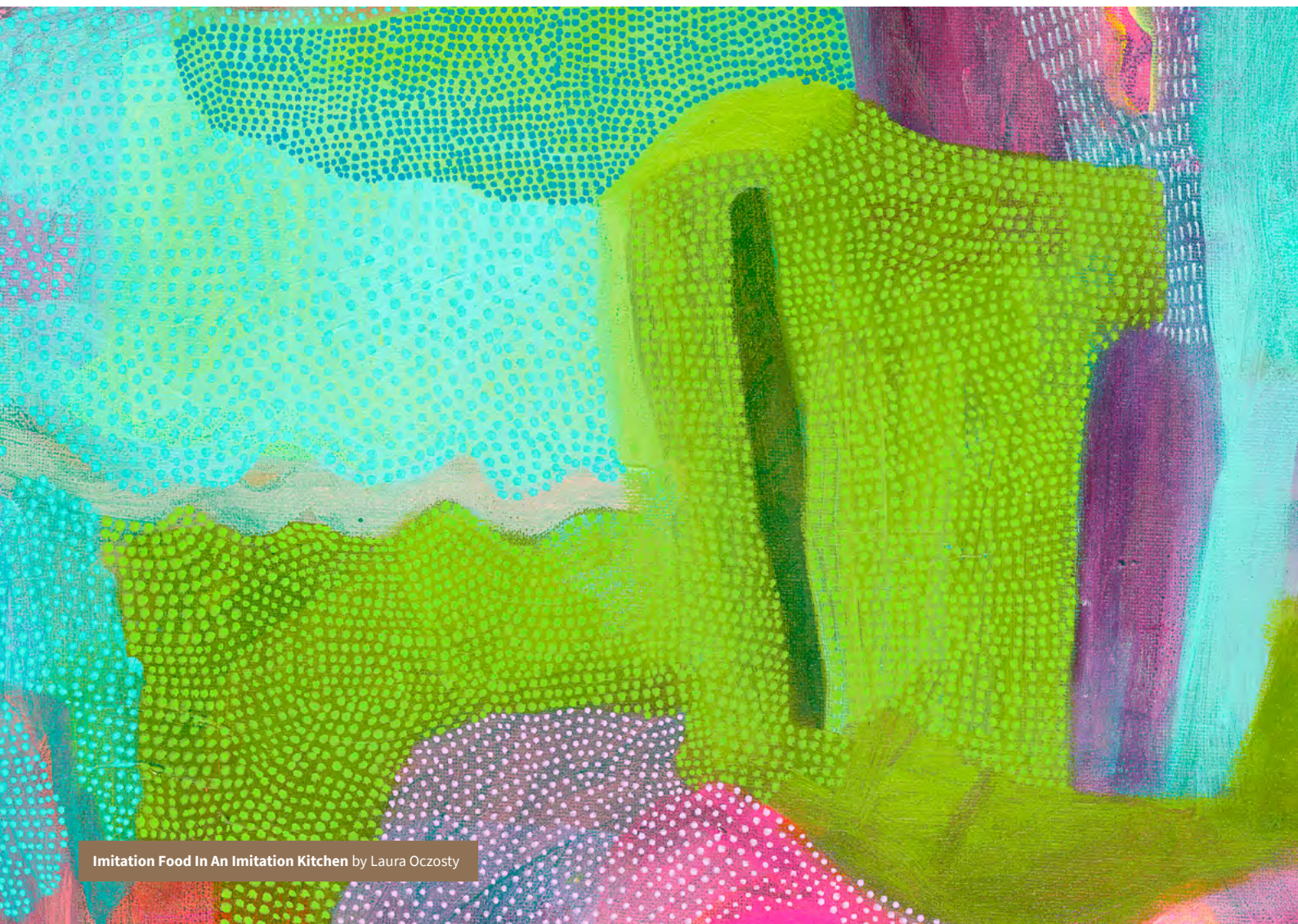


IN PRIVATE

KWM M&A INSIGHTS | OCTOBER 2025



FROM OVERSIGHT TO OFFENCE: NAVIGATING WAGE THEFT RISKS IN PORTFOLIO COMPANIES

Recent cases involving underpayment and significant penalties for breaches of workplace laws have made front-page news. For the private capital sector, these issues have the potential to affect all stages of the investment life cycle.

Below we look at some of those recent developments and reflect on where we see best practice in the wage governance space is heading, and what this means for sponsors.

