Governance News

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

30 August 2023

Contents

Diversity

Snapshot of S&P 500 board composition

Spencer Stuart has released its latest analysis of S&P 500 board composition.

Key Takeaways

Board composition is top of mind – financial expertise, prior CEO or COO experience in demand

A survey of nominating/governance committee Chairs found that:

- 56% of those surveyed nominated board composition as their top focus area.
- In terms of recruitment priorities – financial expertise is a key priority for 38% of survey respondents. Spencer Stuart attributes this stronger focus on financial expertise to a generational shift on boards observing:

  > 'It is now 20 years since the Sarbanes-Oxley Act of 2002 finalised the financial expert rules, and the second generation of financial experts are now rolling off boards'.

- 25% of respondents are looking for candidates with CEO experience or COO experience – the second highest recruitment priority.
- These priorities are reflected in new director appointments:30% of new directors appointed in 2023 are active/retired CEOs and 27% have a financial background.

Other in-demand skills

Other skills/experience in demand include:

- technology (21%, down from 38% last year)
- digital (20%, up from 12% last year)
- cyber (19%, up from 8% last year)

Board gender and ethnic/racial diversity – current picture

Gender (and to a lesser extent racial/cultural) diversity of S&P 500 boards was found to be continuing to increase 'incrementally'. The low rate of boardroom turnover is identified as a key factor in the slow rate of change.

- Gender diversity:
  - Female directors now account for 33% of S&P 500 directors (up from 32% in 2022) – of all the S&P 500 women directors, 9% self-identify as underrepresented minorities
  - There are zero all-male S&P 500 boards
  - 56% of first-time directors are women (up from 44% in 2022) and within this group, only 15% self-identify as underrepresented minorities
- 'Underrepresented minorities':
  - 24% of S&P directors are from underrepresented minorities (vs 43% of the US population)
  - Of the directors appointed this year, 36% self-identify as underrepresented minorities (down from 46% in 2022).
  - Looking at first-time directors appointed this year, the same proportion (36%) self-identify as underrepresented minorities (down from 61% in 2022)
  - Very few board and committee leadership roles are held directors identifying as underrepresented minorities. For example, only 8% of S&P 500 independent board chairs self-identify as underrepresented minorities (down from 9% in 2022)
- (Some form of) disclosure of board gender and racial/ethnic diversity is the norm:
  - 98% of boards disclose their gender balance
  - 97% disclose their racial/ethnic composition
- Relatively few boards (19%) provide a 'general statement' on LGBTQ+ composition – though the proportion of boards doing so looks to be trending upwards (just 6% of boards did so in 2021).
- Just 20% of boards are prioritising recruitment of women and underrepresented minorities

Tenure

- The average tenure of an independent director is 7.8 years (unchanged from last year)
- 70% of boards have average tenures of between six and ten years.
- 69% of boards reported having a mandatory retirement policy (down from 70% in 2022). Of the boards with age limits in place, most (57%) set it as 75 years or older.
- Across all S&P 500 boards the average retirement age was 74 years, which has remained unchanged for the past three years.

Independent directors

- Overall, the proportion of independent directors on boards has fallen. In 2023 there are 388 independent directors (down from 395 in 2022)
- 53% of boards appointed at least one new independent director (down from 55% in 2022).

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 22/08/2023]

The proportion of CEO roles held by women is slowly increasing in companies listed on major stock indicies, but gender parity is still in the far distance (at the current rate of progress)

Russell Reynolds Associates' analysis of the number of women holding CEO roles at companies listed on the S&P 500, FTSE 100 and Nikkei 225 has concluded that despite continuing (if very slow) progress, at the current rate, gender parity is not projected to be reached until next century.

According to Russell Reynolds' analysis:

- Women remain underrepresented in CEO roles: currently, 41 women hold CEO roles at S&P 500 companies, there are 10 FTSE 100 CEOs who are women and just one Nikkei 225 CEO role held by a woman.
- The proportion of women CEOs appointed in H1 2023 varied across the three indices: FTSE 100 companies lead the way with 27% of CEO appointments going to women vs 13% for S&P 500 companies and 0% for Nikkei 225 companies.

Russell Reynolds considers that the higher rate of CEO turnover in H1 2023 – 106 CEOs across 1822 companies left their positions in H1 2023 – which, given the current environment is expected to continue, is an opportunity for companies to accelerate progress on the issue.

