Governance News

Weekly wrap up of key financial services, governance, regulatory, risk and ESG developments.

10 November 2021

Contents

Diversity

New report suggests women on boards are driving progress on ESG

Key Takeouts

- The report finds that boards are more ESG prepared than previously and that women are driving progress. The report identifies 'a strong and significant correlation between ESG consciousness and gender' with women, on average more ESG conscious than their male counterparts.
- Having said this, the report found that the overall level of director 'ESG consciousness' remains fairly low (40% overall). Only 8% of 'ESG conscious' directors have a formal ESG/sustainability credential or have published/taught in the area. The report highlights the need to lift director capability in this area.

The Sustainability Standards Board Report has released its latest annual report monitoring how prepared boards are to deal with ESG challenges. To do this, the report assesses the level of 'ESG preparedness' of the boards of the world's largest 100 publicly listed companies and the level of 'ESG consciousness' of directors serving on those boards.

The findings in the report are based on an assessment of the publicly available data published on company websites. The data was collected between July and August 2021.

Director consciousness vs competence?

Interestingly the report does not talk about director ESG competence, but rather director ESG consciousness – awareness of/knowledge of ESG issues. The report explains that this approach was adopted to avoid the issue/discussion of director incompetence.

The level of director ESG consciousness is assessed against the following 'checklist'. Whether the director:

- has experience of being actively involved in sustainability strategy or governance (at board level or senior executive level)
- has experience as a board member of a business material (under SASB) non profit organisation, foundation, charity, or fellowship of an international campaign body.
- holds a formal ESG/sustainability certification/accreditation or has published or taught in the area.

Assessment of board ESG preparedness is based on the presence of a board-level committee with ESG oversight responsibility.

Key Takeaways

Boards are increasingly prepared for ESG challenges, but the overall level of director 'ESG consciousness' remains low

- The report found that generally level of boards' ESG preparedness and the level of individual director consciousness of ESG issues is trending upwards. For example:
  - 71% of boards were assessed as 'ESG prepared'. That is, the report found that 71% of boards had a board-level committee with a charter stipulating ESG issues in place (up from 63% in 2020). In 52% of cases, the committee was a dedicated ESG or sustainability committee (as opposed to a committee with other responsibilities as well).
  - Though the overall level of 'ESG consciousness' on boards remains fairly low (40% overall), this is still higher than in previous years. In 77% of cases, this consciousness derives from executive or board experience in sustainability strategy or governance. Only 8% of 'ESG conscious' directors have a formal ESG/sustainability credential or have published/taught in the area.

Progress is being driven by women directors

- The report found that women directors are 'driving the conversation on sustainability' at board level.
- Consistent with previous reports going back to 2019, the report identified 'a strong and significant correlation between ESG consciousness and gender' with women, on average more ESG conscious than their male counterparts. For example, the report found that across all the boards sampled, 40% of all directors sitting on

ESG committees/committees with ESG oversight were 'ESG conscious'. Applying a gender lens, 52% of women on relevant committees (vs 36% of men) were assessed as being 'ESG conscious'.

- The report argues that the 'clear evidence connecting strong ESG with corporate performance…makes another business case for greater gender diversity on boards and in senior management'.

Work to do: ESG policy is often 'boilerplate', directors need to 'upskill'

- The report found that narratives around sustainability governance in committee charters are 'overwhelmingly boilerplate' and vary in comprehensiveness. For example:
  - 61% of charters that reference sustainability issues include general, 'boilerplate' narrative
  - 22% included more specific reference to ESG
  - the remainder reference either corporate social responsibility/philanthropy or other issues (eg health and safety'
- The report argues that 'the lack of disclosure of material ESG issues and detail of what exactly the board's role is, suggests sustainability policy all too often remains a box ticking exercise'.
- The report calls for more rigour to be applied to the writing of/implementation of sustainability policies. The report also calls for more involvement at board committee level in ESG conversations within organisations, in ESG reporting and oversight. Boards should ultimately sign off on ESG reports and make sure that all relevant material factors are included.
- Generally, the report concludes that directors need to 'upskill and become at least conscious about ESG issues, but better – competent. What that exactly means will be up to every individual and their specific context'.

  [Source: The Sustainability Board Report 2021]

UK government backs a new five year diversity initiative, building on the success of the Hampton-Alexander Review

- Following the delivery of the final report of the Hampton-Alexander review earlier in the year, the UK government has announced that a new five year review is to be tasked with tracking progress towards new targets for increased representation of women in senior roles at FTSE companies and with encouraging firms to 'open up opportunities to everyone'.
- Announcing the new review, Business Minister Paul Scully emphasised the link between diversity and business success and also what he considers to be the success of the government's current approach. He stated:

  'UK business has taken great strides when it comes to gender diversity at board level, underlining the success of the government's voluntary approach. Companies shouldn't take their foot off the gas. Evidence shows that more diverse businesses are more successful businesses – the case is too strong to ignore. To date, the government's actions have proven immensely successful in encouraging companies – without the use of quotas – to improve the gender balance on their boards, through fair recruitment on the basis of merit'.
- The announcement cites various statistics in support of this including the achievement of the 30% female representation target for FTSE350 boards over the five years that the Hampton Alexander Review ran.
- Next steps:
  - According to the announcement the leadership of the review is currently being appointed. New targets have not yet been announced.
  - The government called on FTSE companies to submit their gender diversity data via the FTSE Women Leaders Review online portal.

  [Sources: Department for Business, Energy and Industrial Strategy media release 01/11/2021]

Shareholder Activism

Harder for US companies to be able to exclude certain shareholder proposals?

Following a 'record year' for shareholder proposals, the US Securities and Exchange Commission (SEC) has announced a change in its approach to assessing applications by US companies to exclude them.

SEC has issued a new staff legal bulletin that rescinds Staff Bulletins (SLBs) 14 I, J and K. The new bulletin indicates that under its revised approach to assessing applications based on the 'significant social policy exception':

> 'proposals that the staff previously viewed as excludable because they did not appear to raise a policy issue of significance for the company may no longer be viewed as excludable under Rule 14a-8(i)(7). For example, proposals squarely raising human capital management issues with a broad societal impact would not be subject to exclusion solely because the proponent did not demonstrate that the human capital management issue was significant to the company.'

Likewise, with respect to applications relying on the 'ordinary business' exception SEC flags that shareholder proposals calling for companies to set emissions reduction targets/timelines that were previously excluded, would no longer be excluded. SEC states:

> 'many of the proposals addressed in the rescinded SLBs requested companies adopt timeframes or targets to address climate change that the staff concurred were excludable on micromanagement grounds. Going forward we would not concur in the exclusion of similar proposals that suggest targets or timelines so long as the proposals afford discretion to management as to how to achieve such goals. We believe our current approach to micromanagement will help to avoid the dilemma many proponents faced when seeking to craft proposals with sufficient specificity and direction to avoid being excluded under Rule 14a-8(i)(10), substantial implementation, while being general enough to avoid exclusion for "micromanagement."'

SEC Chair Gary Gensler said that the updated SLB 'is consistent with the Commission's original intention'.

The new bulletin is not universally supported by all SEC Commissioners. Commissioners Hester M Peirce and Elad L Roisman (both appointed under the Trump Administration) have questioned the rationale behind the shift in approach, arguing among other things, that it places an unnecessary and unwarranted burden on SEC resources.

SEC's decision has been welcomed by As You Sow as a 'restoration' of shareholder rights. As You Sow President Danielle Fugere commented:

> 'This guidance, which underscores the original purpose of Rule 14a-8 - to allow shareholders to raise and vote on important issues - is timely and necessary. At this time of global upheaval, the stakes couldn't be higher. The shareholder voice plays a critical role in ensuring companies are addressing issues that create risk and opportunity and can affect shareholder value, including greenhouse gas emissions targets and actions, addressing social justice, demonstrating success in diversifying workplaces and boardrooms, reducing the harmful impact of social forums like Facebook, and reducing plastic waste.'

