Governance News

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

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Disclosure and Reporting

Greenwashing and how to avoid it: Views from an expert panel

In a panel discussion entitled *The Risks of Greenwashing* held at the Climate Governance Forum on 11 August 2023, an expert panel – Kathleen Bailey (Lord FAICD Alinta Energy), Sarah Court (Australian Securities and Investments Commission (ASIC)), and Timothy Stutt (Herbert Smith Freehills) - moderated by Christian Gergis (AICD) reflected on the risks attaching to 'greenwashing', the steps organisations should take to mitigate their risk and ASIC's expectations and approach in this context.

Our key takeaways are below.

Greenwashing is a key source of risk for organisations

For context, 'greenwashing' is when an organisation overstates its sustainability-related credentials, strategies or those of its products or services, in order to appear more 'green' or 'ESG focussed' than is actually the case.

These disclosures tend to be voluntary in nature – ie disclosures tend to take the form of positive statements about a product/service which are made in order to secure a competitive advantage over other products/services by appealing to an increasingly 'ESG' conscious market.

Though greenwashing is not a new source of legal and reputational risk for business, it has now become an acute source of legal risk given elevated levels of scrutiny from the market and from both the Australian Securities and Investments Commission (ASIC) and the Australian Competition and Consumer Commission (ACCC) – both of which have included tackling the issue among their top enforcement priorities. The regulators have also demonstrated their willingness to take action – for example, ASIC has launched three court actions over the past 12 months over alleged 'greenwashing'.

How ASIC determines whether to enforcement action – insights from ASIC Deputy Chair Sarah Court

Ms Court prefaced her response by reiterating that ASIC is devoting considerable time and resources to tackling greenwashing in line with its stated 2023 enforcement priorities, and in response to, increasing public demand for ESG products/services.

In light of this increased demand, ASIC considers it essential that investors are able to rely on company disclosures. Ms Court described how ASIC has slowly stepped up its approach over time. Initially, Ms Court said that ASIC focused on raising awareness and communicating expectations through the release of its information sheet (INFO 271). ASIC then moved to issuing infringement notices (see: ASIC Report 763 ASIC's recent greenwashing interventions, summarised) and to taking court action against three entities over their use of ESG screens.

Looking ahead to the next 12 months, ASIC's focus on targeting the issues identified previously in infringement notices/court actions to date is expected to continue. For example, ASIC expects to continue to focus on 'vague' and unqualified 'net zero' claims as well as use of ESG investment screens.

What should boards be doing to mitigate their greenwashing risk?

Consistent with previous statements from ASIC, Ms Court encouraged boards to think about the information that underpins the claims being made in all public disclosures about their products/services, across all communication channels including in marketing campaigns, presentations, and on their websites. Boards should be active in ensuring that the claims being made are being made on reasonable grounds, and are not overstated/are accurate.

'Greenhushing': ASIC's views

Asked to comment on whether companies will react to increased regulatory scrutiny by intentionally minimising their climate disclosure, Ms Court prefaced her response by stating that at present, ASIC is focused on enforcing compliance with existing (and long-standing) laws - ie prohibitions against misleading and deceptive conduct.

Ms Court suggested that if companies elect to hold back on making what are (at present) voluntary sustainability claims – eg net zero claims - where they do not have the information to back up their claim/where the claim being made is not 'reasonable', then ASIC considers this to be 'OK'.

Moreover, ASIC expects this would be a short-term response from companies.

Adding to this, the panel suggested reviewing existing disclosures to ensure claims are being made on 'reasonable grounds' and updating, qualifying or withdrawing risky disclosures, is a prudent step for companies to undertake.

The detail underlying sustainability claims is not yet a key focus

Ms Court emphasised that at present, ASIC's surveillance work is focused on enforcing compliance with existing laws. More particularly, ASIC is focused on taking action against what Ms Court termed 'vanilla' misleading and deceptive conduct claims in which the question of the quality of the information relied on by the company to substantiate a claim doesn't emerge – for example, where a company makes a 'net zero' claim, ASIC isn't delving into the detail of the climate transition plan underpinning the target. Rather ASIC is targeting instances where there is no climate plan at all.

While ASIC is presently taking a 'careful' approach to litigation, the forum heard that litigation risk from climate activists is increasing. These cases are more likely to focus on the detail behind sustainability-related claims.

Correcting climate disclosures – ASIC's (likely) approach

Asked how companies should respond, upon becoming aware (having made a claim) that an assumption on which they relied was incorrect, Ms Court opined that ASIC would (in all likelihood) be unlikely to take action provided that: a) the claim was based on an assumption that was reasonable at the time the disclosure was made, and b) the company was monitoring developments/keeping on top of developments; and c) the disclosure was corrected (and an explanation provided).

Minimising greenwashing risk

Both ASIC's information sheet (INFO 271) and separately the ACCC's draft guidance were referenced as a source of guidance to companies on regulatory expectations.

Panellists also suggested that clarity in language – becoming skilled in articulating assumptions and aspirations – in this context is required to minimise the risk of inadvertent greenwashing. Disclosing in line with the Taskforce on Climate-related Disclosure (TCFD) framework it was suggested, could provide a helpful lens in this context.

Further resources

You can find MinterEllison's latest update on navigating greenwashing risk here: Navigating greenwashing risks – July 2023 update - Insight - MinterEllison

[Source: This article is based on notes from the 11 August 2023 Climate Governance Forum panel discussion: *The Risks of Greenwashing*. The panel included: Kathleen Bailey (Lord FAICD Alinta Energy), Sarah Court (Australian Securities and Investments Commission (ASIC)), and Timothy Stutt (Herbert Smith Freehills) and was moderated by Christian Gergis (AICD)]

Disclosure of sustainability-related risks: Two companies make additional disclosures following ASIC's review

- Two companies have made additional disclosures to address ASIC's concerns that they had not sufficiently 'disclosed a diverse range of material business risks, including sustainability-related risks' in their reporting (ie the operating and financial review (OFR) of the directors' report).
- These concerns were identified through ASIC's ongoing financial reporting surveillance program and subsequent inquiries into a selection of recent annual reports.
- Announcing this, ASIC Commissioner Danielle Press said that:

  > 'One of ASIC's strategic priorities is to support market integrity through the proactive supervision and enforcement of governance, transparency, and disclosure standards in relation to sustainable finance. Directors must provide investors with useful and meaningful information to help them make informed investment decisions.'

- Commissioner Press added entities should be preparing now for the introduction of internationally aligned mandatory reporting requirements, for example by reporting in line with the Task Force on Climate-related Financial Disclosures (TCFD) framework and 'engaging with the ISSB standards'.
- For more on the ISSB standards see: Step change in sustainability reporting: First two ISSB standards released - Why the release of the first two global sustainability standards is such a big deal - MinterEllison. For more on the government's proposed new mandatory climate reporting standards see: Introduction of mandatory climate reporting in Australia: Second round of consultation launched - Technical update - MinterEllison.

