Governance News

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

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Contents

Diversity

Affirmative action unlawful? Fortune 100 companies urged to abandon 'illegal' racial quotas following US Supreme Court decision

The Attorneys General of 13 US states, led by Tennessee Attorney General Jonathan Skrmetti and Kansas Attorney General Kris Kobach, have written to the CEOs of Fortune 100 companies urging them to immediately abandon their use of 'illegal' race-based quotas and other 'race based preferences in employment and contracting practices' or face potential legal consequences,

The letter follows the US Supreme Court decision in Students for Fair Admissions v, President & Fellows of Harvard College, No, 20-1199 (US June 29, 2023) which struck down Harvard and the University of North Carolina's affirmative action admissions policies.

The letter underlines that (in the view of the Attorney's General) the court's reasoning in the case applies equally to companies' employment/contracting practices, The letter states:

> 'the Supreme Court's recent decision should place every employer and contractor on notice of the illegality of racial quotas and race-based preferences in employment and contracting practices. As Attorneys General, it is incumbent upon us to remind all entities operating within our respective jurisdictions of the binding nature of American anti-discrimination laws. If your company previously resorted to racial preferences or naked quotas to offset its bigotry, that discriminatory path is now definitively closed. Your company must overcome its underlying bias and treat all employees, all applicants, and all contractors equally, without regard for race'.

Importantly, the letter also emphasises that 'the supposedly benign nature of racial preferences cannot save them'.

The letter concludes with the warning:

> 'We urge you to immediately cease any unlawful race-based quotas or preferences your company has adopted for its employment and contracting practices, If you choose not to do so, know that you will be held accountable - sooner rather than later - for your decision to continue treating people differently because of the colour of their skin'

> [Sources: Tennessee Attorney General Skrmetti media release 13/07/2023; Full text letter]

In Brief | A report tracking trends in the representation of women and underrepresented racial and ethnic groups on Fortune 500 boards highlights that while overall progress towards increased representation continues to be made, progress towards increasing representation of racially/ethnically diverse women is lagging with women in this group holding just 7.8% of board seats

> [Note: A number of reports flag a similar issue in Australia, For example: a standout finding from the 2023 Board Diversity Index (from the Governance Institute and Watermark) is the lack of progress on this issue – the report found that 90% of board members are from an Anglo-Celtic background (consistent with the 2021 and 2022 reports), For more see: Still 'too male, too pale and too stale': Report finds ASX 300 boards are still lagging on diversity - POST - MinterEllison, Separately, in acknowledgement of the issue, Chief Executive Women (CEW) has released a report - Unlocking Leadership: Conversations on Gender and Race in Corporate Australia – highlighting the lack of progress towards increasing representation of culturally and racially diverse women in senior leadership roles and putting forward some practical actions to start to 'unlock the potential of culturally diverse women leaders', For more see: Governance News 26 July 2023 at p3]

> [Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 28/07/2023]

Disclosure and Reporting

Time to mandate digital corporate reporting in Australia?

In a new report, Deloitte calls on the government to mandate digital corporate reporting as part of a broader shift towards modernising and ultimately improving the quality and accessibility of corporate disclosures, including sustainability disclosures.

Broadly, Deloitte argues that this is warranted because:

> 'mandatory digital reporting would bring Australia in line with the world's advanced economies, cut red tape, improve efficiency and reduce errors and duplications'

In addition, Deloitte considers mandating digital reporting is necessary because a voluntary approach has not been effective - despite having had the option to do so since 2010, companies have not elected to (voluntarily) lodge financial reports with ASIC in digital form.

It's also submitted that the introduction of new (internationally aligned) sustainability reporting standards should be designed to be 'digital-ready' as part of the transition to moving to full (mandatory) digital reporting.

> [Note: The government recently concluded a second round of consultation on its proposed approach to the introduction of mandatory climate-reporting standards. For more about what is being proposed see: Introduction of mandatory climate reporting in Australia: Second round of consultation launched - Technical update - MinterEllison]

Treasurer flags the government is open to 'further discussions'

Announcing the release of the report, Treasurer Jim Chalmers praised it 'another example of the kind of input that we'll need to keep us moving in the right direction', but did not commit to (or rule out) implementing mandatory digital reporting.

Mr Chalmers did indicate that the government is interested in how reporting, and in particular climate reporting, could be made more accessible through technology. The Treasurer indicated that the government's upcoming consultation on its draft sustainable finance strategy is planned to include seeking feedback from regulators on 'how we can improve access to climate data through electronic reporting platforms'.

On this point, Mr Chalmers said:

> 'This might mean working through ASIC's existing voluntary reporting process –
>
> It might mean seeing what we can do within the scope of other reporting systems –
>
> But what it definitely means, is that we're up for having further discussions on where the real opportunities lie at the intersection between sustainable finance, climate disclosure and digital'.
>
> [Source: Treasurer Jim Chalmers speech, Launch of Deloitte Access Economics report on mandatory disclosure and digital reporting, 25/07/2023]

UK regulator welcomes proposed strengthened corporate reporting requirements, flags plans to issue guidance

The UK government has released draft regulations that would introduce additional corporate reporting requirements for large companies (ie companies with at least 750 employees and an annual turnover of £750 million or more) into the Companies Act 2006 (UK).

Broadly, the new requirements would require in-scope companies to:

- 'explain how they are managing significant risks, and building or maintaining resilience
- demonstrate that they have enough realised profits to pay any dividend (or make any other distribution of profit), and explain the company's approach to making dividends and other profit distributions over the short and medium term
- describe the actions taken by the directors to prevent or detect major fraud
- explain how the company assures the quality and reliability of its corporate reporting',

The new measures are intended to 'respond to lessons learned from major and sudden corporate collapses in recent years, including that of Carillion' and 'form part of the government's wider audit and corporate governance reform plans'.