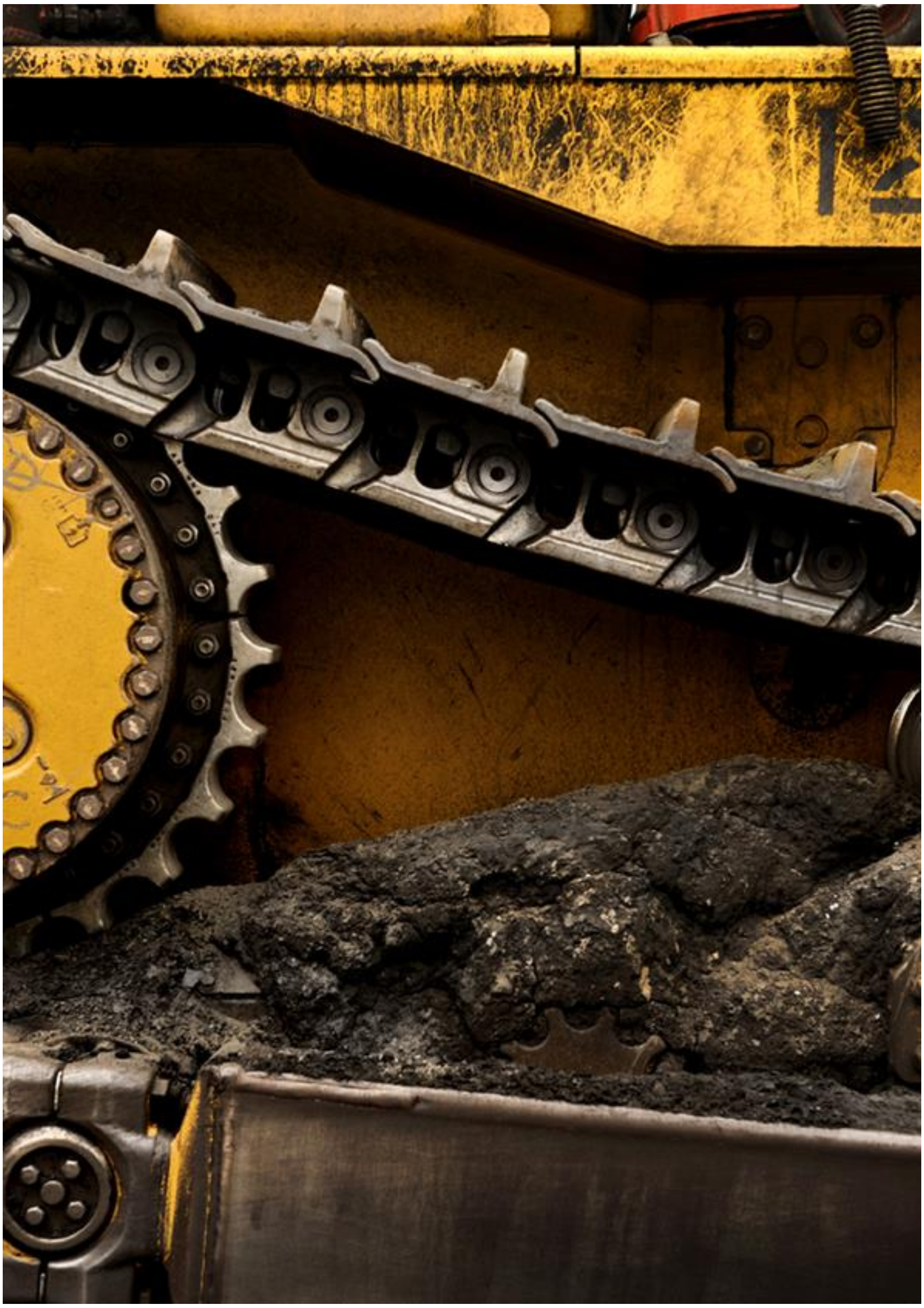
Ten As You Sow shareholder resolutions were blocked by SEC in 2021.

> [Sources: Statement regarding Shareholder Proposals: Staff Legal Bulletin No. 14L, SEC Chair Gary Gensler 03/11/2021; Shareholder Proposals: Staff Legal Bulletin No. 14L (CF); As You Sow media release 03/11/2021; Harvard Law School Forum on Corporate Governance and Financial Regulation 04/11/2021]

NAB has revised its fossil fuel lending policies, activist Market Forces will press ahead with its resolution calling for an immediate end to fossil fuel investment

- As part of its net zero commitment, NAB has announced significant updates to its fossil fuel lending policies (you can find full details here). Among other things the bank has:
  - introduced a cap on its exposure to the oil and gas industry
  - committed to reducing thermal coal exposure by 50% by 30 September 2026 with a view to reducing this to effectively zero by 2030 'apart from residual performance guarantees to rehabilitate existing thermal coal mining assets'.
  - committed not to 'finance new thermal coal mining projects or take on new to bank thermal coal mining customers'

- NAB states that its lending decisions and overall 'path to decarbonisation' will be guided by the Energy Agency's net Zero Emissions (IEA NZE 2050) scenario) which outlines a path to limit temperature rise to 1.5 degrees by 2050.
- Market Forces, which has lodged a resolution with the bank calling for an immediate end to fossil fuel investment has dismissed the bank's new commitments as 'a greenwashing exercise' on the basis that the policy 'contains so many allowances and loopholes that it's unclear how it will materially impact the bank's lending for new fossil fuel developments moving forward'. For example, the policy does not put a hard stop to funding greenfield gas extraction in Australia, NAB will still provide funding where this 'plays a role in underpinning national energy security'.



- Market Forces has called on NAB to withdraw its net zero commitment:

  'The IEA provides clear red lines to clarify fossil fuel developments no longer permissible if we are to achieve the goal of net-zero emissions by 2050. NAB's policy twists and blurs those lines, allowing it to continue funding business-as-usual fossil fuel expansion. The bank isn't serious about net zero by 2050 and should either take genuine action or publicly withdraw its commitment to the goal.'

- The NAB AGM will be held on 17 December 2021.

  [Sources: NAB media release 09/11/2021]

Morgan Stanley sets science based 2030 targets for emissions reduction across all Scopes, As You Sow has welcomed the move

- Morgan Stanley has announced its first interim targets for reducing its financed greenhouse gas (GHG) emissions for three sectors within its lending portfolio - Auto, Manufacturing, Energy and Power – in line with its 2050 net-zero commitment.
- The targets are:
  - Auto Manufacturing: -35%
  - Energy: -29%
  - Power: -58%
- These targets have been informed by the International Energy Agency's Net Zero by 2050 emissions pathways and are inclusive of Scope 1, 2, and 3 emissions. Further detail on the methodology used to set these targets is available here.
- In a statement welcoming Morgan Stanley's announcement, As You Sow comments that it engaged with Morgan Stanley and with other banks on the development of a net-zero financing targets. President of As You Sow, Danielle Fugere commented:

  > 'We welcome this progress and leadership from Morgan Stanley. It is critical that banks set and disclose interim targets to demonstrate they are on track to meet their 2050 net-zero goals. Banks will be a key driver of success in meeting the Paris Agreement's 1.5 degree goal. Investors will be looking for assurance from banks that their interim targets, especially intensity-based targets, are resulting in year on year emissions reductions to successfully drive the necessary global contraction of emissions.'

  [Sources: Morgan Stanley media release 03/11/2021; As You Sow media release 04/11/2021]

BHP plans to divest its 80% interest in QLD two coal mines as part of its green strategy

- As part of its emissions reduction strategy, BHP announced that is has signed a sale and purchase agreement to divest its 80% interest in BHP Mitsui coal.
- Under the agreement, ASX listed Stanmore Resources Ltd, which BHP states has both 'established relationships with Traditional Owners and strong engagement with their workforce and local communities', would acquire BHP's interest and assume economic and operating control of the South Walker Creek and Poitrel mines upon completion of the sale. This is expected to occur (subject to certain regulatory approvals) in mid-2022.
- Until this point, BHP would continue to operate the mines and provide 'transitional services' to Stanmore Resources for a short period afterwards.
- BHP's President Minerals Australia Edgar Basto commented:

  > 'This transaction is consistent with BHP's strategy, delivers value for our company and shareholders and provides certainty for BMC's workforce and the local community. As the world decarbonises, BHP is sharpening its focus on producing higher quality metallurgical coal sought after by global steelmakers to help increase efficiency and lower emissions'.