NEW WAGE THEFT LAWS IN AUSTRALIA

On 1 January 2025, new wage theft laws commenced under the *Fair Work Act 2009 (Cth)* (**Fair Work Act**). The laws make it a criminal offence for employers to intentionally engage in conduct that results in the underpayment of wages or entitlements to - or for the benefit of - their employees under the Fair Work Act or an industrial instrument.

If a person is convicted of wage theft, they can face imprisonment for up to 10 years. In addition:

- companies and other bodies corporate can face fines of up to A\$8.25 million or the greater of 3 times the underpayment amount; and
- individuals may face fines of up to A\$1.65 million or the greater of 3 times the underpayment amount.

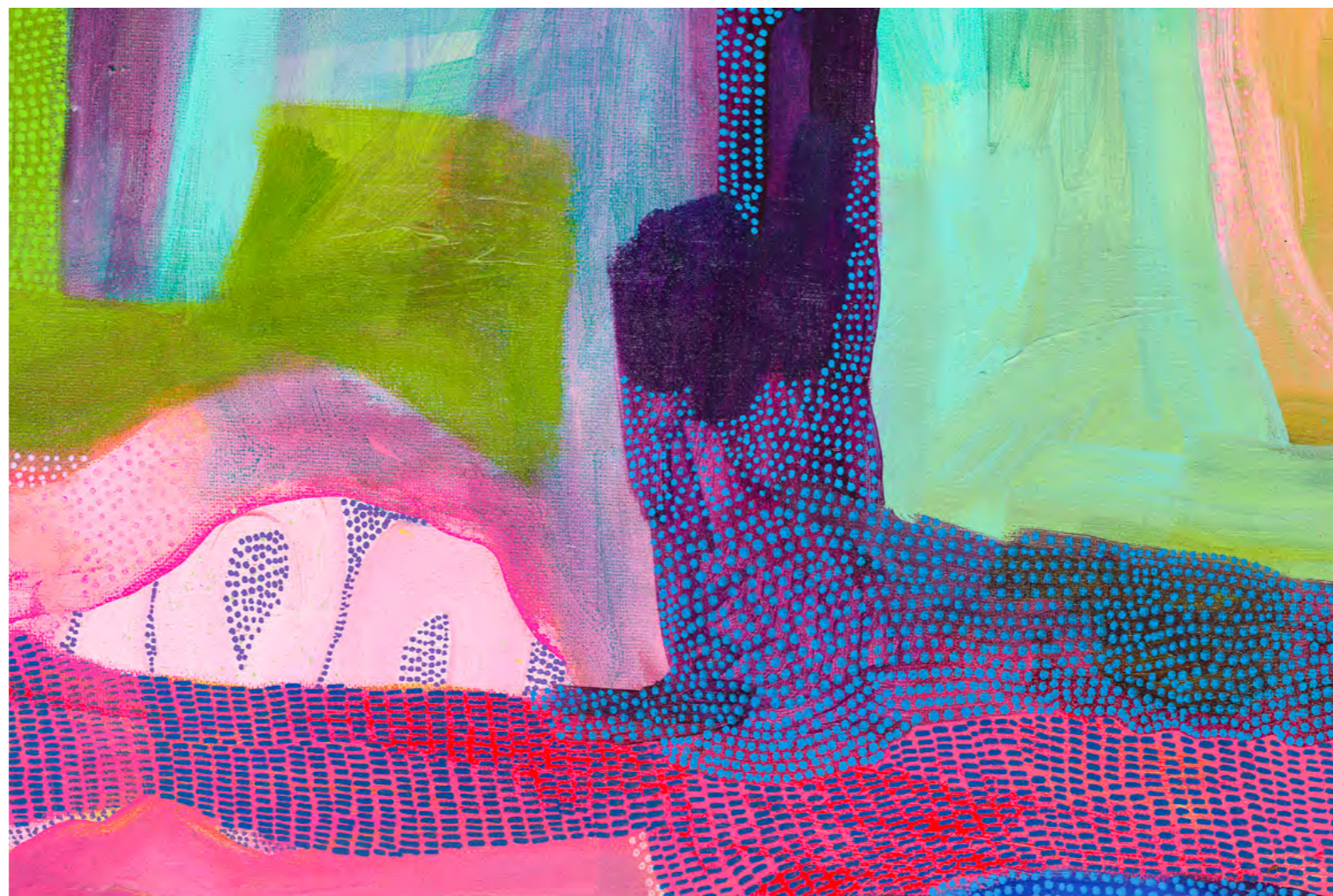
While the focus of the wage theft laws is on 'intentional' underpayments, there is scope for the requisite intention to be established in circumstances other than obvious wrongdoing. In particular, the Fair Work Ombudsman (FWO) has indicated that the regulation could apply in circumstances where non-compliance is detected (for example, during due diligence) but not remediated with appropriate urgency. Additionally, in establishing the fault element, evidence that the organisation lacks a 'culture of compliance' can be relevant.