If approved by Parliament, the regulations would come into force, on 1 January 2025.

In a statement welcoming the draft regulations, Financial Reporting Council (FRC) Executive Director of Regulatory Standards Mark Babington said that it underlines the government's commitment to 'audit and corporate governance reform'.

The FRC has flagged it will develop guidance to support compliance with the new requirements. The new guidance (which will be subject to consultation) is planned to be released before the new requirements take effect.

> [Source: FRC media release 20/07/2023; UK Department for Business and Trade media release 19/07/2023]

Remuneration

Top Story | APRA finalises remuneration disclosure requirements for all APRA-regulated entities

Key Takeouts

- Under a newly updated cross-industry standard – CPS 511 Remuneration – all APRA regulated entities will be required to publicly disclose (eg on its website) more detailed information about:
  - how remuneration is aligned with performance and risk
  - more detailed information about how consequence management is applied
  - how non-financial measures have been incorporated in remuneration outcomes (for variable remuneration).
- Consistent with the consultation draft, APRA has adopted a 'proportionate' approach with SFIs required to disclose more detailed quantitative information and non-SFIs required to provide more limited data (though APRA may require non-SFIs to comply with SFI-reporting requirements).
- Timing: In a departure from the consultation draft, the new requirements will take effect for all APRA-regulated entities from 1 January 2024 and apply to an entity's first financial year on or after this date. For example, for entity's with a 31 December year end date, the first disclosure under updated CPS 511 will be due by 30 June 2025 (six months after their year-end date) – and for those with a 30 June year end date, the first disclosure will be due by 31 December 2025.
- Separately, APRA has flagged plans to publish the findings from an implementation review of CPS 511 to assist industry with implementing the new requirements 'shortly'.

Overview

Following consultation, the Australian Prudential Regulation Authority (APRA) has released an updated version of CPS 511 Remuneration incorporating new disclosure requirements for all APRA-regulated entities.

Broadly, the changes require APRA-regulated entities to disclose more detailed information about how:

- remuneration is aligned with performance and risk and 'how remuneration is decided, beyond purely financial performance'
- consequence management is applied
- non-financial measures have been incorporated in remuneration outcomes (for variable remuneration).

APRA states that the disclosure requirements are intended to:

> 'promote transparency, ensure boards are accountable for their remuneration decisions and demonstrate how practices have been strengthened under CPS 511'.

Our high level summary of the key changes is below.

New disclosure requirements under CPS 511

Proportionate approach

APRA proposed to adopt a 'proportionate' approach to remuneration disclosure, with Significant Financial Institutions (SFIs) subject to 'enhanced requirements' to reflect their size/complexity as well as their status as SFIs and other institutions subject to simpler requirements. This approach has been retained in the final CPS 511.

Proposed new disclosure requirements for SFIs

SFIs will need to publicly disclose, on an annual basis, details of the their remuneration framework. For example,

- SFIs will need to provide (in line with the requirements set out in Table 1 in the standard) an explanation of how their remuneration framework:

  > '(i) aligns to the APRA-regulated entity's business plan, strategic objectives and risk management framework;

(ii) promotes effective management of both financial and non-financial risks, sustainable performance and long-term soundness;

(iii) supports the prevention and mitigation of conduct risk; and

(iv) for an RSE licensee, promotes the RSE licensee performing its duties and exercising powers in the best financial interests of beneficiaries'.

- A description of their remuneration governance arrangements including (among other requirements) how the board exercises its discretion in determining remuneration outcomes and disclosure of whether external consultants were commissioned to advise on the remuneration framework and 'what areas' of the remuneration framework they advised on.
- Details of the design of variable remuneration for specified roles
- Details of its deferral and vesting policy
- Details of how consequence management is applied in the event of misconduct, a description of the adjustment tools available and how remuneration and risk outcomes are aligned

In addition, SFIs will be required to disclose (in line with the requirements in Tables 2 and 3 in the standard) quantitative information on remuneration outcomes, including: fixed and variable remuneration outcomes, special payments (eg guaranteed bonuses), and deferral and adjustments relating to the financial year for the following roles:

- the CEO (on an individual level)
- senior managers, highly paid material risk takers (HPMRTs) and other material risk takers (MRTs) at a cohort level (unless there are fewer than five individuals in the cohort – consistent with the approach in the consultation draft).

In a departure from the consultation draft, quantitative disclosure requirements for risk and financial control personnel (RFCP) have been dropped from the final CPS 511.

New disclosure requirements for non-SFIs

In contrast, non-SFIs will be required to disclose what APRA describes as 'summary information' on remuneration design, governance and information about key aspects of variable remuneration (where this is offered).

Unlike SFIs, non-SFIs will not be required to disclose quantitative information on remuneration outcomes under CPS 511.

Having said this, APRA may determine, on a case by case basis, that a non-SFI is required to comply with the same disclosure requirements as SFIs.

Response to industry feedback

Not 'excessive' or duplicative

APRA observes that a number of submissions raised concerns that the proposed new disclosure requirements 'duplicate other existing disclosure requirements [in both the Corporations Act 2001 (Cth) (Corporations Act) and the Superannuation Industry (Supervision) Act 1993 (Cth) (SIS Act)] and appear excessive'.

In its response paper, APRA rejects these concerns maintaining that the new requirements intentionally 'build on existing disclosure requirements…rather than duplicate them'.