  [Source: ASIC media release 10/08/2023]

ACSI report into climate disclosure: ACSI considers the 'majority of the ASX200 is ready for mandatory climate reporting'

Report snapshot | ACSI report: Promises, pathways and performance: Climate change disclosure in the ASX200 August 2023

Key Takeouts

- Ahead of the expected introduction of mandatory climate reporting requirements in Australia, a report from the Australian Council of Superannuation Investors (ACSI), highlights that ASX 200 companies have stepped up their climate disclosure efforts.
- The report makes clear that though this progress is welcome, ACSI considers there remains significant scope for improvement from a quality and comparability perspective in a range of areas.
- Looking ahead, ACSI considers that the proposed mandatory disclosure regime will assist in addressing the gaps identified.
- ACSI flags disclosure around the following as key focus areas for engagement with companies:
  - use of/reliance on carbon offsets
  - 'just transition' risks

Ahead of the expected introduction of mandatory climate disclosure requirements in Australia (see: Introduction of mandatory climate reporting in Australia: Second round of consultation launched - Technical update - MinterEllison) and ahead of the Australian 2023 meeting season, the Australian Council of Superannuation Investors (ACSI) has released a report monitoring climate disclosure trends across the ASX 200, including the extent the extent to which ASX 200 companies are reporting in line with the Taskforce on Climate-related Financial Disclosure (TCFD) framework. For context, the TCFD framework is considered a good foundation for/preparation for the expected new disclosure requirements.

The headline message is that climate disclosure continues to improve on a number of fronts, suggesting that most ASX 200 companies are 'ready for mandatory climate reporting'. However, ACSI CEO Louise Davidson made clear that this is not to say that no challenges remain – ACSI considers that the (expected) transition to mandatory reporting will require significant further improvement in a short timeframe. Ms Davidson commented:

> 'This research does show a maturing system, which is heartening, but there is a very long way to go, and not a lot of time before Australia must complete its transition to a low-carbon economy if there's a hope of keeping warming to 1.5°C'.

Our key takeaways are below.

Proportion of companies reporting in line with the TCFD recommendations has spiked to 70%

- ACSI found that 70% of ASX 200 companies now report in line with the TCFD recommendations (up 31% on the previous year). ACSI considers this reflects: a) increasing market and regulatory pressure for information about the impact climate change may have on company's long-term performance; and b) 'increased recognition [by companies] of the systemic and financially material climate change risks' facing them and the broader economy.
- Having said this, the report also points out that:
  - a number of companies (included in this total) are only reporting 'partially' in line with the TCFD recommendations – for example, only companies in the utilities sector are considered to be 100% aligned (see: Figure 2 at p7 of the report)
  - 'full alignment to the TCFD framework does not always correlate with sufficient disclosure' – in that the disclosure can lack the detail needed to be useful. .
- Looking ahead, ACSI expresses the hope that the introduction of mandatory climate-reporting standards will

  > 'help bridge the reporting gap and support economy-wide comparable climate-related risk assessments, assisting investors in managing climate-related risks within their portfolios'.
- ACSI opines that sectors lagging on TCFD reporting – eg the consumer discretionary, health care and information technology sectors – will have to 'significantly improve reporting to meet the new [mandatory climate-disclosure] standards'.

The majority of companies have publicly committed to Net Zero

According to the report, as at 31 March 2023, 61% of companies had made a net zero emissions commitment (up from 48% last year). Looking more closely, the largest companies are leading the way with 78 ASX 100 companies and 43 ASX 101-200 companies having made some form of net zero commitment.

While welcoming this as a positive 'signal of the pace of the transition', ACSI also flags a number of gaps in disclosure. These include:

- Lack of disclosure of interim targets – for example, ACSI found that 14% of companies with a net zero target have no interim targets (ie no short term or medium targets) to meet their long-term net zero commitment. On this point, ACSI cautions that

  > 'Companies that have net zero commitments without a transparent pathway of how the company will deliver the required emissions reductions may face risks in future access to capital and legal risks'.
- Targets tend to be limited to Scope 1 and 2 emissions (and in some cases it is unclear what emissions are covered)
- Scope 3 targets remain rare: Though more than half of the ASX200 now report Scope 3 emissions data (110 companies), just 22% of the ASX200 have set a Scope 3 target (or 43 companies, up from 27 companies last year).

Most companies have not set science based targets

ACSI found that science based targets remain fairly rare - 71% of the ASX200 have not set/taken steps towards setting science-based emission reduction targets.

For context, this is still an improvement on last year - 49 companies were found to have set a science-based target (up from 36 companies last year). For clarity, this includes companies that have set 'partial, verified, accredited targets and those which disclose their targets are science based without accreditation'.

Looking ahead, ACSI's expectation is that:

> 'implementation of mandatory climate disclosure requirements, as well as the Australian Government's commitment to develop sector pathways to achieve net zero could see an acceleration the number of companies in setting verifiable, science-aligned targets'.

More companies are disclosing their climate transition plans

ACSI found that the number of companies publicly disclosing their climate transition plans is increasing.

Looking forward, ACSI expects UK guidance – Transition Plan Taskforce Disclosure Framework and accompanying implementation guidance – to inform the Australian market. ACSI opines that companies that

> 'implement high quality transition plans are more likely to attract and retain the quality, long term capital necessary to deliver their decarbonisation strategy'.

The report also flags that the number of climate transition plans being put forward (by management), for an advisory shareholder vote – ie a 'Say on Climate' vote - increased is rising and is expected to continue to do so.

Use of offsets (or carbon credits)

The report flags that disclosure of the extent to which companies rely on/use carbon offsets is currently limited with 51% of companies not referencing use of offsets at all.

ACSI observes that ISSB IFRS S2 Climate-related Disclosures will require companies to disclose more detailed information on offsets.

ACSI flags that

> 'Closing this disclosure gap is a high priority for ACSI's engagement and advocacy in support of the Australian introduction of the ISSB reporting standards'.

Use of scenario analysis has increased

ACSI found that the majority (59%) of ASX 200 companies disclose that they have undertaken scenario analysis to test business resilience against physical and transitional climate risks, with an additional 9% of companies committed to undertaking and disclosing scenario analysis.

Looking at this more closely:

- 46% of companies use Paris-aligned scenario analysis (ie test their business using a 1.5°C or well below 2°C aligned pathway), up from 38% last year.
- 47% of the ASX200 disclosed use of 3°C+ scenarios (ie testing their business against 'worst case' physical risks)

ACSI flags that from an investor perspective, comparability remains a challenge given the number of different scenarios in use (including use of company-generated scenarios) and the lack of transparency around underlying assumptions.

ACSI comments that:

> 'Ultimately, the inconsistency in disclosure of scenario analysis and scenarios used makes it difficult for investors to assess the integrity, rigour and comparability of companies with peers and the broader market. Once more, mandatory climate disclosures aim to assist investors and drive higher quality, internationally comparable disclosures'.