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 23/-8/2023]

Equal Pay Day: WGEA urges employers to act to close the persistent gender pay gap

The Workplace Gender Equality Agency (WGEA) has used 'equal pay day' as a platform to call on employers to step up their efforts to close the persistent gender pay gap in Australia including through undertaking gender pay gap analysis, acting on the results and monitoring progress.

For context, 'equal pay day' which this year fell on 25 August 2023 marks the 56 days into the new financial year that Australian women need to work to earn the same, on average, as men did last year.

WGEA CEO Mary Wooldridge commented:

> 'The 56 extra days that women have to work to earn the same, on average, as men, shows us that these barriers are still significant in Australian workplaces…Currently at 13%, the gender pay gap in Australia is a persistent and pervasive issue that undermines women's earnings… Today's Equal Pay Day is a call to action for all employers to build on this moment by taking the time to find out what steps they need to take to support greater gender equality in their own workplace.'

The WGEA's call comes ahead of the publication, from next year, of gender pay gap information for employers with a workforce of 100 employees or more.

[Source: WGEA media release 25/08/2023]

Remuneration

UK Executive Remuneration | FTSE 100 CEO pay rises to five year high

Key Takeouts

- Accordng to the High Pay Centre's report, FTSE 100 CEO pay increased 16% to 3.91 million in 2022
- The High Pay Centre submits the jump is not justified – especially given the current cost of living crisis – and has called for urgent reform to increase transparency around executive pay generally, and amplify worker voices in setting executive pay.

The UK High Pay Centre has released its latest report analysing trends in FTSE 100 and FTSE 250 CEO pay based on companies' annual reporting for their financial year ending in 2022.

Key Points

Spike in FTSE 100 CEO pay

According to the report:

- The median FTSE 100 CEO was paid £3.91 million in 2022. For context, this is a 16% increase on 2021 bringing pay to a five year high and means median FTSE 100 CEO pay is 118 times the median earnings of a UK full-time worker.
- 96% of FTSE 100 companies paid their CEO a bonus in 2022 (up from 87% in 2021) though the bonuses paid out were smaller (the mean bonus in 2022 was £1,407k vs £1,431k in 2021)

Smaller increase in FTSE 250 pay

According to the report:

- The median FTSE 250 CEO was paid £1.77 million in 2022 (up £0.05 million on 2021). For context, this puts median FTSE 250 CEO pay at 54 times that received by the median UK worker.

Overall spend on executive pay increased

According to the report:

- The median total spend on executive pay (including the CEOs and other executives) for FTSE 100 companies in 2022 was £6.39 million (up from £6.30 million in 2021).
- In 2022, the total expenditure of FTSE 250 companies on their executives' pay packages was£604.72m for 352 roles.

Unlikely this was a 'post-lockdown surge'?

The report opines that there is no indication that the increase in 2022 was a one-off, commenting:

> 'The fact that the substantial, above inflation increase in FTSE 100 CEO pay witnessed in 2021 was repeated in 2022, also dispels the notion that last year's increase was merely a one-time post-lockdown surge'.

The High Pay Centre also queries whether higher pay for UK executives/CEOs is justified from a financial perspective submitting that:

> 'the fact that UK executives do not appear ungenerously awarded by comparison with their counterparts in most countries despite comparatively moribund recent business and economic performance, is an unpromising indicator of the impact of even higher top pay'.

How does UK executive pay compare?

Noting recent calls for consideration to be given to increasing executive pay – for example, this has been suggested by London Stock Exchange CEO Julia Hoggett - the report also provides some international comparisons.

Ultimately, the High Pay Centre concludes (based on its initial analysis) that 'UK FTSE 100 CEOs do not appear to be lowly paid in comparison with the CEOs of comparable companies in other markets'.

For example, High Pay Centre found that:

- While median FTSE 100 CEO pay (£3.9 million in 2022) was lower than median pay of S&P 500 CEOs in the US in 2022 (median pay for S&P 500 CEOs was £12 million or USD $14.8 million) the High Pay Centre considers that the difference can be explained by the significant difference in S&P 500 company size/reach - the median market capitalisation of a S&P company was £25.3 billion vs £8.3billion for FTSE 100 companies.
- Similarly, the High Pay Centre considers that higher median pay for TSX 100 CEOs - £5.4 million (C$8.6 million) in 2022 vs £3.9 million in 2022 for FTSE 100 CEOs - reflects the larger size of Canadian companies relative to their UK counterparts – median market capitalisation of TSZ 100 companies was £9.5 billion in 2022 vs £8.3billion for FTSE 100 companies.
- Both Australia and Germany pay their CEOs less:
  - Looking to Australia – ASX 100 CEOs are paid significantly less than their UK counterparts. In Australia, the median CEO pay for ASX100 CEOs was £2.2 million (AUD$3.93 million) in FY22(vs £3.9 million for FTSE 100 CEOs in 2022.