APRA considers this is warranted in the interests of enhancing transparency around remuneration governance arrangements and remuneration design and in the interests of 'shining a light' on 'how executives are incentivised and on the consequences for poorly managed risk'.

Moreover, APRA considers that the new requirements

> 'align to those of the Basel Committee for Banking Supervision as well as having regard to the disclosure principles of the Financial Stability Board. In particular, the requirements will apply to a broader range of entities than those covered by existing legislation and add important transparency on remuneration design to explain how risk has influenced remuneration outcomes. This will indicate how entities are complying with CPS 511'.

Consolidating remuneration requirements into CPS 511

On the issue of duplication, APRA also reiterates that it intends that all remuneration requirements applying to all APRA-regulated entities will eventually be 'housed' in CPS 511.

On this point, APRA notes that in addition to having revoked the remuneration components in Prudential Standard CPS 510 Governance (CPS 510) and Prudential Standard SPS 510 Governance (SPS 510), it intends to:

- phase out Attachment G to Prudential Standard APS 330 Public Disclosure (APS 330) from 1 January 2024; and
- 'retire' Prudential Practice Guide PPG 511 Remuneration and Prudential Practice Guide SPG 511 Remuneration, which have been superseded by Prudential Practice Guide CPG 511 Remuneration, released in October 2021.

Application of CPS 511 disclosure requirements to groups

APRA notes that submissions sought clarification on how the disclosure requirements would apply to groups, including where a group comprises both SFIs and non-SFIs. In addition, APRA notes that submission suggested that disclosure should be permitted at group level only, rather than requiring disclosure for each individual entity within a group and at a group level.

The response paper clarifies that:

- 'APRA-regulated entities that are not part of a group will be required to disclose on a regulated entity basis; and
- where an APRA-regulated entity is part of a Level 2 or Level 3 group, the required disclosure would be at the group level only. The disclosure would include those persons who are in specified roles at the group level.'

Timing: When the changes will apply

The proposed changes to CPS 511 were originally due to commence on a staggered basis starting with SFI ADIs from January 2023. In response to industry feedback, APRA has pushed back commencement of the changes to 1 January 2024 for all APRA-regulated entities.

APRA has also agreed to provide additional flexibility around the timing of disclosures with annual disclosures required within six months of an entity's financial year-end.

This means that the first disclosure will be required to be made six months after the end of an entity's first full financial year commencing on or after 1 January 2024.

Proposed new data collection: draft CRS 511.0

APRA also consulted in July 2022 on a proposal to collect qualitative and quantitative information on entities' remuneration governance and variable remuneration design and outcomes to support its supervisory activity and enable publication of data on remuneration practices. Table 3 at p16 of the July 2022 discussion paper provides a summary of the proposed APRA reporting requirements. APRA also released draft standard and reporting template for entities to report information to APRA as part of APRA's collection of information.

In terms of APRA's plans to publish the data, APRA proposed to

> 'utilise data drawn from the proposed CRS 511.0 reporting standard and provide aggregated information about specified roles on an entity level across all APRA-regulated industries'.

Tables 4 and 5 at pages 18-19 of the discussion paper set out the data that APRA proposed to publish to facilitate benchmarking across regulated entities.

APRA has indicated it is still in the process of considering feedback on draft CRS 511.0 and has delayed its response to submissions on CRS 511.0 'to ensure it adequately addresses the issues raised by industry and, in particular, those concerns raised regarding privacy'. The planned commencement of CRS 511.0 will be delayed in consequence.

APRA will also consult on its planned publication of remuneration data 'at a later date'

[Source: APRA media release 01/08/2023; Response paper; Updated Prudential Standard CPS 511 Remuneration]

ESG

Top Story | Navigating greenwashing risks – July 2023 update

MinterEllison's latest greenwashing update outlines key developments that have happened in H1 2023 and highlights what to watch for in FY24.

The update also includes practical tips for reducing greenwashing exposure.

You can access the full text here: Navigating greenwashing risks – July 2023 update - Insight - MinterEllison

Biodiversity as a material financial risk – new guide for directors published

MinterEllison and the Australian Institute of Company Directors, as part of the Climate Governance Initiative, have published a guide for directors explaining the relevance of biodiversity in the exercise of their role as directors, the relevance for organisations and the potential risks posed by biodiversity loss.

The final page of the guide also includes a suggested list of questions to assist directors in their oversight of biodiversity risk.

You can access the full text here: Biodiversity as a Material Financial Risk: What Board Directors Need to Know (aicd,com,au)

Consultation opens on proposed IFRS sustainability disclosure taxonomy

The International Sustainability Standards Board (ISSB) is consulting on a proposed IFRS Sustainability Disclosure Taxonomy.

The purpose of the proposed taxonomy is to 'facilitate digital consumption of sustainability related financial disclosures [ie IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information and IFRS S2 Climate-related Disclosures] from day one' by providing a 'global baseline for tagging sustainability-related disclosures'.

The proposed taxonomy (unlike the EU taxonomy for sustainability activities) is:

> 'not a taxonomy for assessing or categorising the sustainability rating or attributes or an entity or product, or sustainability attributes of particular economic activities'

The consultation is open for comment until 26 September 2023.