- Stanmore Resources Ltd CEO Marcelo Matos commented that the sale will make the company 'one of the leading metalurgical coal producers globally'. z

ACCR would like to see BHP wind down, rather than divest its interest

In a statement, Dan Gocher, Director of Climate and Environment at the Australasian Centre for Corporate Responsibility (ACCR) expressed disappointment in BHP's decision to divest, rather than 'retain these assets and decline production in keeping with a 1.5C pathway, in accordance with just transition principles'. The ACCR considers that Stanmore Resources Ltd is unlikely to 'wind down the BMC assets on a pathway consistent with limiting global warming to well below 2°C' given the company has not either publicly supported the Paris Agreement, or set emissions reduction targets.

The ACCR called on shareholders not to support the 'say on climate' resolution that will be put to the BHP AGM on 11 November.

[Source: BHP media release 08/11/2021; Stanmore Resources Ltd media release 08/11/2021]

Meetings and Proxy Advisers

ISS is consulting on proposed benchmark policy changes for 2022

Institutional Shareholder Services Inc (ISS) is consulting on 16 proposed changes to its benchmark voting policies for 2022 (and going forward). The proposed changes have been informed by the findings of ISS' 2021 Global Benchmark Policy Survey and Climate Survey.

Key (proposed) changes

Diversity

ISS proposes to expand the coverage of board gender and racial/ethnic diversity policies in various markets. Proposed changes include the following.

- Canada: ISS proposes to expand its board gender diversity policy (which requires at least one woman on the board) to apply to most Canadian listed companies for 2022.
- US:
  - ISS proposes to expand its board gender diversity policy (again requiring at least one woman on the board) to apply to most listed US companies from 2023
  - The policy announced last year for US Russell 3000 and S&P 1500 companies to have at least one racially/ethnically diverse director will come into effect in 2022
- Japan: ISS proposes to revise its policy to introduce a requirement for boards to include at least one woman from 2023 (regardless of board structure).
- UK and Ireland: From 2022, FTSE 100 companies are expected to include at least one director from an ethnic/minority background. By 2024, it's proposed that these requirements will be extended to 'most other UK companies'. For UK & Ireland Benchmark policy, the proposed changes are to phase in from 2022

Climate risk

- Holding the directors of the 'highest emitting' companies directly accountable: ISS proposes to amend its Benchmark policies for the US, UK and Ireland, Continental Europe, and Russia and Kazakhstan, to introduce recommendations to 'vote against the re-election of relevant directors or any other appropriate items at companies that have not made appropriate climate-related disclosures, such as according to the TCFD framework, or that have not set quantitative GHG reduction targets'.
- Position on use of non-financial ESG related metrics in executive compensation plans: ISS proposes changes to policies for Continental Europe and the UK and Ireland to 'add language clarifying that the relevance and stringency of non-financial ESG metrics in compensation plans will be assessed similarly to financial metrics'.
- 'Say on climate' vote recommendations: ISS proposes to maintain its 'case by case' approach to formulating recommendations, but proposes to update its policies to 'codify' this approach.
  - With respect to management proposed 'say on climate' proposals, ISS states that it will 'assess the completeness and rigor' of the proposal (for example, ISS will take into account among other factors: the quality of disclosures, the rigor of targets, whether targets are science-based, external verification) in determining a voting recommendation.
  - With respect to shareholder 'say on climate' proposals ISS proposes to 'analyse each request on a case-by-case basis, taking into account the details of the request and the company's current climate-related disclosures and performance'.

Next steps

- The due date for submissions is 16 November 2021.
- ISS plans to announce final benchmark policy changes 'by or around the end of November 2021'.
- Once finalised, the revised policies will be applied for shareholder meetings taking place on or after 1 February 2022 (except where otherwise noted for later implementation).

[Sources: ISS Media release 04/11/2021; Proposed ISS Benchmark Policy Changes for 2022]

Disclosure and Reporting

Global sustainability standards one step closer: ISSB to develop global standards

International accounting standards setter the IFRS Foundation has announced the formation of a new International Sustainability Standards Board (ISSB) which will develop 'a comprehensive global baseline of high-quality sustainability disclosure standards'.

The new global standards

- The new standards are expected to 'enable companies to provide comprehensive sustainability information for the global financial markets' and to 'facilitate compatibility with requirements that are jurisdiction specific or aimed at a wider group of stakeholders (for example, the European Union's planned Corporate Sustainability Reporting Directive as well as initiatives in the Americas and Asia-Oceania)'.
- Consistent with feedback received through earlier consultations, the new global standards will build on and leverage off both existing voluntary sustainability reporting frameworks and the expertise behind their development.

'Prototype' disclosure documents released

- Two 'prototype documents' were also released. The first focuses on climate-related disclosures (together with a supplement technical requirements prototype) build on the TCFD's recommendations, the second sets out general sustainability disclosures.
- Both prototypes will be 'part of the initial work program' of the ISSB.
- The climate prototype recommends that the ISSB consider prioritising the development of 'detailed technical protocols for the cross-industry metrics [listed below]…to ensure consistency and comparability across reporting entities'.
  - greenhouse gas emissions—in terms of absolute gross Scope 1, Scope 2 and Scope 3
  - transition risks and physical risks

  - climate-related opportunities
  - the amount of capital expenditure, financing or investment being deployed toward managing climate-related risks and opportunities
  - internal carbon pricing information
  - the proportion of executive management remuneration affected by climate-related considerations in the current period

- The prototypes were developed by representatives of the Climate Disclosure Standards Board (CDSB) the International Accounting Standards Board (IASB), the Financial Stability Board's Task Force on Climate-related Financial Disclosures (TCFD), the Value Reporting Foundation (that houses the Integrated Reporting Framework and the SASB Standards) and the World Economic Forum and consolidate key aspects of existing standards/frameworks.

The ISSB

- The ISSB will sit within the IFRS Foundation, alongside the IASB, and will work closely with it to ensure 'connectivity and compatibility between the IFRS Accounting Standards and the ISSB's standards'.

- Two investor-focused international sustainability standard-setters - the Value Reporting Foundation (which houses both the SASB Standards and Integrated Reporting) and the Climate Disclosure Standards Board (CDSB) will be consolidated into the new ISSB. This consolidation is expected to have been completed by June 2022.

- The ISSB is expected to commence work on progressing the development of the standards once the Chair and Vice Chair have been appointed.

An end to 'climate confusion'

The announcement has generally been welcomed. In Australia, the Chartered Accountants ANZ (CA ANZ) issued a statement expressing the view that the ISSB standards could 'end climate confusion' (created by the lack of global standards, and the plethora of voluntary frameworks) and also be an effective tool in combatting greenwashing. CA ANZ also states that it looks forward to working with the new ISSB during consultation on the new standards and to 'amplifying the voice of the Australian accounting and business community' through this process as well as working with government and the standard setters around implementation in the Australian context.