Other individuals and entities can also be prosecuted under the 'related offence' provisions in the Fair Work Act, including if they incited, aided, abetted, counselled or procured the commission of the offence.

Importantly, the criminal wage theft laws continue to operate alongside the existing civil penalty regime for underpayments under the Fair Work Act. Given the absence of the need for intentional or deliberate conduct and the lower standard of proof that applies in civil proceedings, we expect the civil regime will remain an active forum for the FWO.

REVISED EXPECTATIONS FROM THE OMBUDSMAN

Following the introduction of the new wage theft laws, the FWO has published detailed guidance to assist organisations in ensuring they are meeting their wage compliance obligations and to minimise the risk of criminal liability and other enforcement proceedings for underpayments.



This includes:

FWO's Compliance and Enforcement Policy	The Policy outlines how the FWO will exercise its compliance and enforcement functions. It highlights its 3 main responses to allegations or instances of non-compliance – encouraging voluntary compliance, guiding compliance where required and enforcing the law when it is in the public interest.
FWO Payroll Remediation Program Guide	The Guide sets out the FWO's expectations for employers when conducting a payroll remediation. The Guide makes it clear that employers should take an 'employee-centred' approach while acknowledging there is no 'one size fits all' approach to a remediation.
Voluntary Small Business Compliance Code	Although published for small business employers, the Code and Guide provide detailed insights into the regulator's expectations as to how employers can demonstrate they are complying with minimum pay obligations.
Guide to Paying Employees Correctly and the Voluntary Small Business Wage Compliance Code	This includes making reasonable efforts to ascertain correct pay rates and entitlements, considering and relying on information that the employer reasonably believes is accurate and seeking information or advice in relation to the payment of wages and entitlements.

WAGE COMPLIANCE - A RISK GOVERNANCE ISSUE

There is no doubt the FWO expects wage compliance to be a priority for employers and their boards and shareholders.

PROCEEDINGS AGAINST SUPER RETAIL GROUP

The commencement of prosecution proceedings against the Super Retail Group in 2023 demonstrated this focus. In that matter, the regulator alleged that SRG Limited was liable as a holding company for certain wage contraventions of its subsidiary employing entities because it knew or could reasonably be expected to have known that those entities would or were likely to underpay set-up workers and retail managers their entitlements to overtime under the relevant Award. Under the relevant Fair Work Act provisions, no offence is committed where the holding company took reasonable steps to prevent the contravention by the subsidiary.

Treating wage compliance as a risk governance issue (in accordance with conventional risk management practices) ensures that boards and their sponsors can receive information about the wage compliance systems and processes (including key risk factors), whether further resources and capabilities are required, and the results of monitoring, audit and assurance activities.

At a practical level this looks like:

- ensuring sound processes are in place for classifying employees under modern awards / industrial instruments and there is ongoing review of these classifications (including when there is a job change or a new employee commences);
- mapping legal obligations against compliance systems and processes and ensuring relevant controls are in place to achieve compliance;
- undertaking regular reviews and audits (both internally and externally) to assess compliance with applicable industrial instruments and laws;
- maintaining robust time keeping, payroll and data entry processes and testing those processes on a regular basis; and
- investing in governance and compliance protocols and resources.

HOW IS THIS PLAYING OUT FOR SPONSORS?

Wage underpayments are often discovered years after the initial error(s), with the damage compounding over time. The underpayment alone is unlikely to be the sole issue encountered. The knock-on consequences can include: superannuation and interest costs, a lengthy and costly external investigation, actual FWO prosecution or having to provide the FWO with enforceable undertakings, incurring penalties, threats of class action claims from former and current employees, and reputational fallout. On top of all this is the potential for holding companies to be liable for breaches of the Fair Work Act by their subsidiaries and the potential personal exposure of appointee directors under the new wage theft laws where they are knowingly involved in a contravention.

THE WOOLIES/COLES DECISION

The recent Federal Court decision in high-profile proceedings by the FWO against Woolworths and Coles highlights the complexity in this area and will have immediate impacts in the private capital space.