> [Sources: IFRS sustainability disclosure taxonomy]

European Commission adopts ESRS

- The European Commission has formally adopted the European Sustainability Reporting Standards (ESRS) for use by all companies subject to the Corporate Sustainability Reporting Directive (CSRD).
- There are 12 ESRS, covering a range of sustainability issues – eg climate, pollution, water and marine resource, biodiversity and ecosystems, workers in the value chain, consumers and end users, affected communities - in line with European Financial Reporting Advisory Group's (EFRAG) proposal.
- Importantly, only two ESRS - ESRS 1 (General Requirements - which do not themselves include disclosure requirements) and ESRS 2 (General Disclosures) are mandatory for all companies under the CSRD scope.
- The other 10 ESRS (and the individual disclosure requirements and datapoints included in them) are subject to a materiality assessment, to be carried out by individual companies. That is, companies are not required to report information if they determine it is not 'material' for their business. On this point, the Commission notes that

  > 'If a company concludes that climate change is not a material topic and therefore does not report in accordance with that standard, it has to provide a detailed explanation of the conclusions of its materiality assessment with regard to climate change, This requirement reflects the fact that climate change has wide-ranging and systemic impacts across the economy'.

- The materiality assessment process is subject to external assurance in accordance with the provisions of the Accounting Directive.

- Reporting under the ESRS is planned to be phased in, starting with the large companies previously subject to the Non-Financial Reporting Directive (NFRD) (large listed companies, large banks and large insurance undertakings with more than 500 employees), as well as large non-EU listed companies with more than 500 employees from FY24.
- EFRAG is expected to publish guidance to support ESRS implementation, The Commission has 'suggested that EFRAG prioritises the development of guidance on materiality assessment and on reporting with regard to value chains', This guidance is expected to be released in draft 'in the near future'.
- According to the Commission, there is a 'very high degree of alignment between ESRS and the two ISSB standards', It is intended that companies required to report under the ESRS that also wish to comply with the ISSB standards would not have to report separately under the ISSB standards.

Concerns remain

While welcoming of the release of the ESRS, the European Sustainable Investment Forum (EUROSIF) and the Institutional Investor Group on Climate Change (IIGCC) separately reiterated their concerns about the move away from requiring mandatory sustainability disclosures (which will now be subject to materiality assessments).

The IIGCC commented:

> 'It will be essential to ensure that appropriate safeguards are put in place to enable investors to access the information they need to finance the transition and meet their own regulatory obligations'.

[Sources: European Commission media release 31/07/2023; Questions and Answers on the Adoption of European Sustainability Reporting Standards 31/07/2023]

SEC Chair flags potential adjustments to long-awaited climate disclosure rule

In his 28 July 2023 address to the Financial Stability Oversight Council: Climate Risk Disclosure hearing, Securities and Exchange Commission (SEC) Chair Gary Gensler sought to provide some 'context' for the SEC's proposed climate disclosure rule.

Mr Gensler underlined that:

> 'The SEC has no role as to climate risk itself, But we do have an important role in helping to ensure that public companies make full, fair, and truthful disclosure about the material risks they face, Already today, issuers are making climate risk disclosures, and investors are making investment decisions based on those disclosures, Indeed, a majority of the top thousand issuers by market cap already make such disclosures, including what's

> known as Scope 1 and Scope 2 greenhouse emissions, Further, investors representing tens of trillions of dollars in assets are making decisions relying on those disclosures, Thus, in fulfilling the Commission's important role, we put out for comment a proposal about climate-related disclosure to bring consistency and comparability to such disclosures'.

On the proposed rule itself, Mr Gensler said that the SEC is still considering the 15,000+ comments received in response to the consultation, Mr Gensler also did not rule out changes to the proposed rule stating:

> 'We greatly benefit from public input and, given the economics and the law, will consider adjustments to the proposed rule that the staff, and ultimately the Commission, think are appropriate in light of those comments'.

[Source: SEC Chair Gary Gensler Remarks before the Financial Stability Oversight Council: Climate Risk Disclosure 28/07/2023]

Climate litigation: Global report finds the number of climate cases has more than doubled since 2017 (and Australia ranks second in the world)

The UN Environment Programme's latest report monitoring global trends in climate litigation - Global Climate Litigation Report: 2023 Status Review – has found that:

- The total number of climate change cases has more than doubled over the 2017 – 2022 period from 884 in 2017 to 2,180 in 2022
- Climate litigation is increasingly a global phenomenon:
  - climate cases have been filed in 65 jurisdictions
  - the majority have been filed in the US (1,522 cases) – but the volume of cases in other jurisdictions is on the rise (and is predicted to continue to increase)
  - interestingly, Australia ranks second behind the US in terms of the number of climate cases filed with 127 cases
- According to the report, most ongoing climate litigation falls into one or more of the following six categories,
  - 'cases relying on human rights enshrined in international law and national constitutions'
  - 'challenges to domestic non-enforcement of climate-related laws and policies'
  - 'litigants seeking to keep fossil fuels in the ground'
  - 'advocates for greater climate disclosures and an end to greenwashing'
  - 'claims addressing corporate liability and responsibility for climate harms'
  - 'claims addressing failures to adapt to the impacts of climate change'
- Looking ahead, the report predicts that:
  - the volume of climate cases will continue to increase
  - there will be an increase in both: a) the number of cases brought by people 'disproportionally affected by climate change' (eg cases dealing climate migration and cases brought by Indigenous peoples); and b) cases addressing liability following extreme weather events

Australia

Separately, a University of Melbourne database tracking climate litigation (including settled cases and court orders) in Australia, New Zealand and the Pacific Islands – using a broader definition of 'climate litigation' than is used in the UNEP report – puts the number of climate-related cases in Australia at an even higher figure - between 2000-22, 371 examples of Australian climate litigation were recorded.

