Directors' defence of reliance on recommendations made by artificial intelligence systems: Comparing the approaches in Delaware, New Zealand and Australia

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Artificial intelligence systems are rapidly improving their capabilities, leading some companies to incorporate them into their business decision-making processes (even at the boardroom level). This article analyses and compares three different approaches in respect of the directors' reliance defence in corporate law and offers some tentative suggestions as to the applicable legal principles when directors rely on information and advice from an artificial intelligence system. It argues that a statutory reliance defence is not necessary, because whether or not it exists, reliance is always a relevant factor in the analysis of whether a director's conduct meets the applicable reasonableness standard. Where the advice and information is offered by AI, certain issues with AI (such as non-transparency, explainability, and narrowness) may arise. This article discusses how each of these problems may affect the reasonableness analysis and recommends boards consider using Algorithmic Impact Assessments to assess the suitability of implementing an AI system prior to relying upon its recommendations.

I Introduction

During the last few years, it seems not a month goes by without a major news story about artificial intelligence ('AI').[1] Indeed, AI has the potential to be one of the most radically transformative technologies ever developed by humankind, reshaping many aspects of business and society. In the business sector, AI is already playing an increasingly important role. In terms of automated assets management, Vanguard, the largest provider of mutual funds, has over US$115 billion of assets managed by robots;[2] each of the big four accounting firms has implemented extensive AI initiatives to embrace a

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1 For recent examples see Kelsey Piper, 'A Poetry-Writing AI Has Just Been Unveiled. It's ... Pretty Good', *Vox* (Article, 15 May 2019) <www.vox.com/2019/5/15/18623134/openai-language-ai-gpt2-poetry-try-it>; Jurica Dujmovic, 'Drone Warship Sea Hunter of the US Navy Is Powered by Artificial Intelligence', *MarketWatch* (online, 3 July 2019) <www.marketwatch.com/story/drone-warship-sea-hunter-of-the-us-navy-is-powered-by-artificial-intelligence-2019-07-03>; Elizabeth Lopatto, 'Elon Musk Unveils Neuralink's Plans for Brain-Reading "Threads" and a Robot to Insert Them', *The Verge* (online, 16 July 2019) <www.theverge.com/2019/7/16/20697123/elon-musk-neuralink-brain-reading-thread-robot>.

2 Barbara A Friedberg, 'Robo-Advisors with the Most Assets under Management: 2019', *Robo-Advisor Pros* (Blog Post, 30 March 2019) <www.roboadvisorpros.com/robo-advisors-with-most-aum-assets-under-management>.