Physical risk assessment

ACSI found that 59% of companies disclosed some analysis of physical risk, but that the 'quality of disclosures varies widely' - ACSI considers only 31% of companies disclose 'beyond a basic level' (up from 21% last year).

Concerningly, the report flags that 41% of ASX200 companies provide no disclosure of physical risk assessments. ACSI comments that:

> 'While some ASX200 sectors may be less materially exposed to physical climate risks, it is unclear what level of risk assessment 'non-reporters' have undertaken.
>
> As physical climate risks continue to appear and evolve, ACSI expects company analysis and mitigation strategies to mature to match accelerating risk'.

Just transition risk

ACSI found that disclosure of 'just transition risks' remains minimal

ACSI makes clear that it 'expects companies with assets that may be affected by the energy transition to demonstrate a principles-based approach and plan to support a just transition through a set of expectations' included at p13-16 of a separate 2022 ACSI report: A just transition to a clean energy economy.

ACSI expects to continue to engage with companies on the issue.

[Sources: ACSI media release 10/08/2023; ACSI report: Promises, pathways and performance: Climate change disclosure in the ASX200 August 2023]

Over 70 Democrat members of congress urge SEC to issue climate-disclosure rule as soon as possible

In a 7 August 2023 letter, over 70 Democrat members of US Congress have urged the Securities and Exchange Commission (SEC) to push ahead with its proposed climate disclosure rule (despite political opposition). They write:

> 'Enhanced climate-related disclosure is the direction of travel for capital markets around the world. You have drafted a well-reasoned proposal that is grounded in financial materiality, aligns with the demands of investors and market participants, and is clearly within the SEC's mission, authorities, long-standing norms, and responsibilities. We urge you to finalize and adopt a credible mandatory disclosure rule as quickly as possible'.

[Source: Letter to SEC Chair Gary Gensler 07/08/2023]

In Brief | ASIC has commenced a third greenwashing court action over a super funds' alleged failure to apply ESG investment screens as claimed

[Source: ASIC media release 11/08/2023]

ESG

Top Story | Why and how boards should be prioritising nature-related risk: Insights from an expert panel

In a panel discussion moderated by MinterEllison Partner and Head of Climate & Sustainability Risk Governance Sarah Barker entitled *Biodiversity and Nature: What can Boards Do?* held at the Climate Governance Forum on 11 August 2023, an expert panel - Penny Bingham-Hall FAICD (Fortescue Metals Group), Ian Hamm MAICD (Indigenous Land and Sea Corporation) and Carolin Leeshaa GAICD (Taskforce on Nature-related Financial Disclosures, National Nature Lead KPMG Australia) explored the question of why nature loss poses a significant risk for organisations and why it should be a priority for boards.

The panel discussion also touched on Taskforce on Nature-related Financial Disclosure (TNFD) framework which is expected to be released on 18 September 2023.

The relevance of nature loss for boards

The starting point for the discussion was that climate and nature are inextricably linked – net zero will not and cannot be achieved, without being nature positive - we can have both (ie protecting nature and achieving net zero) or neither.

As such, nature loss like climate change, is already a material ESG risk for organisations and a source of financial risk – eg supply chain disruption – as well as a source of potential opportunities.

Yet, despite our collective dependency on nature/biodiversity, nature continues to be thought of largely as 'free' (ie biodiversity/nature is not accorded a financial value). In consequence, nature continues to be open to exploitation and this comes at significant cost, both now (as is becoming apparent from recent events) and into the future.

In the panel's view, looking ahead, biodiversity/nature may become so valuable that it will be determinative of the use to which an area/resource is put, and in the shorter term, significantly increase the value placed on restoring biodiversity as part of any project.

> [Note: There already indications that this is likely to be the case. In Australia and in other jurisdictions, governments and industry are starting to explore ways to incentivise a reversal of biodiversity/nature loss. The introduction of the Nature Repair Market Bill 2023 (Cth) and Nature Repair Market (Consequential Amendments) Bill 2023 (Cth) which together would establish a framework for a voluntary national biodiversity market in Australia is one example of this. For more on these Bills see: Australia's biodiversity agenda: Nature Repair Market - Insight - MinterEllison]

Reframing our thinking on Nature-based solutions - Not an 'either, or' choice

Reflecting on how we can draw on and learn from Indigenous People when it comes to thinking about nature-based solutions, Mr Hamm emphasised the importance of taking a 'balanced' approach – that is, balancing considerations of the economy, and nature, and culture – rather than assuming than pursuing a certain approach must come at the cost of nature, culture or the economy. It should not be assumed, for example that all mining projects are automatically ruled out, if we are looking to protect and preserve nature. Rather, it a question of rethinking which projects should go ahead and how they can go ahead to have as little impact as possible, as well as how biodiversity can be restored after the project is completed.

Nature, it was suggested, should not be thought of as something to be managed, but as an opportunity – consideration of nature should be part of/inherent in every decision.

Reporting on nature-related risks

What is the TNFD?

In light of the interdependencies between nature and climate, the panel agreed that it would be imprudent for boards not to be thinking about, and ensuring they are across, developments in this area. The panel's expectation is that nature risk will eventually need to be disclosed on balance sheets (as climate needs to be disclosed).

The Taskforce on Nature Related Financial Disclosure (TFND) framework, currently in its final stages of development, is a market-led, science-based framework that aims to assist businesses to integrate nature into their decision making. More particularly, it's envisaged that the new TFND framework will enable businesses to identify, assess and disclose nature-related risk in much the same way as the existing Taskforce on Climate-Related Financial

Disclosures (TCFD) supports businesses in managing and disclosing climate-related risk. The final TFND framework is expected to be released on 18 September 2023.

Expectation that TNFD-aligned disclosure will be mandatory in time

The TNFD has been developed to be consistent with the recently released International Sustainability Standards Board (ISSB) global sustainability standards and with the existing TCFD framework.

Importantly, while the TFND is not binding on business as yet, the panel expects that it will become so in time.

What should boards be doing now?

The panel agreed that boards would be well-advised, in light of the fact that globally we are moving ever closer towards the edge of several 'tipping points', to prioritise action on nature-risk.

As a starting point, it was suggested that boards would be well-advised to:

- **Think of nature-related risks as compounding factor** rather than as a 'new' risk – boards should be focused on the interdependency between climate and nature-related risk, and prioritise it on this basis.
- **Build awareness and understanding of nature-related risk** by drawing on the materials/data available including the material available on the TNFD website. As a starting point, it was suggested that organisations give consideration to the TNFD's four-phase LEAP risk and opportunity assessment approach. This process assists organisations to: 1) Locate the interface with nature; 2) Evaluate the priorities/impacts; 3) Assess material risks/opportunities; and 4) Prepare to respond and report. This resource (from MinterEllison and the AICD may also be of relevance: Biodiversity as a material financial risk: What board directors need to know
- **Educate yourself as a director** (and/or senior manager) on what the impacts of nature-loss are likely to be for your own organisation eg through drawing (where necessary) on expert assistance from experts.
- **Take ownership of the challenge:** Given the urgency of the problem, boards were urged to prioritise and 'run towards' what is a significant, and urgent challenge – to lean into the inherent uncertainties – rather than put off taking action.