[Sources: Global Climate Litigation Report: 2023 Status Review; UNEP media release 27/07/2023; The Conversation 27/07/2023]

New Bill would impose a 'duty of care' on decision-makers to consider young Australians when making decisions on projects that could significantly increase GHG emissions

ACT Independent Senator David Pocock has flagged plans to introduce a Bill into the Senate - the Climate Change Amendment (Duty of Care and Intergenerational Equity) Bill 2023 (Cth) – which, if legislated, would enshrine a new requirement for decision makers to consider the impact of climate harm on young people and future generations when making decisions that facilitate the financing/development of projects that could significantly increase greenhouse gas emissions (GHG), The new requirement (or duty) would apply to decisions made under the following six existing pieces of legislation:

- Environmental Protection and Biodiversity Conservation Act 1999 (Cth)
- Export Finance and Insurance Corporation Act 1991 (Cth)
- Infrastructure Australia Act 2008 (Cth)
- National Reconstruction Fund Corporation Act 2023 (Cth)
- Northern Australia Infrastructure Facility Act 2016 (Cth)
- Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth),
- It seeks to add two conditions to decisions made including the Environmental Protection and Biodiversity Conservation Act 1999

The Bill is not proposed to operate retrospectively.

Senator Pocock has also announced a 'grassroots community campaign' to build support for the Bill.

Why is this change considered necessary?

Senator Pocock considers that

> 'The bill would plug a dangerous gap in the legislative framework exposed by the case [Sharma and others v Minister for the Environment] which highlighted the need to embed in legislation the principle that governments should care about the health and wellbeing of children…,
>
> Politicians and policy makers should have a duty of care to protect the health and wellbeing of young people and future generations…We need a legislative tool that can be used in government decision making, and this bill will deliver that'.

For context, Sharma and others v Minister for the Environment turned on the questions of whether the Minister for Environment had a duty of care to avoid causing harm to Australian children when deciding whether or not to approve a coal mine expansion; and if so, whether an injunction could be sought to stop the Minister from approving the coal mine expansion. For more see: Sharma and others v, Minister for the Environment - Climate Change Litigation (climatecasechart,com)

[Source: David Pocock media release 31/07/2023]

Human capital disclosure: Ceres urges SEC to prioritise mandating more detailed disclosure requirements for public companies

- Ceres has called on the Securities and Exchange Commission (SEC) to prioritise issuing a new human capital disclosure rule for public companies.
- Ceres considers the issue is urgent because the existing 2020 principles-based rule (which does not require disclosure of 'basic metrics' eg worker safety, employee turnover) has proven to be ineffective in eliciting detailed disclosure in line with investor expectations. The quality of disclosure around workforce diversity and corporate diversity is also raised as a key focus of investor concern.
- Ceres observes that human capital disclosures also 'appear to be important' to the SEC – pointing to the inclusion of human capital disclosure on the SEC's regulatory agenda since 2021 in support
- Touching briefly on the question of whether SEC has authority to make the requested rule in light of the 'Major Questions Doctrine', Ceres submits that it has no application in this case – and should not be a barrier to the SEC issuing a more detailed human capital disclosure rule. In Ceres' view the requested rule:

> 'would not have a broad social or economic impact and its implementation would not cost hundreds of billions of dollars, It would merely require more fulsome disclosure of information that is important to investors – the bread and butter of the SEC's statutory role, A human capital rule would be altogether unremarkable when placed up against the Major Questions Doctrine's precedents and standards',

[Source: Ceres letter to SEC Commissioners: Human Capital Management Rulemaking 19/07/2023]

Biodiversity risk: The UK Institute of Faculty of Actuaries outlines commitments

The UK Institute of Faculty of Actuaries (IFoA) has issued a statement setting out five commitments to support the development of policy frameworks/methods for managing biodiversity and nature-related risks in the financial services sectors in line with the aims of the 2022 Kunming-Montreal Global Diversity Framework (GBF).

Specifically, IFoA states that it will:

- 'advocate for the development of effective policy frameworks worldwide and methods for managing biodiversity risk including by understanding the unintended consequences of the concept of natural capital and different valuation metrics
- use the actuarial skill set and influence to help equip the wider global financial services markets to fully incorporate biodiversity risk
- support actuaries in their understanding of biodiversity risk through a set of think pieces, webinars, education resources and blogs
- advocate for better disclosure of consistent and robust information about biodiversity risk by corporates and other market participants
- support collaborations between its members and other organisations to help develop and align national and global financial systems with a just, sustainable economy that manages biodiversity risk and seeks to enhance the natural environment',

In addition, IFoA has said that it will continue to work with the Sustainable Finance Education Charter, the UN's Principles for Responsible Investment, and the UN's Principles for Sustainable Insurance and other organisations (eg the Taskforce for Nature Related Financial Disclosure (TNFD)), 'to better align the finance system with an understanding of biodiversity risk'.

[Source: IFoA Biodiversity and nature-related risks policy statement July 2023]

Environmental groups say TNFD has failed to respond to their concerns about the proposed reporting framework

On 31 May 2023, ahead of the expected mid-September 2023 release of the final Taskforce on Nature-Related Financial Disclosures (TFND) framework, 370 environmental and human rights organisations wrote an open letter to the TFND raising concerns about the proposed framework including that:

- the development process lacks transparency and gives too much weight to business interests;
- the proposed framework lacks rigour and would not operate to drive necessary changes to company decision-making/behaviour;
- the proposed framework would (it is submitted) enable and legitimise greenwashing,

On 27 July 2023, the organisations released a statement reiterating the concerns raised in the 31 May 2023 letter and expressing their frustration at the lack of any response from the TFND – according to the letter, the TFND has failed to respond to the letter,

The organisations comment:

> 'The simplest way to interpret this non-response is that the TNFD thinks either that these groups are stupid - and these concerns aren't valid, or that they're irrelevant - so can be overlooked so long as business interests are kept on-side, or both'.