– Looking to Germany - Germany's CEO mean pay for DAX30 companies was £5.2 million (€6.1 million) in 2021 vs £6.0 million for the top 30 FTSE 100 companies by market capitalisation in 2021. For context, the median market capitalisation of a DAX30 company was £27.0 billion vs £34.1 billion for the top 30 FTSE 100 companies by market capitalisation.

A reputational risk?

Given current cost of living pressures, the High Pay Centre cautions that pay increases could be a source of reputational risk for companies going forward.

> 'In the current economic climate, it is surely not desirable that firms including some of the UK's biggest employers are dedicating resources to boosting the pay of multi-millionaire executives while so many of their workers and customers endure the hardships brought on by the cost of living crisis. This has the potential to be a major reputational issue for business'.

Policy recommendations

The report makes a number of policy recommendations aimed at ensuring 'fairer, more proportionate and economically sensible levels of executive pay'.

These include (among others):

- Requiring UK listed companies to include a minimum of two elected workforce representatives on the remuneration committee that sets pay
- Guaranteeing union access to workplaces (to enable unions to communicate the benefits of union membership and collective bargaining to workers)
- Establishing 'new bodies' to enable unions to negotiate with employers 'across sectors' starting with hospitality and social care
- Phasing out long-term incentive payments, in line with the Conservative 2019 Manifesto Commitment to 'improve incentives to attack the problem of excessive executive pay and rewards for failure'.

[Sources: High Pay Centre media release 21/08/2023; Full text report: Analysis of UK CEO Pay in 2022: High Pay Centre]

Health insurer slashes bonuses following cyber attack

Following last year's 'cybercrime event', Medibank has announced that it has made a number of adjustments to executive remuneration.

Medibank comments:

> 'Medibank recognises the impact the cybercrime event has had on our customers, our people, and shareholders. In consideration of the expectations of our customers, shareholders, and the community the Board exercised their discretion and their powers under the malus and clawback policy to reduce the variable remuneration outcomes of 10 (current and former) employees by approximately $3.6m.'

Key changes include:

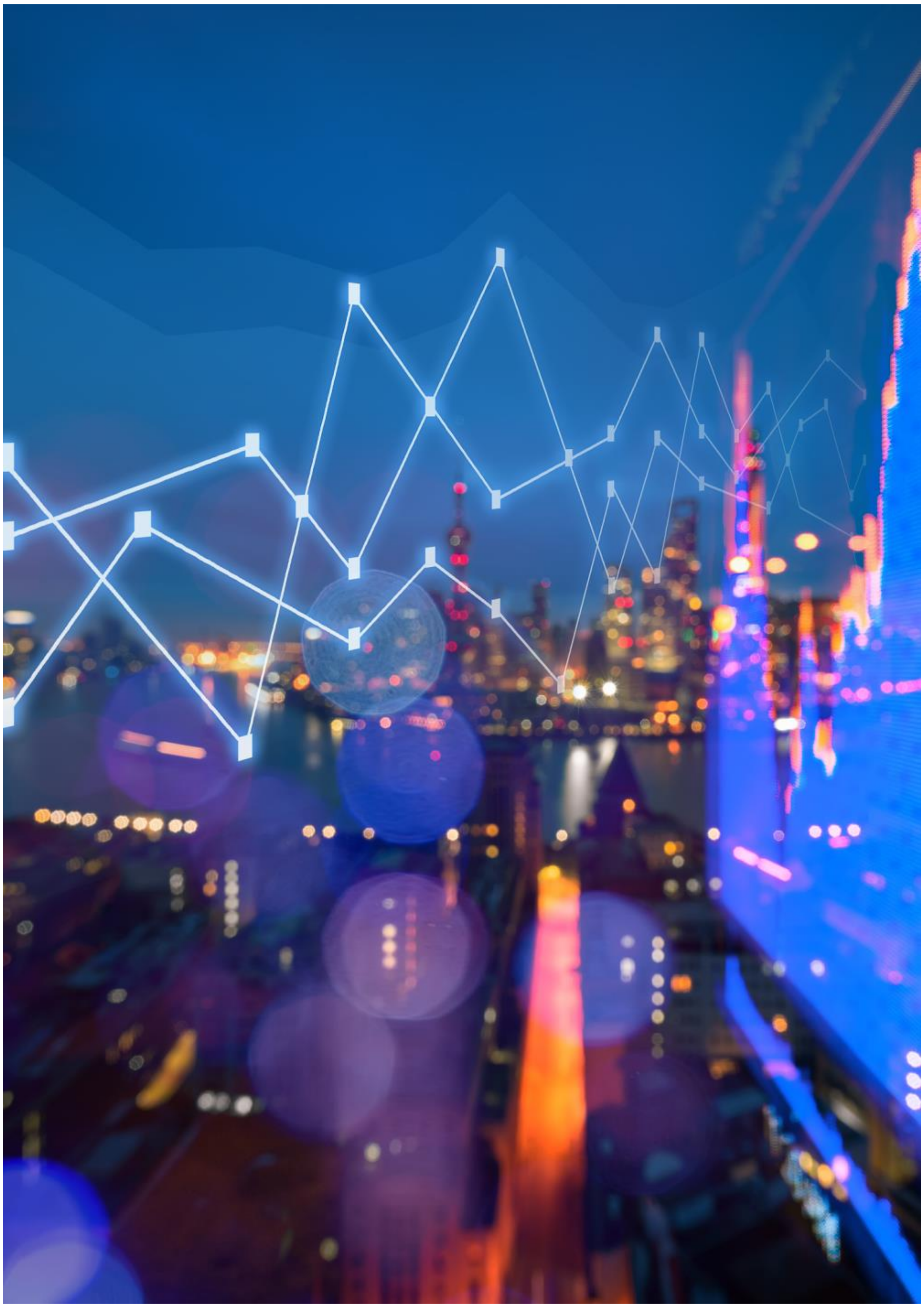
- reducing 2023 Short term incentives for the CEO and other executives to zero
- zero increase to CEO remuneration or non-executive director fees in 2024
- $3.6m reduction in variable remuneration for the executive leadership team

