit internal communications and do not destroy any documents.
- Contact your lawyer immediately and ask the regulator to temporarily halt their search.

You usually have a right to:

- see a copy of the warrant;
- observe the search (but not to obstruct);
- retain a copy of items seized;
- obtain a receipt listing the items seized; and
- take reasonable steps to maintain privilege.

Phase Two: Regulator first contact

How to react to a regulatory notice – first week

Who do we need?

- **In the business** – witnesses and senior team members to oversee response/document production.
- **Outside of the business** – external lawyers, consultants and other experts.

What documents do we need?

- Establish chain of custody and preliminary review.
- Consider privilege and basis for non-production (see following slides).

What are the options?

- Understand your prospects and likely outcomes.
- Consider cost and reward.

Phase Two: Regulator first contact

How to react to a regulatory notice – first week

A regulator may serve a notice requiring the collation and production of documents falling within certain categories relevant to their investigation.

The regulator will nominate a deadline by which the documents are to be produced.

Things to consider:

- The **scope** of the notice – what documents are captured?
- The **validity** of the notice (a question for your lawyer)

Phase Two: Regulator first contact

How to react to a regulatory notice – first week

- It is possible to engage with the regulator to narrow the scope of the notice and/or obtain extensions of time within which the documents are to be produced.
- First assess the scope of the notice and estimate the number of documents likely to fall within its terms.
- Consider how (and in what format) the notice will be responded to, including how the documents will be produced.
- If an extension to comply with the notice is required, be transparent and honest in your dealings with the regulator.



Phase Two: Regulator first contact

Requests for interview – first week

- Regulators may require you to answer questions, either in person or in writing/correspondence.
- This may occur as part of a broader inquiry (such as with a notice to produce documents).
- Where possible, request questions in writing ahead of time.



Introduction
and context

01

PHASE ONE

Preventative
Measures

02

PHASE TWO

Regulator first
contact

03

PHASE THREE

Responding

1. Understanding where the regulator could take the matter
2. What to provide and how to provide it
3. What not to provide (privilege)

04

PHASE FOUR

Aftermath

Phase Three: Responding

Understanding where the regulatory action may lead

- Why are they asking us this? Could be several reasons:
 - they suspect regulatory breaches and intend to impose fines, penalties or commence Court action;
 - they have received one or more complaints and are seeing if they are substantiated;
 - they are conducting a routine "risk review" and do not have any particular concerns in mind;
 - they are seeking assistance in an investigation into someone else – eg a supplier, employee or customer.

If in doubt, ask the regulator the purpose of their investigations.



Phase Three: Responding

What to provide and how to provide it

- Document all attempts to collate and produce information, include document repositories searched and the details of reviews undertaken.
- Consider issues regarding scope and size of production and negotiate with the regulator if required (see earlier slides).
- Review the material you are producing to (a) determine whether it discloses a regulatory issue and (b) ensure you are not producing material you shouldn't be (see following slides).
- Often the context to the documents is important. Consider providing context so the regulator has the full picture.



Phase Three: Responding

What not to provide – material subject to legal professional privilege

- Regulators are not entitled to seize or request copies of documents that are the subject of legal professional privilege
- A document will attract legal professional privilege if it is:
 - confidential in nature;
 - exchanged between a lawyer (including an in-house lawyer) and their client; and
 - brought into existence for the dominant purpose of the giving of legal advice **OR** use in litigation that is either on foot or reasonably contemplated.
- The protocol for the handling and storage of potentially privileged material can be addressed in your management strategy

Phase Three: Responding

What not to provide – material subject to legal professional privilege

- Legal professional privilege is not absolute – a document may be privileged but can be subsequently dealt with in a way which waives the privilege
- Examples of conduct that risk waiving privilege:
 - Wholesale distribution and/or publication of the document so that it is no longer considered 'confidential'
 - Communications with joint venture or strategic commercial partners which disclose the nature or content of the legal advice
- Consider developing a strategy (for use as a part of a broader document strategy) to ensure that privilege is maintained
 - Distributing privileged material to the minimum extent possible
 - Ensuring that in-house or external lawyers are copied to the communications
 - Marking privileged communications as "Privileged and Confidential"