[Source: BankTrack media release 27/07/2023]

In Brief | Setting ground rules for 'impact investment': Japan's Financial Services Agency (FSA) is has called for comment on 'Draft Basic Guidelines on Impact Investment'

[Source: FSA media release 31/07/2023]

In Brief | Kraft Heinz has announced a goal to reduce its use of virgin plastic globally by 20% by 2030

[Source: Kraft Heinz Company media release 31/07/2023]

Financial Services

AFCA complaints spike 34% to record highs: Key takwaways from AFCA's latest complaints update

Complaints to the Australian Financial Complaints Authority (AFCA) reached new heights over the past 12 months, jumping 34% on last year to 96,987 complaints.

Top five most complained about issues

Insurance claims handling delays

The top issue in complaints to AFCA in 2022-23 was delay in insurance claim handling with 10,996 complaints received in FY 23 up from 6,259 in FY 22 (or 76%), Looking at this more closely:

- general insurance complaints (excluding life insurance) increased 66% on last year (to 7,953)
- interestingly, AFCA flags that this uptick was not due to an uptick in complaints about claim delays related to natural disasters/catastrophes – only 912 of 7,953 complaints were associated with 'significant' events/natural disasters,

Commenting on this, AFCA's Chief Ombudsman and CEO David Locke said:

> 'We have been raising our concerns about claim delays with insurers for over 12 months now…It is disappointing that this continues to be a concern, While we acknowledge the challenges insurers have faced, the bulk of complaints in the past year were not about natural disasters but about regular claims, We would like to see insurers take the necessary steps to ensure fewer policyholders have to take a complaint to AFCA'

Unauthorised transactions

The second most complained about issue was unauthorised transactions (with 10,840 complaints received in FY 23 up from 6,398 in FY 22), AFCA considers that scam activity is a contributing factor in this, noting that the category includes credit card transactions that aren't authorised by the cardholder, the sale of an investment without authority, or ATM withdrawals made with a stolen card. On this point, AFCA observes that

> 'we often see that the dispute between the consumer and firm is about whether or not a transaction was authorised by the consumer'

Other issues

The next most commonly complained about issues were:

- Service quality (8,374 complaints in FY 23 down from 8,744 in FY 22), This was the only issue where there was a decrease on last year,
- Insurance claim amount (6,266 complaints in FY 23 up from 4,419 in FY 22)
- Denial of insurance claim due to exclusion/ condition (4,851 complaints in FY 23 up from 3,222 in FY 22)

Scams-related complaints are up 46% on last year

AFCA received 6,048 scam-related complaints in 2022-23 (up 46% on last year)

Commenting on this, AFCA welcomed initiatives by individual banks to combat scams but states that it 'would welcome a more consistent approach across the sector', AFCA also welcomed the government's plans to introduce Codes of Practice to address scams on the basis that enforceable standards will 'lift the bar for scam prevention and remediation' as well as aid the work AFCA does as an ombudsman service.

The top five most complained about sectors

- Banking and Finance was the most complained about sector – with 53,638 complaints in FY 23 up from 42,392 in FY 22. Within this, AFCA notes there was an uptick in complaints involving financial difficulty, home loan complaints and credit card complaints in the final three months of 2022-23, AFCA considers that this reflects the 'impact of financial stress from rising interest rates and costs of living'.

- The next most complained about sectors were:
  - General Insurance – with 27,924 complaints in FY 23 up from 18,563 in FY 22
  - Life Insurance – with 1,898 complaints in FY 23 down from 2,482 (the only sector where there was a decrease)
  - Investments and Advice – with 4,840 complaints in FY 23 up from 3,207 in FY 22
  - Superannuation – with 6,957 complaints in FY 23 up from 5,286

Top five most complained about products

The most complained about products were:

- Personal transaction accounts (13,781 complaints in FY 23, up from 7416 for FY 22), AFCA observes that this is the first time credit cards have not topped the list since AFCA's inception, AFCA attributes the uptick in part to the increase in scam related complaints
- Credit Cards (10,555 complaints in FY 23 up from 9,153 in FY 22)
- Home Building (9,592 complaints in FY 23 up from 6,120 in FY 22)
- Vehicle insurance (comprehensive) (8,296 complaints in FY 23 up from 5,791 in FY 22)

  [Source: AFCA media release 28/07/2023]

APRA to review data collection roadmap

APRA to undertake a review of its five year data collection roadmap

APRA has advised it will shortly commence its first annual review of the five year data collection roadmap released in March 2022.

APRA states that the review will:

> 'reconsider the pace, sequencing, and priorities of the roadmap, while also seeking to ensure APRA's data and technology capabilities are aligned with our goals'

APRA intends to provide further updates on the outcome of the review in 'early 2024'.

Impact on data collections

While the review is on foot, APRA advises that the timing of some planned industry and cross- industry data collections will change, An annex to the letter outlines which data collections APRA intends to prioritise over the remainder of 2023 and flag the data collections which will be paused.

Having said this, APRA flags that 'ad hoc informal data collections' (both those that are currently in place/future informal collections) – separate from and in addition to – APRA's priority collections set out below will continue/may be requested.