The 2023 Medibank Private Limited AGM will be held on Wednesday 22 November 2023.

[Source: Medibank ASX Announcement (Remuneration Report) 24/08/2023]

Markets and Exchanges

CHESS replacement: RBA and ASIC issue joint letter of expectations to ASX



The Australian Securities and Investments Commission (ASIC) and the Reserve Bank of Australia (RBA have issued a joint letter to ASX Clear Pty Ltd and ASX Settlement Pty Ltd (together ASX) outlining their expectations around how ASX should engage with the ASX Cash Equities Clearing and Settlement Advisory Group (Advisory Group).

For context, the Advisory Group was established in response to concerns about the CHESS replacement program – including (among others) concerns about the 'adequacy' of stakeholder engagement in this context.

The letter requires ASX Clear and ASX Settlement to resource, consult and engage with the Advisory Group in good faith and in the public interest.

ASX Clear and ASX Settlement are expected to formally acknowledge the letter and provide a public undertaking that it will comply with the regulators' expectations by 31 August 2023.

Announcing this ASIC Chair Joe Longo and RBA Deputy Governor Michele Bullock underlined the importance of ensuring market trust and confidence in the CHESS replacement project. They also made clear that the regulators will actively monitor ASX Clear and ASX Settlement's engagement with the Advisory Group.

Further action possible

Mr Longo reiterated that ASIC stands ready to

> 'use all available regulatory measures to ensure ASX Clear and ASX Settlement comply with our expectations and obligations under the Corporations Act. This includes measures under the current regulatory framework and any new powers ASIC receives under the Government's proposed Competition in Clearing and Settlement Reforms and Financial Market Infrastructure Regulatory Reforms.'
>
> [Source: ASIC media release 30/08/2023]

ESG

'So many proposals were over-reaching, lacking economic merit, or simply redundant': BlackRock's support for shareholder E&S proposals has dropped significantly

Key Takeouts

- BlackRock has pulled back on its support for shareholder E&S proposals
- BlackRock maintains that this does not reflect a shift in its approach on environmental or sustainability issues – BlackRock underlines that its voting decisions are always informed by whether the proposal in question is in the best financial interests of clients – rather BlackRock attributes the drop in support to the high volume of (what it views to be) overly prescriptive proposals, lacking in 'financial merit', proceeding to a vote.
- BlackRock also submits that its approach is in line with a broader drop in investor support for E&S proposals

BlackRock has released its latest stewardship report covering the 2022-23 proxy year (1 July 2022 to 30 June 2023). The purpose of the report is to provide context for BlackRock's voting record over the period.

Our key takeaways are below.