SME perspective

It was acknowledged that for smaller enterprises and not for profits that lack the scale/resources of larger enterprises, integrating nature into decision making can be a daunting prospect. However, the consensus was that despite this, small enterprises would be ill-advised to ignore the risk.

Instead, it was suggested that SMEs should start small – for example, by thinking about where they source their supplies – and build from there.

It was further suggested that one advantage smaller enterprises have over their larger peers, is the ability to adapt/respond more quickly to changes in the operating environment – an attribute that potentially stands them in good stead in this context.

> [Source: This article is based on notes from the 11 August 2023 Climate Governance Forum panel discussion: Biodiversity and Nature: What can Boards Do? The panel included: Penny Bingham-Hall FAICD (Fortescue Metals Group), Ian Hamm MAICD (Indigenous Land and Sea Corporation) and Carolin Leeshaa GAICD (Taskforce on Nature-related Financial Disclosures, National Nature Lead KPMG Australia) and was chaired by Sarah Barker MAICD (MinterEllison Partner and Head of Climate & Sustainability Risk Governance)]

'Climate targets are business targets': Expert panel says integration of climate into overall strategy is key to successful transition planning

In a panel discussion moderated by Zoe Whitton (Pollination) entitled *Transition Planning* held at the Climate Governance Forum on 11 August 2023, an expert panel - Ewan Crouch AM FAICD (Bluscope), Kate Harris (Lendlease) and Kerry Schott AO (AGL) – discussed the challenges for organisations and for boards in particular, in implementing and operationalising transition planning and integrating it into overall strategy.

Looking at the issue more broadly, Ms Schott also offered insights into the progress of Australia's transition away from reliance on coal-generated electricity and the vital role this plays in enabling virtually all other entities to decarbonise.

The starting point for the discussion was that despite the inherent uncertainty and complexity in the task, planning for the transition is a necessary step for all organisations large and small to take, and for boards to actively engage in.

A whole of organisation approach – integration of climate into overall strategy and decision making is key

Drawing on their own experiences as directors, the panel reflected on how their organisations started their transition planning journeys and the key challenges they faced.

A key message was the importance of 'making sustainability targets, business targets'. That is, the importance of ensuring the whole of the organisation is on board with the strategy and the targets set, so that execution of climate/sustainability targets is accorded the same (or greater) importance as other business targets.

In terms of successfully operationalising climate targets the panel offered a number of suggestions, including the following.

- Implementing the Taskforce on Climate-related Financial Disclosures (TCFD) framework and creating scenarios relevant to the business was flagged as one way of helping to build understanding of potential climate impacts (and opportunities) across the business and building support for/giving priority to climate action (at board level and across the organisation). Once there is understanding of the opportunities – how taking a particular action can be a competitive advantage - thinking around targets tends to shift.
- Embracing data – including learning from/utilising data being published by market leaders (organisations were encouraged to take advantage of the extensive information being shared)
- Putting in place a realistic, detailed strategy that includes milestones for the short term (12 months, 24 months) and beyond, and revisiting the strategy regularly to monitor progress.

Leaning into uncertainty: View on where new/emerging technologies and use of offsets

It was acknowledged that there remains a high degree of uncertainty around new and emerging carbon elimination/reduction technologies, adding to the inherent uncertainty inherent in transition planning – especially over the longer term.

Reflecting on how to respond to this, it was suggested that data about the alternate solutions available and ensuring the business has access to relevant data has a key role to play – both in terms of ensuring the business is kept as informed as possible, and in terms of providing as much certainty as possible about the solution being suggested/contemplated. There is a need for ongoing focus in order to ensure organisations are aware of/thinking about emerging solutions.

On offsets, the panel's view is that they should be relied on only as a 'transition tool' or 'secondary' solution only given the imperative of lowering emissions..

When it comes to lifting capability (in the context of alternate sources of energy), infrastructure was identified as a key challenge (in addition to the challenges facing other sectors eg shortage of skilled labour, supply chain pressures etc).

SME view

Asked how smaller enterprises and not-for-profits that lack the scale of larger organisations, and may be less advanced in their transition planning journey, should start by allocating executive accountability for climate action (and setting realistic and achievable KPIs/milestones around this). These milestones/KPIs might include for example eg switching to solar power, cutting down on waste – depending on the particular business.

More broadly, for all organisations at the start of their transition planning journey, allocating executive accountability and setting milestones for monitoring progress into the future was identified as a good starting point.

[Source: This article is based on notes from the 11 August 2023 Climate Governance Forum panel discussion: *Transition Planning* . The panel included: Ewan Crouch AM FAICD (Bluscope), Kate Harris (Lendlease) and Kerry Schott AO (AGL) and was chaired by Zoe Whitton (Pollination)]

Stakeholders want boards to prioritise action on nature and climate: Insights from an expert panel discussion

In a panel discussion Climate Governance Forum entitled *Understanding Stakeholder Expectations* an expert panel chaired by Pru Bennett (GAICD, Brunswick Group) – Deborah Blakey (GAICD Health Employees Superannuation Trust Australia (HESTA); Brynn O'Brien (GAICD Australasian Centre for Corporate Responsibility (ACCR), and Kelly O'Shanassy (Australian Conservation Foundation) - shared their insights into how their respective organisations seek to engage with boards on nature and climate and their expectations of boards/organisations in this context.

Our key takeaways are below.

What would the panel like to see from boards?

A key message to emerge from the discussion is that the penal would like to see boards prioritise meaningful action on climate/nature as a matter of urgency.

Increased engagement on nature/climate, including through the use of shareholder proposals and/or campaigns targeting individual directors are indications to boards of the level of stakeholder concern.

The ACCR's Brynn O'Brien commented:

> 'The message for oil and gas company boards or the boards of major emitters is, it's time to start setting company strategy like your jobs depend on it, because they do'.

For clarity, this is not to suggest that the panellists were in full agreement on what action companies should be taking – rather that the panellists agreed that climate/nature action should be a priority.

Views on the role of directors in countering disinformation on climate/nature

The ACF's Kelly O'Shanassy and the ACCR's Brynn O'Brien both urged leaders to 'speak up' in support of government action on climate and nature, and ensure that their support for climate action is heard and represented by the influential industry associations to which they are members (eg the Business Council of Australia).

Mr O'Brien underlined industry lobbying against climate action by government as a key hurdle to climate progress. In light of this, insuring lobby groups/industry groups hear that their members support action on climate is considered important in countering this issue.

Speaking as an investor, HESTA's Deborah Blakey said that HESTA is guided by its members on the issue (and considers it has a mandate to act on climate on this basis). Ms Blakey observed that directors have an educational role when it comes to climate action, drawing on the evidence available.