The table below provides a snapshot of APRA's priorities,

SECTOR	PRIORITY
Cross industry	**Non-financial risk collections:** APRA plans to engage with industry in mid-2024 on the design of a non-financial risk data collection to support supervision of APRA's policy priorities including and CPS 230 Operational Risk Management, CPS 234 Information Security, CPS 510 Governance, CPS 520 Fit and proper
	Remuneration: APRA states that it is currently considering the responses to the July 2022 consultation on remuneration reporting and disclosure requirements and intends to 'shortly release a response paper on disclosure and relevant updates to CPS 511' [Note: APRA has since released updated CPS 511, together with a response paper, This is covered separately in this issue of Governance News, See: APRA media release 01/08/2023; Response paper; Updated Prudential Standard CPS 511 Remuneration]

SECTOR	PRIORITY
	APRA's also advises that its response to submissions for CRS 511,0 Remuneration will be delayed and the commencement date for the data collection extended
	Financial Accountability Regime (FAR): APRA flags that it intends to engage with industry further after the passage of the FAR Bills [Note: The Financial Accountability Regime Bill 2023 and the Financial Accountability Regime (Consequential Amendments) Bill 2023 have passed the House of Representatives without amendment, The Bills are currently before the Senate, If the Bills are passed by the Senate during the 31 July - 10 August sittings (and receive Assent in August), the earliest possible date from which the FAR would apply (for the banking sector) is February 2024 (and for the insurance and superannuation sectors) February 2025, You can read more about the FAR here: FAR status update: FAR Bills delayed (again),]
Banking	**Capital Framework:** APRA confirms that implementation of reporting changes resulting from revisions to the capital framework for ADIs is now complete
	Liquidity and Interest Rate Risk in the Banking Book (IRRBB) data collections: APRA intends to engage with industry from August 2023 on the design and approach for collections relating to: ▪ APS 210 Liquidity Risk (ARS 210,0) ▪ APS 117 Capital Adequacy: Interest Rate Risk in the Banking Book (ARS 117,0 and ARS 117,1) This will include incorporation of any changes to prudential standards into the collection, and migration to APRA Connect
	Economic and Financial Statistics (EFS) definition changes: APRA intends to consult on a 'small number of definitions for Economic and Financial Statistics (EFS) collections in H2 2023 to ensure consistency with revised business size definitions introduced as part of the new capital framework', APRA confirms that reporting forms for this collection will remain unchanged
	APRA will continue its review of the ADI Points of Presence Review and seek further feedback on proposed changes to the Points of Presence data collection and publication in a second discussion paper, This is expected to be released in 'late 2023/early 2024'
	Comprehensive Credit Collections: APRA confirms that it will not progress the Comprehensive Credit Collection (CCC) as described in the collection roadmap, APRA flags it will work with industry on the design of a future credit risk data collection, 'but does not intend to engage with industry before January 2025' In the interim, APRA intends to undertake a review of the outcomes of the Proof of Concept (PoC) exercise – conducted with several banks in 2021/2022 – with insights gleaned, to inform future collections design
Insurance	**AASB17 / PHI Capital collections:** APRA notes that the AASB 17 and PHI Capital collections are being implemented with the first data due for submission in October 2023
	Strategic collections: APRA flags that discussion papers are planned to be released this year to 'further engage general insurers and life insurers on the nature of wider and more granular data to inform the scope of strategic collections'. Importantly, APRA observes that 'a longer timeframe than indicated in the collection roadmap is required and industry will be consulted on implementation timeframes'.
Superannuation	▪ Phase 2 of the Superannuation Data Transformation (SDT) project: APRA will not consult on reporting proposals over the peak year-end reporting period ▪ APRA also advises it intends to 'postpone consultation on RSE licensee operations, other reporting standards relating to financial data and cross industry proposals for non-financial risk data collection, which were originally intended to commence in November'

SECTOR	PRIORITY
	▪ Reporting standards for investments: APRA intends to 'commence formal consultation in November this year on proposed reporting standards for investments (including indirect investment costs), registrable superannuation entity (RSE) and RSE licensee profile, and RSE licensee financials' ▪ APRA states that it 'will engage industry on timeframes for consultation on remaining topics, with the intent to confirm timeframes in early 2024'

[Source: APRA letter to industry 31/07/2023]

'Supporting crisis preparedness': APRA is consulting on plans to remake APS 910

- The Australian Prudential Regulation Authority (APRA) is consulting on a proposal to remake Prudential Standard APS 910 Financial Claims Scheme (APS 910), which 'requires locally-incorporated authorised deposit-taking institutions (ADIs) to be pre-positioned for the Financial Claims Scheme (FCS)'
- For context, APRA describes the FCS as 'an Australian government scheme to provide financial protection [to depositors of locally-incorporated ADIs] in the unlikely event of a failure of a bank, credit union, building society or general insurer'
- APRA is proposing to remake APS 910 without substantial changes
- APS 910 is currently due to sunset on 1 October 2023
- APRA intends to conduct a comprehensive review of APS 910 at an unspecified 'later date' in light of the lessons to be learned from 'recent international events' (which appears to be a reference to recent bank collapses overseas)
- The due date for submissions is 23 August 2023

[Source: APRA media release 27/07/2023]

Housekeeping: Consultation launched on minor/technical amendments to Treasury portfolio laws

- The government is consulting on draft legislation – [exposure draft] Treasury Laws Amendment (Measures 4 for Consultation) Bill 2023: 5 Miscellaneous and technical amendments—Spring 2023; and [exposure draft] Treasury Laws Amendment (Measures for Consultation) Regulations 2023: Miscellaneous and technical amendments—Spring 2023 – that (if legislated) would implement various technical amendments to Treasury portfolio laws to ensure they operate as intended
- Broadly, the amendments can be summed up as follows:
  - 'repealing redundant and inoperative provisions;
  - enhancing readability and administrative efficiency;
  - reducing unnecessary red tape; and
  - making other technical changes',
- The due date for submissions is 23 August 2023

[Source: Treasury consultation: Miscellaneous Amendments to Treasury Portfolio Laws 2023 27 July – 23 August 2023]