Likewise the Investor Group on Climate Change (IGCC) has welcomed the development. The IGCC flags the need for consideration to be given to how the new global standards will be integrated into Australia's existing legal frameworks to 'ensure efficient and timely adoption'. IGCC Policy Manager Amy Quinton commented:

> 'Integrating the ISSB standards under development and related disclosure requirements is a natural evolution of Australia's existing legal framework, considering market developments and industry expectations…A commitment and roadmap for domestic climate risk disclosure requirements will send an important market signal to prepare companies and financial institutions…APRA will finalise its prudential guidance on climate risk shortly. It would be timely and prudent for ASIC to also review and update its guidance and expectations for corporate disclosures in light of rapidly evolving climate risk disclosure practice'.
>
> [Sources: IFRS media release 03/11/2021; CA ANZ media release 04/11/2021; IGCC media release 04/11/2021]

Institutional Investors and Stewardship

Better reporting on engagement activities? ICSWG releases new guide to improve reporting by asset managers/service providers

- The UK Investment Consultants Sustainability Working Group (ICSWG) has published a new guide – the ICSWG Engagement Reporting Guide – for asset managers and platform providers to support the consistent collection and reporting of engagement data.
- The primary aim is to improve the usefulness of stewardship reporting from an investor perspective by making it easier (among other things) for investors to evaluate asset managers' engagement activities.
- Importantly, guide is intended to complement existing stewardship reporting guidance (eg UK Stewardship Code 2020) by providing example metrics and case study formats to use. The ICSWG does not intend that the guide be used as a 'fixed template' but that asset managers/service providers who elect to use it, do so in a way that 'suits their engagement approach'.
- The ICSWG has flagged that it will shortly be releasing further guidance for asset managers, which will cover a range of subjects including ESG reporting metrics and consultants' responsible investment manager assessment criteria.

Announcing the release of the guide, Amanda Latham, Chair of the ICSWG Stewardship workstream commented:

> 'Undertaking effective stewardship is one of the ways asset owners like pension trustees can create long-term value for beneficiaries leading to sustainable benefits for the economy, the environment and society. This guide should help improve engagement reporting, bringing greater transparency and consistency to the process, and shows the importance of collaboration across the investment consulting firms to drive better stewardship'.

[Sources: ICSWG media release 02/11/2021; ICSWG Engagement Reporting Guide]

Regulators

NGFS calls on financial regulators/supervisors to factor the risks associated with climate-related litigation into their supervision activities

Key Takeouts

- The Network for Greening the Financial System (NGFS) has highlighted the need for central banks/supervisors to take steps to integrate consideration of the risks associated with climate-related litigation into their supervisory activities.
- The report provides a high level overview of the key drivers of climate-related litigation, the rapid rise green lawfare globally and trends in climate-related litigation. The report opines that climate-related litigation is likely to continue to increase in coming years, together with the risk to the financial system.

- The Network for Greening the Financial System is a global, voluntary initiative under which member organisations (Central Banks and Supervisors) agree to help strengthen 'the global response required to meet the goals of the Paris agreement and to enhance the role of the financial system to manage risks and to mobilise capital for green and low-carbon investments in the broader context of environmentally sustainable development'. As of 2 November 2021, the NGFS had 100 members and 16 observers. You can find a full list of member organisations here. Both the Reserve Bank of Australia (RBA) and the Australian Prudential Regulation Authority (APRA) are members.
- The NGFS) has released a report – Climate related litigation: raising awareness about a growing source of risk – providing a high level snapshot of the global rise in climate-related litigation, the sources of this risk and highlighting the potential scale of the risk from a financial perspective.

The global rise in climate-related litigation

- The report highlights a global increase in climate-related cases being filed in recent years against a range of public and private entities including financial institutions, central banks and supervisors. Annex 1 of the report lists examples of various climate-related cases that 'were considered particularly interesting by the NGFS'.
- The report draws on the findings of an NGFS member survey which gathered information about climate-related litigation in different jurisdictions. Among other findings, the results of the survey provide further confirmation of the prevalence of climate-related litigation globally. For example, of the 50 answers received from central banks, supervisory authorities and observers:
  - 52% of respondents confirmed there were climate-related cases in their jurisdiction (46% were not aware of any such litigation)
  - 58% of respondents expect a general increase in climate-related litigation in the future.
- Themes in climate-related litigation:
  - Survey responses indicated that the legal bases for climate-related cases varies considerably in different jurisdictions – some respondents referenced international treaties or conventions (eg the Paris Agreement), others referenced other laws/regulations in various 'fields of law' eg: criminal, administrative and civil law. The report highlights that 66% of respondents indicated that the environmental/climate-related rights relied on derived directly or indirectly from their constitution. The report observes that increasingly (and in addition to being based on constitutional or administrative law), cases are being brought over alleged breaches of a duty of care (in tort or civil law) or breaches of human rights.
  - The survey also highlighted what the report describes as a 'notable trend' on the plaintiff side for NGOs to commence proceedings against public and private actors (either as parties to the litigation themselves or as supporters of individual litigants) as deliberate strategy to raise awareness/increase pressure. The report also flags that NGOs are beginning to cooperate across borders. For example, the Urgenda v The Netherlands case led to litigation being brought on similar grounds in various other jurisdictions. Annex 1 of the report lists examples of cases that 'were considered particularly interesting by the NGFS'.
- The report suggests that 'these rapid developments indicate that the risk of climate-related litigation has become material in the past years, and it is likely that the number of climate-related cases will continue to rise in the future'.

Regulatory perspective

- The report argues that in light of the rise in climate-related litigation 'all concerned actors' (including potential defendants and regulators/supervisory authorities) should be aware of/manage the associated risks.
- From the perspective of financial regulators, the report argues that the risks associated with climate-related litigation should be 'taken into account in microprudential supervision and financial stability monitoring'. The report gives five reasons in support of this view:
  - 'the potential magnitude of the financial impact of these litigations on financial and non-financial entities is very large' eg defendants could be held liable for substantial awards of damages and/or required to undertake adaptation measures which in turn could have follow on effects such as 'potential bankruptcies and ensuing chain effects on the financial system'
  - the 'wide range of financial and non-financial entities' that could be affected
  - the possibility that the 'impact of climate-related litigation could materialise in a non-linear manner'. The report suggests that as climate science becomes more sophisticated, litigants may be able to more easily establish causation between CO2 emissions and climate induced damage. Were this to occur, the report observes that it could 'lead to a wave of potentially successful and thereby financially devastating lawsuits'.
  - the enactment of nationally determined contributions (including quantifiable climate mitigation targets) into domestic laws/regulations (were it to occur) 'may increase the likelihood of such domestic legal obligations being enforced in the courts'.
  - 'climate change is a unique type of risk, as vital interests are affected globally. Given the growing importance of physical and transition risks in general, climate-related litigation risk may grow in parallel'
- The key message in the report is that supervisory authorities/regulators should be factoring the potential impact of climate-related litigation into their supervision of financial institutions and that even though some progress on the issue has been made, 'further incorporation of the risks associated with climate-related litigation is highly recommended'. For example, according to the NGFS survey:
  - 22% of respondents reported they have not yet taken specific measures to address climate-litigation risks.
  - 50% of survey respondents reported that they have taken some steps to do so by incorporating climate risk into the exercise of their functions and the design of new policies.
- The report concludes:

  > 'supervisory authorities may not have, so far, fully recognised the impacts of such cases when assessing climate-related financial risks even though they constitute an important channel through which physical risks and transition risks may affect assets or counterparties of financial institutions. Therefore, the current trend of rising climate litigation requires a careful monitoring of these risks by supervisors and central banks. Supervisors need to ensure that financial institutions supervised by them adequately manage financial and operational risks resulting from potential climate-related litigation against themselves as well as against institutions to which they are exposed'.

  [Source: NGFS report: Climate-related litigation: raising awareness about a growing source of risk]

NGFS reiterates commitment to act on climate risk

The Network for Greening the Financial System (NGFS) has issued a statement reiterating the commitment of its 100 central bank/supervisory body members to contributing to the global response required to meet the objectives of the Paris Agreement'.

The statement flags that the NGFS intends to both: a) step up efforts to improve the resilience of the financial system to climate-related and environmental risks; and b) scale up the financing flows needed to support the transition to a low carbon economy.