How boards can enhance their engagement with stakeholders

Asked to comment on this, Ms Blakey observed that if boards adopted an open (as opposed to defensive) mindset when engaging with stakeholders on climate/nature related issues it could lead to more constructive engagement.

Likewise Ms O'Brien urged leaders to view engagement as an opportunity. Ms O'Brien pointed to the ACCR's recent engagement with several Japanese companies that resulted in positive steps by the companies in question, in support of this.

Views on divestment vs engagement as a means of catalysing action on climate/nature

The panel agreed that engaging with companies on climate/nature through meetings, shareholder proposals etc is more effective in driving down emissions than simply tilting a portfolio away from heavy emitters (through divestment). Ms O'Brien pointed to the changes achieved at AGL through engagement efforts in support of this position, noting that the result at the company would not have been achieved had investors (eg HESTA) pulled out of the company.

On this point, Ms Blakey made clear that HESTA will consider divestment (as a last resort) where engagement is ineffective in driving action (and where this is considered to be in the best financial interests of members). On supporting shareholder proposals, Ms Blakey said that HESTA evaluates shareholder proposals on a case by case basis on their merits with a preference for supporting proposals that are focused on securing useful information for shareholders about how risks/opportunities are being managed (rather than proposals that are overly prescriptive). .

Ms O'Shanassy drew a distinction between investment in new fossil fuel projects/companies and supporting companies in their transition journey.

Views on what companies that are not heavy emitters can do to accelerate their action on climate

Ms O'Shanassy offered three suggestions for companies to accelerate their climate/nature efforts: 1) interrogate supply chains; 2) advocate (through industry association membership) in support of climate action by government; and 3) treat climate policy advocacy like 'doing nothing on climate is going to be bad for your business'.

Ms O'Brien underlined the importance of board diversity in this context noting that lack of diversity is unlikely to lead to alternative ideas/ways of thinking about climate/nature-related challenges.

The role of rare metals/critical minerals in the transition

Asked for their views on how the need to mine critical minerals/rare metals (which are essential to enabling the transition to low-carbon technologies) should be/can be balanced with climate/nature-related considerations, Ms O'Shanassy acknowledged the need for new mining projects of this kind, but drew a distinction between mining for rare metals and new coal/gas projects (which in her view, are non-essential and should not be supported).

In saying this, Ms O'Shanassy said that it is critical that there is a national plan in place for renewables – including how mining projects that are critical to the transition, should preserve nature/restore nature. In the ACF's view, mining of critical minerals does not have to be at the expense of nature. Ms O'Shanassy flagged that the ACF intends to release new principles around this.

Adding to this, Ms O'Brien underlined the need to listen to Indigenous voices in this context, and 'do better' than we have in the past when it comes to mining projects. The difficulty inherent in this, should not be seen as an excuse for repeating the mistakes of the past.

> [Source: This article is based on notes from the 11 August 2023 Climate Governance Forum panel discussion: *Understanding Stakeholder Expectations*. The panel included: Deborah Blakey (GAICD Health Employees Superannuation Trust Australia (HESTA); Brynn O'Brien (GAICD Australasian Centre for Corporate Responsibility (ACCR), and Kelly O'Shanassy (Australian Conservation Foundation) and was chaired by Pru Bennett (GAICD, Brunswick Group)]

RBNZ releases climate stress test scenario for large banks, plans to release an aggregate report early next year

- The Reserve Bank of New Zealand (RBNZ) has released a climate stress test scenario to assess the capability to NZ's five largest banks – ANZ, ASB, BNZ, KiwiBank and Westpac – to manage climate-related risks.
- The scenario, entitled – 'too little, too late' - is described as 'somewhat unique' in that it 'combines the impacts' from two Network for Greening the Financial System scenarios (Current Policies and Delayed Transition). The scenario was developed in collaboration with participating banks, with input from other regulators (eg APRA), as well as from industry, academia and government.
- Participating banks are due to submit their final results to the RBNZ by the end of the end of 2023.
- The RBNZ envisages releasing the results of the exercise (in aggregate form) in 'early 2024'.
- The RBNZ submits that the scenario may have broader application for other financial institutions suggesting that 'non-participating banks and other financial institutions may find the scenario helpful as they consider and develop their own responses to climate risks'.

> [Source: RBNZ media release 10/08/2023]

Vote no | CalSTRS pledges to continue to vote against boards on climate grounds

- The California State Teachers' Retirement System (CalSTRS) voted against the boards of 2035 companies globally, on climate grounds (ie concerns about their climate risk disclosure) during the 2023 US proxy season.
- This voting action is in line with CalSTRS' broader goal of achieving a net zero investment portfolio by 2050 or sooner.
- Voting against directors is considered to be an effective means of communicating the seriousness of its concerns. CalSTRS states:

  > 'The risk of climate change broadly impacts CalSTRS' investment portfolio, which is why CalSTRS voted against the boards of directors of many industries this year, including steel producers, transportation companies, and metal and mining companies. CalSTRS exercises this important shareholder right because companies consider votes against their directors as a serious action'.

- CalSTRS reiterates that its minimum expectations of portfolio companies is that they:
  - Report their direct and indirect greenhouse gas (GHG) emissions (Scope 1 and 2 emissions)
  - Report in line with the Taskforce on climate-related Financial Disclosures (TCFD) framework.
  - Have a 'credible plan' for cutting their emissions

- Commenting briefly on the release of the International Sustainability Standards Board's (ISSB) first two global sustainability standards and the Securities and Exchange Commission's (SEC) proposed climate disclosure rule, CalPERS expressed support for the move toward internationally harmonised disclosures, noting that presently the process of assessing whether a company is 'properly disclosing its risks and opportunities associated with climate change' is made more complicated by the absence of globally mandated rules.

  [Source: CalSTRS media release 10/08/2023]

Vanguard releases snapshot of key Q2 2023 voting decisions

Vanguard's latest quarterly vote report covering the period 1 April 2023 – 30 June 2023 includes a non-exhaustive 'representative sample' of the proposals evaluated and voted on during the period. Vanguard explains that the proposals included in the list are intended to:

> 'convey our perspective on an important governance topic or a shareholder proposal submitted by other investors, or they demonstrate our concern—or lack thereof—regarding some aspects of a company's governance practices.'

Climate-related proposals – Vanguard supported four of the five proposals flagged in the update

The list includes over 100 proposals, just five of which are climate-related.

The table below provides a snapshot of Vanguard's vote rationale and the vote result in each case.

The extent to which the proposal was considered to address a material risk to the company, the extent to which the company was already acting on the risk identified and the level of 'prescription' in the proposal were the determining factors in Vanguard's voting decision in each case.