ASIC grants temporary relief for a funeral savings initiative

- The Australian Securities and Investments Commission (ASIC) has granted a funeral savings initiative – the Funeral Saver Safety Net (Safety Net) - what it describes as 'temporary and narrow' relief from certain licensing, disclosure and design and distribution obligations (DDO)
- The Safety Net, which will be distributed alongside an existing funeral investment product (licensed by ASIC and subject to APRA prudential regulation) aims to give (eligible) financially disadvantaged consumers who sign up for

the product certainty that they will be able to cover the costs of their funeral by providing a 'safety net top-up' payment if they have not met a savings goal of $5,000

- The Safety Net will be distributed by Lifeplan Australia Friendly Society Ltd with no additional fees, The Safety Net will not be sold directly to consumers but can be recommended by financial counsellors and funeral providers, It remains subject to the prohibition on hawking
- The relief will expire on 18 July 2028,

[Source: ASIC media release 25/07/2023]

US regulators consult on proposed rules to strengthen capital requirements for large banks

US bank regulatory agencies – the US Federal Reserve, Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation - have issued a call for comment on a proposal to introduce stronger capital requirements for large banks.

Broadly, the changes would mean that banks with $100 billion or more in total assets would need to:

- apply a consistent set of capital requirements – that is, banks would be required to use a standardised approach (instead of their own internal credit risk and operational risk models), Under the proposal, banks would need to: a) include unrealised gains and losses from certain securities in their capital ratios; b) comply with the supplementary leverage ratio requirement; and c) comply with the countercyclical capital buffer (if activated),
- implement the final components of the Basel III agreement (or the 'Basel III endgame')

Separately, the Federal Reserve Board also requested comment on a proposal that would make certain adjustments to the calculation of the capital surcharge for the largest and most complex banks.

Comments on both proposals are due by 30 November 2023.

[Source: US federal Reserve media release 27/07/2023]

Risk Management

Top Story | AI-pocalypse now? Exploring the broader impact of AI on society

MinterEllison has released an article outlining the rise of generative AI, the potential associated risks and opportunities (for society and for business), the direction of travel on regulation of AI globally and in Australia, and offering insights into the potential business implications.

You can access the full text here: AI-pocalypse now? Exploring the broader impact of AI on society - Insight - MinterEllison

SEC adopts new cyber rules for public companies

- The Securities and Exchange Commission (SEC) has adopted new rules requiring registrants to:
  - disclose any cybersecurity incident they determine to be material (and its material impact or reasonably likely material impact) within four business days after a registrant determines the incident is material (unless disclosure within this timeframe it is determined by the United States Attorney General to pose a substantial risk to national security or public safety)
  - report annually on material information about their cybersecurity risk management, strategy and governance (including the boards' oversight of cyber risk and management's 'role and expertise in assessing and managing material risks from cybersecurity threats'), In addition, registrants will be required to disclose details of their processes for assessing, identifying and managing material cybersecurity threats and the 'material effects or reasonably likely material effects of risks from cybersecurity threats and previous cybersecurity incidents,
- The SEC has also adopted rules requiring foreign private issuers to make comparable disclosures.
- The final rules will take effect 30 days following publication of the adopting release in the Federal Register.

[Source: SEC media release 26/07/2023]

Board performance reviews: Chartered Governance Institute releases new (voluntary) Code of practice for board reviewers

The Chartered Governance Institute UK & Ireland (CGIUKI) has launched a (voluntary) Code of Practice for service providers who conduct board performance reviews of FTSE 350 companies (board reviewers).

Board reviewers will be able to apply for accreditation from the Chartered Governance Institute (subject to satisfactorily demonstrating, and receiving approval from CGIUKI, that their processes/procedures are Code Compliant).

Separately, the CGIUKI has also published two related guidance documents aimed at boards, Namely:

- Principles of Good Practice for listed companies using external board reviewers – which provides guidance around 'how an organisation should engage with its reviewer in order both to achieve the maximum benefit from the engagement and give assurance to its stakeholders'
- Reporting on board performance reviews: Guidance for listed companies which offers guidance around how organisations should 'balance the information requirements of the organisation's stakeholders against the board's legitimate desire to avoid breaching confidentiality'

CGIUKI intends that:

> 'Adherence to the Code will give assurance about the quality and value for money of a service provider to those commissioning external board review services, as well as to investors and other stakeholders…Board reviewers can choose to demonstrate compliance with the Code as a marker of the highest standards of practice in their work'.

Announcing the release of the guidance, Policy and Research Director at CGIUKI commented:

> 'We firmly believe that effective governance leads to better decisions which is why we are launching this new guidance to facilitate board reviews which are both more transparent and more effective, To achieve this goal, we are taking a multi-pronged approach, through overseeing compliance within the Code of Practice, providing training to board reviewers and those who commission them, and accrediting those who have

satisfied us of the standard of their work, This in turn will support both reviewers and boards in achieving the best possible outcomes from board performance reviews'

Similar principles and guidance for charities and not for profits/non-listed companies are planned to follow later this year.

[Source: The Chartered Governance Institute UK & Ireland media release 21/07/2023]

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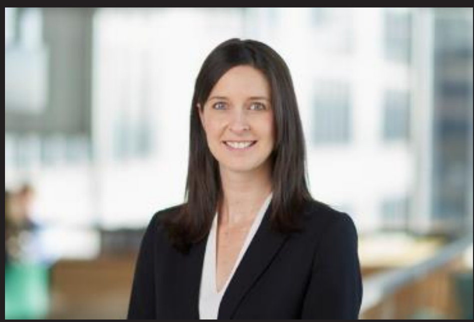

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