The statement lists a number of planned actions that the NGFS intends to undertake 'in the coming years'. These include (among others):

- 'enhance and enrich its climate scenarios'
- 'intensify the work to bridge the data gaps that currently hinder the identification, management and mitigation of climate-related risks'
- conducting analytical work on how best member organisations can integrate climate change considerations into monetary policy strategies and frameworks
- publishing guidelines on TCFD-aligned reporting for central banks

- 'facilitate uplift in supervisory capabilities and the global consistency of supervisory practices'

  [Sources: NGFS media release 03/11/2021; Glasgow NGFS Glasgow Declaration Committed to Action]

RBA and APRA release joint climate pledge

- Member organisations of the global Network for Greening the Financial System (NGFS) have issued public statements underlining the important role of central banks and financial regulators in mitigating the physical, transition and liability risks of climate change in the finance sector.
- As members of the NGFS, the Australian Prudential Regulation Authority (APRA) and the Reserve Bank of Australia (RBA) have also issued a joint 'pledge' reiterating their view that climate related risk poses a systemic risk to the financial system and recapping the measures being implemented in the Australian context to 'ensure financial institutions and the Australian financial system are prepared to respond to the financial risks of climate change'.
- Key actions include (among others):
  - Building internal capacity to conduct analysis and research and working closely with the Australian Securities and Investments Commission (ASIC) and Treasury in 'developing approaches to understanding and managing the financial risks of climate change'
  - Integrating climate-related risks into financial 'stability monitoring and micro-supervision'
  - Taking steps to ensure that financial institutions integrate consideration of the potential impacts of physical, transition and liability climate risks in their decision making. For example: APRA is currently leading a supervisory climate vulnerability assessment (CVA) exercise with the five largest Australian banks under its supervision. APRA also intends to finalise draft prudential guidance (Draft Prudential Practice Guide CPG 229 Climate Change Financial Risks) in 2021. APRA is also considering a 'periodic climate risk self-assessment survey to assist in understanding the financial sector's alignment to the guidance'. The RBA will 'conduct analysis to monitor the implications of climate change and related mitigation policies for the economy and the transmission of monetary policy through financial markets and the banking system to households and business'. The RBA will also use NGFS-derived climate scenarios in its internal analysis of climate-related risks where scenario analysis is required.
  - APRA and the RBA will continue to draw attention to the financial stability and macroeconomic consequences of climate change.

  [Source: APRA media release 04/11/2021]

New York State Department of Financial Services to integrate climate risk into its supervision of New York based banks and insurers

- The New York State Department of Financial Services (NYDFS) has announced that it become the first US State Banking Regulator to establish a dedicated climate risk division. The purpose of the new division is to ensure that financial climate change risks are integrated into the supervision of New York based banks and insurers.
- Dr Yue (Nina) Chen, who is NYDFS's inaugural Director of Sustainability and Climate Initiatives, has been appointed to lead the new division as Executive Deputy Superintendent.
- Acting Superintendent of Financial Services Adrienne Harris commented:

  'This new division and Nina's appointment position DFS at the forefront of climate-related financial supervision, fulfilling DFS' mandate to ensure the safety and soundness of our regulated companies as they manage the financial risks from climate change, and support the roles of our institutions in advancing the low-carbon transition and enhancing communities' resilience'
- The announcement follows the release of industry guidance on how it expects banks and insurers to integrate consideration of the financial risks from climate change into their governance frameworks, risk management processes and business strategies, and develop their approach to climate-related financial disclosure.
- The NYDFS was also the first US financial regulator to join the Network of Central Banks and Supervisors for Greening the Financial System and is a member of the Sustainable Insurance Forum.

  [Sources: New York State Department of Financial Services media release 03/11/2021]

Financial Services

Top story | Uptake of the CDR to be accelerated under new rules

On 5 October 2021, 'Version 3' of the Consumer Data Rules (CDR) was registered under the Competition and Consumer (Consumer Data Right) Amendment (2021 Measures No. 1) Rules 2021 (Cth). The amendments aim to increase the accessibility of the CDR by providing additional pathways to participation, as well as expanding consumer rights and ease of data sharing under the scheme.

MinterEllison has released an article providing an overview of the changes and discussing their likely impact. You can access the full text here.

ASIC calls on companies to do their due diligence before engaging with 'finfluencers'

In an article titled 'Under the finfluence', Australian Securities and Investments Commission (ASIC) Commissioner Cathie Armour called on companies to exercise caution before engaging with financial influencers or 'finfluencers' whether in the context of promotional initiatives or in the context of corporate transactions.

Commissioner Armour states:

> 'If you're approached by a finfluencer seeking to collaborate, or you're considering reaching out to one, make sure you do your due diligence as they may be contributing to your regulatory risks'.

The 'regulatory risks' referred to include the risks that:

- the finfluencer maybe providing unlicensed financial advice in breach of the Corporations Act 2001 (Cth). Commissioner Armour points out that if this is found to be the case, the finfluencer could face 'significant penalties' and that a corporation that 'engages a finfluencer who breaches the law by providing unlicensed financial advice…may also be in breach under section 79 of the Act'.
- the finfluencer may be collecting remuneration from multiple sources or be sponsored by other corporations to produce specific content. This could give rise to a conflict of interest or result in advice that is not in the consumers' best interests.

Commissioner Armour also flagged that ASIC has observed an uptick in 'attempted market misconduct' including 'pump and dump' schemes. She said that the regulator will take action 'when it sees extreme price movement', but made clear that ASIC considers it 'important for companies to be aware of these types of misconduct-related risks and their potential for unintended consequences arising from finfluencer collaboration'.

Commissioner Armour called on companies to 'do your due diligence', and ensure they understand the products/services a finfluencer is providing and whether they are licensed. Commissioner Armour reminded companies that:

> 'Certain social media platforms may have advertising guidelines and some finfluencers state that they self-regulate. Either way, the law still applies'.

Commissioner Armour said that ASIC is both:

- 'engaging with social media platforms and their moderators, as well as with finfluencers, about their responsibilities (including requirements under the Act) and the limits of acceptable promotion'.
- undertaking a review of 'selected finfluencers to understand their business models and how the financial services law applies to this activity'.

  [Source: ASIC media release 09/11/2021]

ASIC has released guidance on records of advice

- The Australian Securities and Investments Commission (ASIC) has released an information sheet - INFO 266 FAQs: Records of Advice - together with three annotated Record of Advice (ROA) examples - Example Record of Advice (ROA): Life insurance advice; Example Record of Advice (ROA): No change advice; and Example Record of Advice (ROA): Stockbroker - to 'provide clarity to financial advisers and advice licensees on their obligations when using ROAs to provide personal advice to retail clients'.

- INFO 266 answers frequently asked questions (FAQs) about ROAs covering their usage, preparation and record keeping as well as exemptions from providing a statement of advice. INFO266 also provides an explanation of the meaning of the legal meaning of 'significantly different' when providing personal advice in a further advice situation.

- ASIC states that the information sheet and accompanying annotated ROA examples were developed in response to industry feedback on recent consultations, including Consultation Paper 332 Promoting access to affordable advice for consumers (CP 332) and subsequent roundtable discussions which called for ASIC to provide shorter, simpler and more user-friendly regulatory guidance and practical examples.
- ASIC observes that industry feedback in response to CP332 suggested that greater use of ROAs would decrease the time and costs burden of delivering advice.
- ASIC Commissioner Danielle Press indicated that ASIC will 'continue to engage with industry and prioritise initiatives that address its concerns about cost and regulatory uncertainty'.

[Source: ASIC media release 05/11/2021]

FASEA consults on potential changes to the wording of Standard 3 (conflicts) in the Financial Planners and Advisers Code of Ethics

The Financial Adviser Standards and Ethics Authority (FASEA) is consulting on possible changes to the wording of Standard 3 of the Financial Planners and Advisers Code of Ethics 2019 (the Code) to ensure alignment with the intent of the standard as explained in FASEA's supporting guidance.

For context, the current wording of Standard 3 is as follows:

> 'You must not advise, refer or act in any other manner where you have a conflict of interest or duty.'

Why is a change in wording being considered?