COMPANY	CLIMATE-RELATED SHAREHOLDER PROPOSAL	VOTE RESULT	HOW VANGUARD VOTED	RATIONALE
BP Plc	**Scope 3 proposal:** Proposal 25 in the Notice called on BP to align its 2030 Scope 3 emissions reduction targets with the goals of the Paris Agreement.	Not carried: 16.75% support	AGAINST the proposal	Vanguard voted against because it: 'Determined the proposal addressed material risk(s) and company had taken sufficient actions and/or had related actions pending to address the proponent request'.
New York Community Bankcorp Inc	**Climate lobbying:** Proposal 9 in the Notice called on the company to assess and report on the extent to which the company's climate-lobbying activities align with the goals of the Paris Agreement.	The proposal was carried	FOR the remaining proposals	Vanguard voted in support of all four other climate proposals listed in its update, giving the same rationale in each case. 'Determined the proposal addressed material risk(s), a gap in oversight or disclosure, and supported long-term investment returns. Proposal not determined to be overly prescriptive'. ▪ d
Coterra Energy Group	**Methane emissions proposal:** Proposal 6 in the Notice called on the company to shareholders request that Coterra report publicly on 'the reliability of its methane emission disclosures' including: a) the outcome of any Coterra efforts to directly measure methane emissions, using recognised frameworks such as OGMP; b) whether is likely to be a material difference between direct measurement results and Company's	The proposal was carried.		

COMPANY	CLIMATE-RELATED SHAREHOLDER PROPOSAL	VOTE RESULT	HOW VANGUARD VOTED	RATIONALE
	reported methane emissions; and c) assessing the degree wot which any differences would alter estimates of the Company's Scope 1 emissions.			
Berkshire Hathaway	Report on climate related-risks: Proposal 4 in the Notice called on the company to report on physical and transition climate-related risks/opportunities. [Note: The proposal was 'flagged' by Climate Action 100+ ahead of the vote. For clarity, Vanguard is not a member of the Climate Action 100+ initiative]	Not carried: Approx 27% support		
	Report on governance of climate-risk: Proposal 5 in the Notice called on the company to report on the audit committee's oversight of climate-related risks and disclosures. [Note: The proposal was 'flagged' by Climate Action 100+ ahead of the vote. For clarity, Vanguard is not a member of the Climate Action 100+ initiative]	Not carried: Approx 18% support		

[Source: Vanguard Quarterly Key Votes Report (April 1, 2023-June 30, 2023) August 2023]

Improving the accessibility of quality nature-related data: TNFD concludes that 'baseline nature-related data should be accessible [via a global, publicly available data facility] to a broad range of stakeholders and not kept behind paywalls or in proprietary systems'

The Taskforce on Nature-related Financial Disclosures (TNFD) (together with a number of partner organisations) have released a 'scoping study' looking at whether there is a need for, and the benefits of, establishing a global, publicly available repository of quality, up to date, nature-related data to facilitate identification, effective management and disclosure of nature-related risks/opportunities.

The headline finding of the study is that there is a need for such a data facility as presently, though there are a number of nature-related metrics and data already in existence and in use, various 'challenges' remain. For example, there is presently a lack of standardisation of methods/definitions. When it comes to 'state of nature' data, information is 'often inconsistent and out of date and hard for many interested data users to access'.

Accordingly, the scoping study concludes that

> 'Wherever possible, baseline nature-related data should be accessible to a broad range of stakeholders and not kept behind paywalls or in proprietary systems'.

Instead, it's proposed that a central, publicly available data repository be established.

The organisations behind the scoping study will move forward with developing a 'blueprint' for how this might work/what this might look like. This is planned to include stakeholder consultation on a range of issues including: a) a) the preferred governance model; b) the preferred funding and operating model; and c) views on how 'synergies with related climate data initiatives such as the Net Zero Public Data Utility (NZDPU) and others' can best be leveraged.

[Source: TNFD media release 11/08/2023]

Financial Services

Top Story | Creating a Separate Financial Services Law

MinterEllison has submitted a response to the Australian Law Reform Commission's third interim report - Interim Report C.

For context, Interim Report C focusses on restructuring and reframing Chapter 7 of the Corporations Act 2001 (Cth) to facilitate better user understanding and navigation of the law.

MinterEllison broadly supports the ALRC's proposals, particularly the proposal to make the financial services regime a schedule to the Corporations Act if separate legislation is not possible. However, MinterEllison considers that the new regime should be principles-based and able to stand-alone separate from other parts of the Corporations Act.

You can access the full submission on our website here: Creating a separate financial services law - Technical update - MinterEllison

Top Story: Targeting predatory lending | ASIC consults on extending two product intervention orders

ASIC is proposing to extend two product intervention orders imposing conditions on the issuing of short term credit and continuing credit contracts to retail clients.

Key Takeouts

- Currently two product intervention orders - a short term credit product intervention order and a continuing credit contracts product intervention order – are in place targeting certain 'predatory' lending practices.
- These product intervention orders came into effect on 15 July 2022 and are set to expire on 15 January 2024.
- ASIC proposes to extend both orders so that they remain in force until they are revoked or sunset on 1 October 2032 (though this proposal is subject to Ministerial approval).
- The due date for submissions to the consultation is 5pm on 31 August 2023.

Which product intervention orders are proposed to be extended?

On 13 July 2022, ASIC made two product intervention orders:

- ASIC Corporations (Product Intervention Order—Short Term Credit) Instrument 2022/647 (2022 short term credit order); and
- ASIC Corporations (Product Intervention Order—Continuing Credit Contracts) Instrument 2022/648 (2022 continuing credit contracts order).

The orders target two lending models deployed previously by Cigno Australia Pty Ltd (Cigno Australia) and its associates.

Broadly, the two orders prohibit the provision of short term credit and continuing credit contracts that involve charging retail clients unreasonably high fees, in excess of the cost caps in the relevant exemptions in subsections 6(1) and 6(5) of the National Credit Code (Code).

For a detailed overview of the two existing product intervention orders see: Targeting predatory lending: Two new product intervention orders now in force - Post - MinterEllison

Proposed length of extension

Subject to the outcome of the consultation, and subject to obtaining Ministerial approval, ASIC proposes to extend both product intervention orders until they are revoked or they sunset on 1 October 2032.

Rationale for the proposed extension

ASIC considers that the proposed extension is warranted because it:

- considers that the orders are operating effectively in reducing the risk of 'significant detriment to retail clients caused by both the short term credit and continuing credit contracts markets'.
- has observed no unintended or negative consequences of the orders on either the market or on retail clients
- considers that there is a risk that if not extended, entities may resume or start issuing short term credit facilities or continuing credit contracts of the type targeted by the existing product intervention orders.

ASIC also submits that extending the orders until 1 October 2032 (or until they are revoked) is preferable to extending them for a shorter period because a shorter extension necessitate further consultation(s) to consider whether the orders should be extended (incurring unnecessary costs to ASIC and stakeholders).

Timing

As flagged, the due date for submissions is 5pm on 31 August 2023.

ASIC will need written Ministerial approval if it determines that the orders should be extended. ASIC envisages applying the Minister for approval in October.

A strategic priority for ASIC

'Protecting financial vulnerable consumers impacted by predatory lending practices or high cost credit' is one of ASIC's enforcement priorities for 2023.