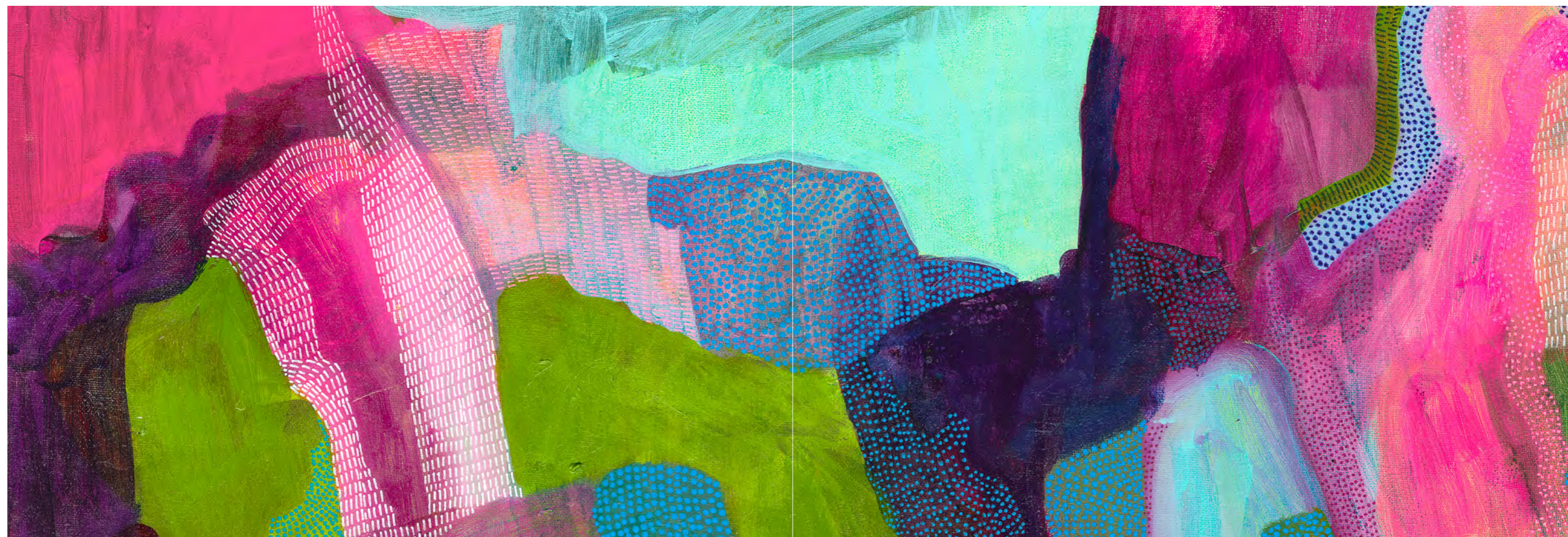
Following this decision, we anticipate more detailed due diligence beyond simple wage compliance – diligence covering record-keeping and other matters will also be required, as well as recognising the potential inability to rely on so called “set-off” rights between pay periods in payroll sampling exercises (increasing the potential for actual legal underpayments to occur).

For our detailed thoughts on this decision and its implications, read our insight [Federal Court Rules Out Contractual Set-Off Award Entitlements Between Pay Periods](#).

In light of this, buyers and W&I underwriters have heightened expectations for targets to be able to demonstrate a strong and comprehensive compliance framework during due diligence. Without this comfort, we are seeing the buy side (particularly W&I underwriters) displaying increasing nervousness (and reluctance) to provide coverage in respect of wage compliance and employment legal compliance warranties.

WHERE TO FROM HERE?

There will continue to be growing scrutiny and regulatory focus on wage compliance, particularly given recent legal developments and as the criminal wage theft regime starts to be tested. In the meantime, smart sponsors will be prioritising a review of payroll practices in their portfolio companies to ensure that their systems and record keeping are robust and their wage compliance culture is fit for any FWO focus or buyer focus that may be coming.





ABOUT KING & WOOD MALLESONS

A firm born in Asia, underpinned by world class capability. With over 3000 lawyers in 29 global locations, we draw from our Western and Eastern perspectives to deliver incisive counsel.

We help our clients manage their risk and enable their growth. Our full-service offering combines un-matched top tier local capability complemented with an international platform. We work with our clients to cut through the cultural, regulatory and technical barriers and get deals done in new markets.

Disclaimer

This publication provides information on and material containing matters of interest produced by King & Wood Mallesons. The material in this publication is provided only for your information and does not constitute legal or other advice on any specific matter. Readers should seek specific legal advice from KWM legal professionals before acting on the information contained in this publication.

Asia Pacific | North America

King & Wood Mallesons refers to the network of firms which are members of the King & Wood Mallesons network. See kwm.com for more information.

www.kwm.com

© 2025 King & Wood Mallesons

JOIN THE CONVERSATION



SUBSCRIBE TO OUR WECHAT COMMUNITY.
SEARCH: KWM_CHINA