BlackRock votes in the best financial interests of clients

The report emphasises that BlackRock's voting decisions are made based on what it considers to be in the best long-term financial interests of clients and independent of proxy recommendations.

BlackRock comments:

> 'BIS votes as an independent fiduciary in accordance with BIS' policies. In making our decisions, BIS relies on a company's disclosures, our engagements with management, and insights shared across investors at BlackRock. While we may reference data and analysis produced by proxy research firms, BIS does not rely on any proxy research firm's voting recommendations'.

Engagement first approach – voting is only one aspect of BlackRock's stewardship efforts

BlackRock explains that it continues to adopt what it terms an 'engagement first approach' to stewardship that is, an approach that centres on

> 'meeting with management teams and understanding their approach to managing risks and delivering shareholder value, to inform our voting decisions'.

According to the report, BlackRock conducted 4000 total engagements across five priority areas – 1) board quality and effectiveness; 2) strategy, purpose and financial resilience; 3) incentives aligned with value creation; 4) climate and natural capital; and 5) company impacts on people – over the period, with the majority engagements (2585) focused on strategy, purpose and financial resilience and board quality and effectiveness (2246).

In light of this, BlackRock considers that looking purely at its voting record – in isolation from these other engagement-efforts – does not communicate the full picture of its stewardship efforts. BlackRock comments:

> 'Simply measuring stewardship by the number of votes for or against proposals, however, is an oversimplification of the issues that investors must contemplate. The binary nature of a proxy vote cannot reflect the complexity and multitude of considerations that go into a vote decision, drawing on company disclosures and our engagements with company leadership. It fails to reflect the unique circumstances in which a company operates, and the progress made to better align their practices with delivering financial performance over the long-term'.

Strong support for management proposals

BlackRock supported the majority of management proposals on a range of issues over the period, including director elections – BlackRock supported the election of management-proposed directors in 89% of cases.

Commenting on this, BlackRock states:

'In the vast majority of cases, we find that investors and management are aligned on how companies are delivering value to their shareholders. Our voting reflects this approach. In the proxy year under review, globally, we supported 89% of director elections, consistent with our voting in recent years'.

Shareholder E&S proposals

The report underlines that shareholder E&S proposals made up only a very small proportion (less than 1%) of the proposals voted on overall.

Drop in support a reflection of the poor quality of many shareholder E&S proposals

BlackRock voted against ~91% of the 813 shareholder proposals voted on globally. Looking at just environmental and social proposals, BlackRock voted in support of just 6.5% (or 26 of 399 environmental (climate/natural capital)) and social (human capital) proposals).

For context, this is a significant drop in support - BlackRock supported 21% of all environmental, social, and governance (ESG) shareholder proposals put to a vote in the 2021-22 proxy year.

BlackRock points to the low quality of many of proposals in explanation for the decline in its support. The report states:

> 'Shareholders submitted a record number of proposals in the 2022-23 proxy year and the quality of proposals continued to decline. In the US, we saw a 34% increase in shareholder proposals focused on climate and natural capital risks (environmental), as well as company impacts on people (social) – namely their human capital and the communities in which they operate. We observed a greater number of overly prescriptive proposals or ones lacking economic merit. Importantly, the majority of these proposals failed to recognise that companies are already meeting their asks. **Because so many proposals were over-reaching, lacking economic merit, or simply redundant, they were unlikely to help promote long-term shareholder value and received less support from shareholders, including BlackRock, than in years past'**. [emphasis added]

BlackRock also observes that the low level of support is in line with the broader drop in support for shareholder E&S proposals. According to the report, median shareholder support for environmental and social shareholder proposals in the US was 15% (down from 25% in the 2021-22 proxy year).

Anti-ESG push in the US a factor?

Though BlackRock does not reference the anti-ESG pressure being brought to bear by (some) Republican forces – for example the US House Financial Services Committee ESG hearings in July, and campaigns to restrict ESG considerations in state government financial affairs - may have been a factor in the broader drop in the level of investor support in the US.

Looking forward, As You Sow opines that it is as yet, too early to judge what the impact of anti-ESG campaigns/pressure may have in future proxy seasons.

'Faltering on its climate commitments'?

New York City Comptroller Brad Lander expressed disappointment in what he considers a shift in BlackRock's approach, Tweeting:

> 'Disappointing to see @BlackRock faltering on its climate commitments because of the short sighted war against ESG at the behest of special interests'. BlackRock has a responsibility to send a clear and consistent message regarding the need to manage climate risks'.