Announcing the consultation, ASIC underlined its intention to continue to 'monitor the short term credit and continuing credit contracts markets and will take regulatory action as appropriate'.

Limits on ASIC's power – CHECKING THIS!

Though the proposed extension in this case is likely to be uncontroversial, the length of the proposed extension raises some interesting questions including:

- the length of time it is appropriate for an order to be in place before further consultation is required
- at what point the controls imposed by the regulator should become permanent. Should it become a matter for parliament after an order has been in place for a certain period?

[Sources: ASIC media release 10/08/2023; ASIC Consultation Paper 371 Product Intervention Orders: Short Term credit facilities and continuing credit contracts August 2023]

ASIC REP 768 | ASIC claims handling review identifies five areas where the regulator considers 'insurers can and should make immediate claims handling improvements'

Snapshot | ASIC Report 768 Navigating the storm: ASIC's review of home insurance claims (REP 768)

Key Takeouts

- REP 768 identifies the following as the five key areas where ASIC considers insurers can improve their handling of home insurance claims:
  - 'better communication with consumers about decisions, delays and complications,
  - better project management and oversight of third parties,
  - better recognition and management of expressions of dissatisfaction and complaints,
  - better identification and treatment of vulnerable consumers, and
  - better resourcing of claims handling and dispute resolution functions'.
- ASIC has issued a call to insurers to 'further analyse the resourcing of claims handling and immediately address under-resourcing of their complaints handling (dispute resolution) functions'.
- Looking ahead, ASIC plans to conduct further work in 2023/24 on both:
  - potential unfair contract terms relating to maintenance and 'wear and tear' issues, and
  - reviewing the performance of insurers dispute resolution functions.

The Australian Securities and Investments Commission (ASIC) has released a report (REP 768) summarising the findings of its review into the handling of home insurance claims by six insurers - which together cover 63% of the

Australian home insurance market – since 1 January 2022. For context this is the date at which claims handling and settling services became a regulated financial service under s912A of the Corporations Act 2001 (Cth).

The purpose of the review was to assess insurers' compliance with their obligations – including their obligation to provide claims handling services 'efficiently, honestly and fairly' - and to better understand consumer experience in home insurance claims.

Five key improvement areas

The headline message in REP 769 is that ASIC considers there is scope for all insurers to improve - that is, scope for insurers to ensure that claims are 'handled well'.

The report identifies five key areas (summarised in Table 1 at p9 of the report) where the regulator would like to see insurers' focus their efforts.

Briefly, these are as follows.

- **'Better communications to consumers about decisions, delays and complications'**: The report flags poor communication as a key contributor to negative customer experience (and conversely, clear and effective communication as a key factor in positive customer experience).

  ASIC's expectation is that insurers are:

  > 'clear, proactive and transparent in communications to prevent or overcome confusion of consumers. Insurers should proactively inform consumers of their claim progress and decisions, outlining any further steps in the claims process'.

  Communication around exclusions, and in particular the 'wear and tear' exclusion, is also highlighted in the report as an area where ASIC would like to see improvement (and an area of ongoing monitoring for the regulator). On this point ASIC comments that:

  > 'Insurers should do more to explain wear and tear and maintenance exclusions to consumers at policy inception and renewal, in addition to a claim event…Insurers should clearly set out their expectations for consumers in terms of property maintenance. They should consider the nature of the claim and the consumer's personal circumstances (including vulnerability): see Table 4 of INFO 253.
  >
  > Insurers need to be careful to ensure that terms do not impose overly broad and open-ended obligations that amount to unfair contract terms: see Table 4 of INFO 253 and s12BF of the Australian Securities and Investments Commission Act 2001. ASIC will monitor this issue. If a claim is partially or fully declined, insurers need to provide clear reasons supported by adequate evidence in writing, with details of their IDR process and the contact details for AFCA. These reasons must clearly explain what parts of the claim have been denied, what evidence has been relied upon and how it relates to specific terms under the policy. It is unfair practice for example, to assert that claimed damage was due to 'wear and tear' or 'lack of maintenance' without explanation: see Table 4 of INFO 253 and paras 81–82 of the Code'.

- **'Better project management and oversight of third parties'** is also identified as a key issue, particularly in the context of building claims. ASIC raises concerns that in some instances, these responsibilities have been 'outsourced' to customers. ASIC also identifies subpar communication as a compounding factor in this context.

  ASIC's expectation is that insurers:

  > 'maintain adequate oversight of insurer-appointed third parties and manage the claims process for consumers. This extends to notifying consumers about the purpose, order and timing of assessors and trades attending their home'.

- **'Better handling of complaints and expressions of dissatisfaction'**: ASIC found instances where insurers 'did not always recognise an expression of dissatisfaction as a complaint'. In illustration, ASIC points to a situation in which consumer who was temporarily housed in an evacuation centre while 'make safe' repairs were made to their home, returned to find that their home had been 'mostly demolished', causing them 'great distress'. Despite this, there was no record of any complaint being lodged in recognition of the consumers' 'extreme dissatisfaction'.

  ASIC also observed that communication around adverse decisions did not always include details of the insurers' internal dispute resolution (IDR) process and the contact details for AFCA.

  ASIC's expectation is that insurers:

> ‘adequately identify and respond to expressions of dissatisfaction and comply with their obligations for resourcing and resolving complaints. Insurers must ensure that staff are trained to detect and adequately respond to expressions of dissatisfaction at the earliest opportunity’.

- **‘Better identification and treatment of vulnerable consumers’**: Though all insurers were found to have designated teams to manage claims of greater complexity or vulnerability, the report raises concerns that vulnerable customers are not always identified and that when they are identified, they are not always treated accordingly.

  ASIC’s expectation is that insurers:

  > ‘tailor their services to consumers who are experiencing vulnerability, by first identifying the vulnerability and then treating consumers accordingly. This includes ensuring that insurer representatives are appropriately trained to identify if a consumer is experiencing vulnerability, and not relying on consumers to self-identify this. While insurers are not responsible for resolving vulnerabilities, if they fail to tailor their claims handling, they may not provide a fair service: see Table 4 of INFO 253 and Pts 9–10 of the Code’.

  ASIC also considers that insurers ‘may need to enhance’ systems/processes to enable default flagging of vulnerability eg for elderly consumers, those living in remote or disaster-affected areas.

- **‘Better resourcing of claims handling and dispute resolution functions’**: The report makes clear ASIC’s expectation that insurers are ‘prepared to better manage surges of severe weather event claims without sacrificing service levels’.

  ASIC requests that

  > ‘insurers further analyse the resourcing of claims handling [including giving consideration to ‘permanently enhancing their claims handling capacity and responsiveness] as soon as practicable and immediately address under-resourcing of dispute resolution’.

Next steps

- As flagged, ASIC has issued a call to insurers to ‘further analyse the resourcing of claims handling and immediately address under-resourcing of their complaints handling (dispute resolution) functions’.
- ASIC plans to conduct further work in 2023/24 on both:
  – potential unfair contract terms relating to maintenance and ‘wear and tear’ issues, and
  – reviewing the performance of insurers dispute resolution functions.
- ASIC states has said it intends to continue to monitor claims handling practices and flags that it has ‘commenced several investigations related to insurance claims handling practices’.