FASEA explains that it has received stakeholder feedback that Standard 3 is 'not workable and that guidance [ie FASEA's supporting guidance on the application/implementation of the standard] cannot be legally relied upon for interpretation'.

In light of this feedback, and in light of the legal requirement obliging FASEA to regulatory review the Code, FASEA has determined to further consult on Standard 3 in order to give stakeholders an opportunity to provide their views on the effectiveness/implementation of the Standard.

Three proposed options for change

The consultation paper puts forward three possible options to amend the existing wording of Standard 3. These are as follows.

3 PROPOSED OPTIONS TO AMEND THE EXISTING WORDING	RATIONALE
Option 1: 'You must only advise, refer or act where you do not have a conflict of interest or duty, being that which could reasonably be expected to induce you to act other than in the client's best interest'.	▪ FASEA explains that this wording is intended to integrate FASEA's intent (consistent with the guidance) into the Standard itself.
Option 2: 'You must not receive any benefit (whether monetary or non-monetary), nor enter into any relationship, that could reasonably be expected to influence the advice you give or the service you provide to your client'.	▪ FASEA explains that this option is intended to align with the findings of the Hayne Commission that where possible, conflicts between duty and interest should be removed and the finding that conflicts of interest and conflicts between duty and interest should be eliminated rather than 'managed'. ▪ FASEA also considers that the proposed wording in Option 2 'draws on the established principles of conflicts contained in section 963A of the Corporations Act'.
Option 3: Proposes to retain the existing wording of Standard 3 without change.	

Timeline

FASEA seeks feedback on the three options outlined above, any other wording that is 'clearly for the purpose of realising the current (and continuing) intent of Standard 3' and the practical applications of the three options.

The due date for submissions to the consultation is 1 December 2021.

[Sources: FASEA media release 03/11/2021]

ASIC says the timeshare industry is 'on notice' to ensure its practices comply with financial advice obligations

- The Australian Securities and Investments Commission (ASIC) has commenced civil penalty proceedings against timeshare provider and Australian Financial Services Licence (AFS) licence holder Ultiqa Lifestyle Promotions Ltd (Ultiqa) over the (alleged) breach of various financial advice requirements under the Corporations Act 2001 (Cth) (Act).

- Ultiqa's business model involved selling interests in a timeshare scheme (Scheme) through a network of sales agents who were authorised representatives of Ultiqa under Ultiqa's AFSL. Paragraphs 6-7, 9, 13 and 15 of ASIC's concise statement summarise the Ultiqa's sales and advice processes.
- ASIC notes that Ultiqa ceased selling interests in the Scheme on 28 January 2020 and was placed into members' voluntary liquidation on 30 April 2021. The Scheme and the balance of the Ultiqa Group entities remain active.

ASIC's Allegations

- Broadly, ASIC alleges that Ultiqa's conduct contravened its obligations under the Act by:
  - failing to take reasonable steps to ensure that its sales representatives complied with sections 961B (provider must act in the best interests of the client), 961G (advice must be appropriate to the client) and 961J (the provider must give priority to the clients' interests where provider knows, 'or reasonably ought to know, that there is a conflict') as required under s961L of the Act.
  - not doing all things necessary to ensure that the financial services covered by the AFSL were engaged in efficiently, honestly and fairly as required under s912A of the Act.
- ASIC is seeking declarations, pecuniary penalties and other orders.
- You can find further detail in ASIC's concise statement and originating application.

Timeshare providers 'on notice'

Announcing that the regulator had launched proceedings, ASIC Deputy Chair Karen Chester said:

> 'This is the first time ASIC has taken action against a timeshare provider in relation to financial product advice practices. The timeshare industry is on notice to ensure existing compliance and advice practices comply at all times with the obligations on all financial advisers, especially for that advice to be in the consumers' best interests,'.

Consumer group CHOICE has welcomed ASIC's action against Ultiqa

In a statement welcoming ASIC's action against Ultiqa, CHOICE said that it has written five complaints about 'potentially illegal conduct' in the timeshare sector since 2016, including a complaint (sent to ASIC in 2017) about Ultiqa's conduct and a 'super complaint' about the timeshare industry in 2021.

CHOICE Director of Campaigns Erin Turner questioned whether, in light of the 'many potential breaches of the law' observed by CHOICE, the timeshare industry should be 'allowed to operate with existing business practices'.

[Sources: ASIC media release 03/11/2021; CHOICE media release 03/11/2021]

FINSIA calls on financial services organisations and professionals to urgently act to lift their 'climate science capability'

- FINSIA has issued a statement calling for a 'dramatic increase in the climate science capability of financial services organisations and professionals…swiftly and on a large scale'.
- FINSIA cautions that if this does not occur, financial services organisations are at risk of being unable to properly evaluate climate-related financial risks – both in terms of evaluating new projects and existing assets. Likewise, FINSIA considers that firms risk missing out on potentially valuable opportunities as the economy transitions.
- The statement quotes a number of experts: Simon Thompson CEO of the Chartered Banker Institute, Ross Buckley, KPMG Law – KWM Professor of Disruptive Innovation at UNSW, Professor Christopher Wright, of the University of Sydney Business School and Dr Tanya Fiedler, Lecturer in Accounting at the University of Sydney – in support of this call for the finance industry to increase its climate-risk assessment capabilities.
- FINSIA CEO Chris Whitehead, Chartered Banker F FIN commented that:

> 'FINSIA is aware of the emerging concerns of regulators and economists. We are performing our role as a connector between financial services professionals, the industry and the regulators to highlight climate science skills as a critical requirement in the professionalism, education and performance of those working in financial services. FINSIA will be increasing its focus on this issue and looking for opportunities for constructive collaboration with other stakeholders in the months and years ahead'.

[Source: FINSIA media release 01/11/2021]

In Brief | The Public Interest Advocacy Centre (PIAC) has called for ASIC to launch an investigation into 'how life insurers treat people with past or current mental health conditions, in response to continuing widespread discrimination by life insurers'. PIAC is concerned that without change, 'there is a real chance people will be discouraged from seeking essential treatment for common conditions like anxiety and depression, for fear of being locked out of insurance'

[Source: PIAC media release 08/11/2021; PIAC report: Mental Health Discrimination in Insurance]

In Brief | The UK may have a central bank digital currency by the second half of the decade: HM Treasury and the Bank of England have announced that a consultation will be held in 2022 on the potential development of a UK Central Bank Digital Currency (CBDC). The announcement makes clear that 'no decision has been made on whether to introduce a CBDC' at this stage. Rather, the planned 2022 consultation will 'inform' the decision on whether to move forward with the 'development phase'. If the 'case' for the introduction of a CBDC is made, 'the earliest date' for launch in the UK would be in the 'second half of the decade'

[Source: Bank of England media release 09/11/2021]

Accounting and Audit

Investor group puts 'big four' UK accounting firms on notice to integrate climate risk into audits or risk votes against their reappointment

A group of investors led by Sarasin and Partners representing over $4.5 trillion have written to each of the UK Big Four Audit firms – PwC, Deloitte, KPMG and EY - calling them to 'sound the alarm when company financial statements ignore the global transition to a 1.5°C temperature pathway' or risk investors voting against their reappointment.

You can find copies of the individual letters written to each firm here. The full list of investor signatories is included at the end of each letter.

The latest development in a long-running campaign

- The letters follows three years of engagement with firms on the issue and the release a Carbon Tracker report highlighting that auditors are 'failing to check whether and how global decarbonisation is being reflected in company accounts, even where the move away from fossil fuels poses an existential threat to the business'.
- The investor group considers that as things stand, there are 'clear risks of accounting misrepresentation putting shareholder capital at risk and driving damaging investment into carbon intensive activities'.

What would investors like to see?

- Specifically, investors have called on the audit firms to:

  > 'provide reassurance that company accounts incorporate material climate risks and that they provide visibility as to whether the accounts can be considered aligned with a 1.5C pathway. Additionally, the investors expect any inconsistencies between narrative disclosures around climate risks and the financial statements to be called out, and that dividend payments are affordable in line with local solvency or capital maintenance rules, having taken these climate impacts into account'.