Phase Three: Responding

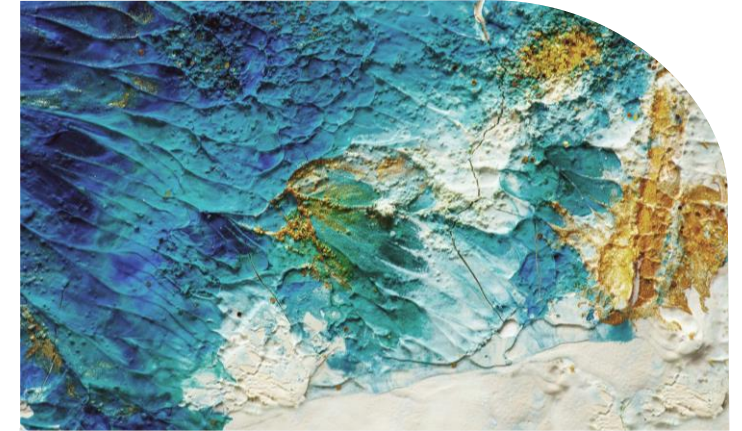
What not to provide – other excuses



Privilege against self-incrimination – works with some regulators but not others



Documents not (or no longer) in your possession or control



Confidentiality or commercial sensitivity? – often not a ground to resist disclosure, but may be able to agree confidentiality protocols with some regulators

Phase Three: Responding

Preparing for and attending an interview

Prepare:

- Refresh memory with relevant documents (including those produced to the regulator).
- Do not speak to other interviewees.
- Consult with your lawyer as to the approach to the examination.



Phase Three: Responding

Preparing for and attending an interview

During the interview:

- Listen carefully to every question.
- Answer the question succinctly – do not ramble or offer additional information.
- Only state facts you know – make it clear when you don't know or don't recall.
- If the examiner refers to a document, take your time to carefully review it before answering any questions.
- Be polite and courteous.
- The best response for the company is the truth. Penalties often apply for false or misleading statements.



Introduction
and context

01

PHASE ONE

Preventative
Measures

02

PHASE TWO

Regulator first
contact

03

PHASE THREE

Responding

04

PHASE FOUR

Aftermath

1. Is the matter really finished or do we need to prepare for future actions?
2. What other steps do we now need to take?
3. How do we improve?

Phase Four: Aftermath

Things to consider

Carefully document any agreements reached with the regulator.

Implementing and monitoring compliance with Court orders / settlement terms / enforceable undertakings.

Consider whether there should be any internal investigations and employee disciplinary actions.

Implied undertaking – restricts the use of documents where litigation is involved.

Consider changes to internal policies/protocols and any associated documentation.

Reflect on investigation and outcome and identify what worked and what didn't .

Key takeaways

Regulators are highly active in Australia - interaction with regulators is therefore a common aspect of doing business in Australia

Early intervention and voluntary disclosures can lead to better outcomes. Look for the signs that particular regulators are becoming more assertive

Be proactive with regulators about the scope and purpose of their investigation

Learn what you should and should not disclose

Work closely with legal and other advisers/consultants where appropriate

Questions?

Sydney

Level 15
1 Bligh Street
Sydney NSW 2000
+61 2 9353 4000

Melbourne

Level 18
333 Collins Street
Melbourne VIC 3000
+61 3 9286 6000

Brisbane

Level 28
Riparian Plaza
71 Eagle Street
Brisbane QLD 4000
+61 7 3292 7000

Perth

Level 27
QV.1 Building
250 St Georges Terrace
Perth WA 6000
+61 8 9426 8000

Canberra

Level 10
NewActon Nishi
2 Phillip Law Street
Canberra ACT 2601
+61 2 6279 4000

Darwin

17-19 Lindsay Street
Darwin NT 0800
+61 8 8943 2555