[Sources: ASIC media release 16/08/2023; ASIC Report 768 Navigating the storm: ASIC’s review of home insurance claims (REP 768)]

APRA has released updated policy priorities for the banking sector

In light of ‘overseas banking stress events earlier this year’, the Australian Prudential Regulation Authority (APRA) has reprioritised its policy initiatives to ‘prioritise some immediate actions to strengthen standards for bank financial stability issues’ and ‘slow down timelines on less pressing policy reforms’.

Key ADI policy priorities for the remainder of 2023

APRA lists the following ‘key’ policy priorities for 2023

STANDARD/REQUIREMENTS	PLANNED ACTION AND PLANNED EFFECTIVE DATE
APS 210 Liquidity (APS 210)	▪ APRA will prioritise consulting on ‘targeted changes’ to APS 210 ‘focused on the treatment of liquid assets for ADIs on the minimum liquidity holdings approach’. ▪ The planned ‘comprehensive review’ of APS 210 will be delayed until 2024. ▪ Expected effective date: ‘2024/2026’
APS 117 Capital Adequacy: Interest Rate Risk in the Banking Book (APS 117) and APG 117	▪ APRA will extend the scope of the review of APS 117 to consider the treatment of non-significant financial institutions (smaller ADIs)

STANDARD/REQUIREMENTS	PLANNED ACTION AND PLANNED EFFECTIVE DATE
	▪ Revised APS 117 is planned to be released in 'late 2023'. APRA flags that the commencement date will be pushed back to allow ADIs 'sufficient' time to implement the changes ▪ Expected effective date: 2025
Additional Tier 1 (AT1) APS 111	▪ APRA will issue a Discussion Paper seeking stakeholder feedback on how the effectiveness of AT1 capital in Australia could be improved, ahead of 'potential consultation' in 2024 ▪ Expected effective date: none given
Capital Framework updates APS/G 112 and APS/G 113	▪ APRA will consult on minor updates to the bank capital framework in relation to these issues in response to the industry feedback around implementation of capital reforms earlier in 2023. ▪ Expected effective date: 2024

You can find the full list of APRA's immediate policy priorities for the banking sector in Annex A in APRA's letter.

[Source: APRA letter to ADIs 10/08/2023]

Independent Review of the Franchising Code of Conduct announced, Terms of Reference Released

The Franchising Code of Conduct is due to sunset on 1 April 2025. Ahead of this, the government has announced a review of the Code, to be led by Dr Michael Schaper.

Terms of Reference

Under the Terms of Reference, the Review will consider (among other matters):

- Whether the Code generally remains fit for purpose
- The role of the Australian Competition and Consumer Commission (ACCC) and the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) in 'supporting enforcement and dispute resolution under the franchising regulatory framework'.
- The role of the Code in regulating the automotive sector (including the effectiveness of various 2020/2021 reforms)
- The impact of 2022 reforms which increased certain penalties available under the Franchising Code to: the greater of $10,000,000 or three times the benefit obtained; or 10% of annual turnover.
- Provisions in the Franchising Code related to the Franchise Disclosure Register.

Announcing the consultation, Minister for Small Business Julie Collins said the review will evaluate previous reforms and

> 'bring a number of smaller reviews under one umbrella including statutory reviews of the Franchise Disclosure Register and New Car Dealership protections in the Code'.

The review process will be informed by consultation. A consultation paper is expected to be released 'in due course'.

Timing

A report is due to be provided to the Minister for Small Business, Julie Collins by the end of December 2023.

[Sources: Treasury Consultation: Franchising Review 15 August 2023 – December 2023]

Risk Management

Top Story | Key insights: 2023 Australian Community Attitudes to Privacy Survey Report

MinterEllison has released an expert overview of the key findings from the Office of the Australian Information Commissioner (OAIC)'s 2023 Australian Community Attitudes to Privacy Survey Report. You can find the full text here: https://www.minterellison.com/articles/2023-australian-community-attitudes-to-privacy-survey-report

Top Story | Meta subsidiaries fined $20m for misleading representations on data collection practices

The Federal Court has fined Meta's subsidiaries $20 million for misleading representations around the handling of 270,000 Australian users' data.

MinterEllison has released an article breaking down the key points in the case and the implications. You can find the full text here: Meta subsidiaries fined $20m for misleading representations on data collection practices - Insight - MinterEllison

Top Story | Respect@Work: Positive duty guidance launched

From **12 December 2023**, the Australian Human Rights Commission will have powers to enforce compliance with the positive duty under the Sex Discrimination Act 1984 (Cth) for employers to take reasonable and proportionate measures to eliminate, as far as possible, sexual harassment, sex-based harassment, sex discrimination, conduct creating a workplace environment that is hostile on the ground of sex, and related acts of victimisation.

For more on the positive duty see: An emerging Australian system to prevent sexual harassment and hostile workplaces - Insight - MinterEllison

The Australian Human Rights Commission has just released practical guidance for organisations on how to comply with the positive duty under the Sex Discrimination Act 1984 (Cth) setting out the practical actions the Commission expects organisations to take in order to comply with the positive duty, by setting seven clear standards applicable to all organisations. For more see: Respect@Work: Positive duty guidance launched - Technical update - MinterEllison

Acting on the 'Set the Standard' report recommendations: Parliamentary Workplace Support Service Bill introduced

The Parliamentary Workplace Support Service Bill 2023 (Cth) (Bill) was introduced into the House of Representatives on 10 August 2023.

If legislated, the Bill would establish the Parliamentary Workplace Support Service (the PWSS) as an independent statutory agency 'to provide human resources services for parliamentarians and persons employed under the Members of Parliament (Staff) Act 1984 (MOPS employees) and other services to support positive cultural change across Commonwealth parliamentary workplaces'.

This would implement the government's response to several recommendations of the Australian Human Rights Commission's Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces (the Set the Standard Report).

Announcing this, Minister for Finance and Women Katy Gallagher said that the Bill 'marks a significant milestone in the cross-party effort to lift the standards and improve the culture' in parliament house. Senator Gallagher also reiterated the government's commitment to implement all 28 recommendations in the Set the Standard Report.

[Sources: Parliamentary Workplace Support Service Bill 2023; Minister for Finance Katy Gallagher media release 10/08/2023]

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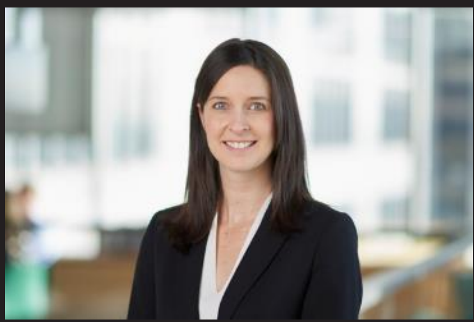

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