- The letters direct auditors to the expectations set out in the 2020 Institutional Investors Group on Climate Change (IIGCC) report: Investor Expectations for Paris Aligned Accounts for further detail around what they would like to see.

- The investor group considers that this demand is in line with the expectations of audit standard setters and regulators which have 'underlined auditors' responsibility to take material climate risks into account under existing standards and regulations'.

Possible voting consequences

Each letter cautions audit firms that failure to meet investor expectations (as outlined above) could result in a possible vote against their reappointment. The letters state:

> 'We began our engagement with you almost three years ago. We cannot afford to wait another three years for you to act. From next voting season, you should expect to see investors increasingly vote against your reappointment as auditor where you fail to meet the expectations we have clearly set out in our previous correspondence, the November 2020 IIGCC paper and underlined again here.'
>
> [Source: Sarasin and Partners media release 02/11/2021]

Where to start: CPA Australia has released a primer to assist accounting professionals to begin to build essential climate-risk expertise

- CPA Australia has released a high level introductory guide or primer for accounting professionals on the identification, materiality assessment and integration of climate-related financials. The lead authors of the guide are: Sarah Barker (Partner, Head of Climate Risk Governance, MinterEllison); Ellie Mulholland (Senior Associate, MinterEllison, Executive Director, Commonwealth Climate and Law Initiative), Rahoul Chowdry (FCA Partner, Senior Adviser, MinterEllison), and Dr John Purcell (FCPA Policy Advisor, ESG, CPA Australia).
- The guide has been released in recognition of the need for accounting professionals to have an understanding of climate risk. The guide states:

  > 'With specific guidance from the AASB, AUASB, ASIC and IFRS on the need to consider material climate-related financial assumptions in the report preparation, assurance and audit process, and specific pressure on both issuers and auditors being brought to bear by institutional investors, it is now essential for accounting professionals to develop a core level of understanding of the relevant issues in order to duly discharge their obligations'.
- The guide provides: 1) an overview of the nature of the financial risks associated with climate change that may materially impact accounting estimates; 2) an overview and commentary on the regulatory framework through which relevant issues should be identified and assessed; and 3) introductory questions and practical examples.

  [Source: Climate Change and Financial Reporting: Guide to climate change assumptions and disclosures in financial statements]

Insolvency and Reconstruction

Phoenix Surveillance Campaign has a 'positive impact'

The Phoenix Surveillance Campaign

- The Phoenix Surveillance Campaign, which is led by the Australian Securities and Investments Commission (ASIC) in collaboration with the Australian Taxation Office (ATO), 'aims to proactively deter and prevent company directors from engaging in illegal phoenix activity' though a program of direct engagement with directors that 'may be at risk' of doing so.
- Engagement involves both the ATO and ASIC engaging with directors to 'to remind them of their director duties, discuss their taxation obligations, and encourage them to seek professional and reputable business advice early if they are experiencing financial distress'.
- The Phoenix Surveillance Campaign was first implemented by ASIC in the 2013-14 financial year, with the ATO joining in the 2019–20 financial year. As part of the campaign, ASIC and the ATO share intelligence and undertake surveillance on at risk directors.

ASIC judges it has 'had a positive impact'

- ASIC states that between 1 July 2020 to 30 June 2021, ASIC and the ATO conducted 21 joint engagement consultations with directors of selected companies.
- According to ASIC, after engaging with the directors, 80% of all outstanding ATO returns were lodged and evidence suggests that the program has had a positive impact on directors behaviour.

[Source: ASIC media release 05/11/2021]

Corporate Misconduct and Liability

US Department of Justice signals tougher stance on white collar crime

Focus on pursuing individual misconduct

- In her keynote address at ABA's 36th National Institute on White Collar Crime, US Attorney General Lisa Monaco outlined the actions the Department of Justice (DOJ) is taking to 'strengthen the way' it responds to white collar crime and the DOJ's immediate priority areas.
- Ms Monaco made clear that while pursuing companies will remain a priority, prosecutors are expected to 'be bold' in holding individuals personally accountable for wrongdoing. She stated:

  'accountability starts with the individuals responsible for criminal conduct. Attorney General Garland has made clear it is unambiguously this department's first priority in corporate criminal matters to prosecute the individuals who commit and profit from corporate malfeasance…as long as we act consistent with the Principles of Federal Prosecution, the fear of losing should not deter them. As set forth in the Justice Manual, a prosecutor should commence a case if he or she believes that a putative defendant's conduct constitutes a federal offense, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction. So long as those principles are followed, we will urge prosecutors to be bold in holding accountable those who commit criminal conduct'.

Three changes to policy

- Ms Monaco outlined three changes in DOJ policies on corporate criminal enforcement which are expected to 'enable our prosecutors to continue to hold individuals and corporations accountable for their misconduct'. These changes are as follows.
  - Restoring prior DOJ guidance requiring companies (in order to be eligible for any cooperation credit) to identify all individuals involved in misconduct, 'regardless of their position, status or seniority' rather than only those the company assesses to be 'substantially involved' in the misconduct.

- Issuing new guidance requiring prosecutors to consider 'the full criminal, civil and regulatory record of any company when deciding what resolution is appropriate for a company that is the subject or target of av criminal investigation' as opposed to a narrower range of 'similar misconduct'. Ms Monaco explained that this approach will 'harmonise the way we treat corporate and individual criminal histories, as well as ensure that we do not unnecessarily look past important history in evaluating the proper form of resolution'.
- Making clear that the department 'is free to require the imposition of independent monitors whenever it is appropriate to do so in order to satisfy our prosecutors that a company is living up to its compliance and disclosure obligations under the DPA [deferred prosecution agreement] or NPA [non-prosecution agreement]'.

- Ms Monaco emphasised that these changes are 'only the first steps to reinforce' the DOJ's commitment to combatting corporate crime.
- Ms Monaco outlined a some of the areas that the DOJ intends to 'examine'. These include consideration of how to deal with companies with a history of 'repeated wrongdoing'. Ms Monaco said that analysis by the DOJ showed that between 10 and 20% of all 'significant corporate criminal resolutions' involve companies who have previously entered into a resolution with the DOJ. In light of this, she said that the DOJ 'need to consider whether and how to differently account for companies that become the focus of repeated DOJ investigations'. For example:
  - whether pre-trial non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs) are 'appropriate for certain recidivist companies'
  - whether companies take their obligations under an NPA or DPA sufficiently seriously. Ms Moncao made clear that 'DPAs and NPAs are not a free pass, and there will be serious consequences for violating their terms'.

DOJ will 'surge resources' to support the shift in focus

- To support this approach, Ms Monaco said that the DOJ will find ways to 'surge resources to the department's prosecutors'.
- Ms Monaco said that a new Corporate Crime Advisory Group has been established to consider these and other enforcement issues and make recommendations for changes to DOJ policies on corporate criminal enforcement.

Companies urged to invest in strong compliance

- Ms Monaco urged companies to invest in, and take proactive steps to implement appropriate strong 'compliance functions' and 'spend resources anticipating problems' in the interests of the company and of shareholders. Ms Monaco cautioned that failure to take these steps could be a 'costly omission for companies who end up the focus of department investigations'.
- Ms Monaco concluded her speech with the following five points:
  - 'Companies need to actively review their compliance programs to ensure they adequately monitor for and remediate misconduct — or else it's going to cost them down the line.
  - For clients facing investigations, as of today, the department will review their whole criminal, civil and regulatory record — not just a sliver of that record.
  - For clients cooperating with the government, they need to identify all individuals involved in the misconduct — not just those substantially involved — and produce all non-privileged information about those individuals' involvement.
  - For clients negotiating resolutions, there is no default presumption against corporate monitors. That decision about a monitor will be made by the facts and circumstances of each case.
  - Looking to the future, this is a start — and not the end — of this administration's actions to better combat corporate crime'.

  [Source: Deputy Attorney General Lisa O Monaco, Keynote Address at ABA's 36th National Institute on White Collar Crime 28/10/2021]

Risk Management

Top Story | Why investors need more information about how companies are dealing with workplace sexual harassment: Insights from the ACCR

Key takeaways from the ACCR report: Sexual Harassment as Material Risk

Key Takeouts

- The Australasian Centre for Corporate Responsibility (ACCR) has released an investor briefing flagging workplace sexual harassment in Australian companies as a known 'material risk' and potential destroyer of value about which investors should be more informed.
- Ultimately the ACCR calls on companies to provide (and for investors to demand) more detailed disclosure about the concrete steps being taken to prevent and respond to the issue in order to enable investors to properly evaluate how effectively the risks are being managed
- The report also flags the ACCR's intention to engage directly on the issue with ASX 100 companies in the extractives and financial services sectors and to publish the findings

Overview

The Australasian Centre for Corporate Responsibility (ACCR) has released an investor briefing highlighting workplace sexual harassment as a known 'material risk' and providing a high level overview of the ways in which it can potentially 'destroy company value' – the potential financial, governance, operational and reputational risks. \

In light of these risks, the ACCR emphasises investors' need for clear, detailed disclosure by companies of the steps they are implementing to deal with the issue. The ACCR states:

> 'Timely reporting by ASX companies on sexual harassment prevention and response measures is necessary to ensure investors have relevant information to assess company performance and governance of these issues. Companies need to disclose to shareholders how they are implementing the Respect@Work seven domains of change to demonstrate a systematic and thorough approach to sexual harassment prevention and response'.

Workplace sexual harassment in Australia is a 'material risk'

- The report contends that investors should view workplace sexual harassment as a known 'material risk' and cites various research showing the pervasiveness of sexual harassment in Australian workplaces and the associated costs in support.
- The report also suggests that Australian companies and investors 'would do well to take notice of trends in the United States' on the issue including:
  - Increasing shareholder pressure for companies to act: The report cites the uptick in the number of sexual-harassment related shareholder proposals filed at US companies and the strong levels of support that some of these have received (eg the mandatory arbitration proposal at Goldman Sachs which received 53.2% shareholder support).
  - The fact that proxy advisers are increasingly considering the issue as a material risk and factoring this into their voting recommendations.

Snapshot: The different types of risk posed by workplace sexual harassment

TYPES OF RISK	WHY
Long Term Financial Risk	▪ The report cites a number of studies/reports demonstrating that sexual harassment has the potential to negatively impact stock performance, profitability and labour costs. ▪ Likewise the report points to research that found that the potential financial consequences of a sexual harassment scandal are significant. According to the report, a scandal of this kind has potential to result in a 1.5% decrease in market value over the 'event day' and the

TYPES OF RISK	WHY
	following trading day, with potential for this drop in value to increase if there is CEO involvement.
Operational and Reputational risk	▪ The report observes that workplace sexual harassment not only has the potential to damage public perceptions of companies but the potential to cause operational/workforce disruptions. In illustration, the report references comments by West Australian Mines and Petroleum Minister Bill Johnson that a failure to report incidents to the government could weaken the mining industry's case for bringing in overseas workers to ease current labour and skills shortages. ▪ The report identifies the mining sector as an industry 'presenting very clear risks' but also makes clear that 'the need for improved prevention and response measures is not exclusive to the mining and finance sectors. Sexual harassment is pervasive and widespread across the public and private sectors'.
Governance Risk	▪ The report argues that the issue of workplace sexual harassment, and the companies' prevention and response mechanisms/policies, should be accorded direct board-level oversight in light of the legal duty directors have to act with reasonable care and diligence including considering foreseeable risks. ▪ Further, in light of the fact that companies and their boards can be held vicariously liable for workplace sexual harassment under both anti-discrimination and workplace health and safety laws, the report contends that the issue should be accorded the same priority by boards as workplace health and safety.

Transparency is key: The information companies should be reporting

The report calls on companies to provide (and for investors to push for) detailed disclosure not only on the overall number of incidents per year (as some companies named in the report have started to do), but details of how they are implementing the Respect@Work 'seven domains of change' to demonstrate a 'systemic and thorough approach to prevention and response'.

For reference the seven domains of change are: 1) leadership; 2) risk assessment and transparency; 3) culture; 4) knowledge; 5) support; 6) reporting; and 7) measuring.

Topic of engagement

- The report observes that 'Investors have the ability to ask key questions to investees and can become an important force for supporting improvements in the companies they hold'.
- Page 13 of the report outlines the 'key indicators' that the ACCR considers companies should report against and flags some of the questions that the ACCR has said it will be putting to ASX 100 companies in the extractives and financial services sectors to gauge their approach to the issue. The ACCR plans to publish findings in H1 2022.

[Source: ACCR media release 04/11/2021; ACCR Report: Sexual harassment as material risk An investor briefing paper]

Climate Risk

Three Australian state governments have come together to found the Net Zero Emissions Policy Forum which aims to facilitate collaboration between sub-national governments globally net-zero by 2050

- Three state governments - the Australian Capital Territory (ACT), South Australian and New South Wales – have launched the 'Net Zero Emissions Policy Forum'.
- The forum is intended to provide state and regional sub-national governments in Australia, and globally, with a platform to exchange 'proven and mature capabilities' and 'solutions' to 'common obstacles' to achieving the net zero emissions by 2050 target. In more practical terms, the forum will provide both a repository of existing policies and resources that can be accessed by participants and facilitate collaboration between governments on policy design. Through collaboration, and shared best practice, the forum is expected to accelerate the transition to a low carbon economy in Australia and globally.
- The initiative has the support of ClimateWorks Australia and the Climate Group.
- The Forum will be directed by a Ministerial Group which will set the priorities for research and collaboration. NSW will chair the Ministerial Group for the first 12 months. As the Forum grows, it is expected that it will be co-chaired by a leading subnational government from overseas.

[Source: Andrew Barr media release 08/11/2021]

In Brief | COP26 Deforestation pledge: Over 100 countries (including Australia) have pledged to work collectively 'to halt and reverse forest loss and land degradation by 2030 while delivering sustainable development and promoting an inclusive rural transformation'. Separately the UK, Belgium, Canada, Denmark, France, Germany, Japan, the Netherlands, Norway, South Korea, the US and the European Commission on behalf of the EU have pledged $12bn to 'support ambitious partnerships in developing countries that tackle the causes of deforestation'

[Sources: Glasgow leaders' declaration on forests and land use 02/11/2021; UK government press release 02/11/2021]

In Brief | COP26: Over 100 countries (not including Australia, China, Russia, India or Iran) have signed the US-EU led, Global Methane Pledge which commits signatories to taking 'voluntary actions' to contribute to the reduction of global methane emissions by at least 30% from 2020 levels by 2030

[Sources: Climate and Clean Air Coalition media release: Global Methane Pledge; US Department of State media release 02/11/2021; Global Methane Pledge website]

In Brief | COP26: The UK says the end of coal is in sight: Australia has not signed on to the UK-led Global Coal to Clean Power transition Statement which commits signatories to phasing out coal power by 2030 for 'major economies' and by the 2040s for the rest of the world and to ending support for new power stations. The Climate Council has described Australia's position on fossil fuels as a 'handbrake on global climate action'

[Sources: Global Coal to Clean Power Transition Statement; UK government media release 03/11/2021; Climate Council media release 04/11/2021]

Other News

Top Story | Top 10 practical tips when preparing for an IPO

The MinterEllison team has released an article providing insight into how to best to prepare for a successful IPO. You can access the full text here.

Contacts

Mark Standen
Consultant

—

mark.standen@minterellison.com
T +61 2 9921 4902 | M +61 412 104 902

Siobhan Doherty
Partner

—

siobhan.doherty@minterellison.com
T +61 2 9921 4339 | M +61 413 187 544

Kate Hilder
Consultant

—

kate.hilder@minterellison.com
T +61 2 9921 8785