[Source: BlackRock 2023 Global Voting Spotlight (August 2023)]

US proxy season: Vanguard-advised funds' support for shareholder E&S proposals dips to 2%

Vanguard's latest stewardship update presents insights into the proxy votes cast by Vanguard-advised funds during the 2023 proxy year.

Looking at the level of support for shareholder environmental and social (E&S) proposals, Vanguard-advised funds supported just 2% of proposals (down from 12% in the 2022 proxy year).

Vanguard states that this is due to:

- **The volume of shareholder E&S proposals proceeding to a vote** (359 proposals, up from 290 in the 2022 proxy year). This uptick is attributed to the shift in the Securities and Exchange Commission's (SEC's) approach to assessing exclusion applications (ie Vanguard considers that SEC is less likely to OK applications by companies to exclude a proposal).
- **The 'nature of the shareholder proposals'** which in some cases: a) did not take into account the steps already implemented to respond to the risk/demand identified; b) did not take into account the disclosure already provided; and c) 'went beyond disclosure and encroached upon company strategy and operations'.

The report also underlines that the drop in support for shareholder E&S proposals does not signal a shift in Vanguard's approach on environmental or social issues. Vanguard states:

> 'Despite changes in voting results, which are driven largely by the volume and substance of the proposals presented, our approach to evaluating shareholder proposals—including those on environmental and social matters—has been consistent over time. Our focus remains on identifying proposals that address financially material risks at a given company, supporting proposals that may fill gaps in the company's current practices (while not intruding on company strategy and operations) and providing sufficient latitude to the company on implementation'.
>
> [Source: Vanguard Investment Stewardship: US Regional Brief August 2023]

Funding nature repair: Australia to host first global nature-positive summit

- Sydney is set to host the first Global Nature Positive Summit in October 2024.
- The purpose of the summit is to 'drive private sector investment to protect and repair our environment'.
- The summit will bring together a range of stakeholders including ministers, environment groups, First Nations peoples, business, scientists and community leaders, 'to consider how to supercharge investment in projects that repair nature'.

- The Summit will focus on three key themes: 1) transparency and reporting; 2) investment in nature (and more specifically, growing business demand); and 3) partnerships and capacity development (specifically, increasing landholder participation).
- Delegates will also consider how to support developing nations, boost First Nations partnership in nature repair and improve policies to increase investment in nature.

Context

The Kunming – Montreal Global Biodiversity Framework sets out a number of high-level goals to protect nature, including enabling investment in nature at scale. Target 19 sets a target for funding of nature repair to reach US$200 billion per year by 2030.

The Summit aims to rally the necessary support, and provide guidance to investors/business, to help enable this target to be met.

> [Source: Joint media release: Minister for Water and the Environment Tanya Plibersek, and New South Wales Minister for Climate Change, Energy, the Environment and Heritage Penny Sharpe 27/08/2023]

No entity 'at risk of not meeting' mandatory disclosure requirements: RBNZ releases results of second industry survey on climate-related risk management and disclosure

The Reserve Bank of New Zealand (RBNZ) has released the results of a second (voluntary) survey of regulated entities' self-assessment of their progress on climate-related risk management and their level of preparedness for meeting new mandatory climate disclosure requirements.

For context, 17 deposit takers and 15 insurers elected to participate – all other prudentially regulated, climate reporting entities chose not to participate.

Key findings include the following.

- **Level of preparedness for mandatory disclosure regime:** No entity assessed itself as 'at risk for not meeting' the new disclosure regime, though most (25 out of 29) consider they need to complete a 'significant further work' as they prepare their inaugural climate statements (due to be published in early 2024)
- **Management of climate-related risk**:
  - Entities view climate change as already compounding a range of business risks and expect this will increase in the future.
  - The level of concern about climate-related risk and the extent to which it is influencing day to day business decisions has increased (compared with the 2019 survey). Having said this, only three of 29 entities consider that climate-related risk is 'fully embedded' (as other risks are embedded).
  - 16 of 29 entities have not yet undertaken climate-related scenario analysis – though all intend to do so in the next 12 months.

The results of the survey will be used to help inform the RBNZ's future supervisory approach to climate-related risk.

> [Source: RBNZ media release 22/08/2023]

Net zero at risk? UK investors call for 'long term policy certainty' on green transition

36 UK investors, managing £1.5 trillion in assets under management (full list of signatories here), have written to UK Prime Minister Rishi Sunak to raise concerns about recent public statements/policy signals from the government which they consider, cast doubt on the government's net zero commitments. In their view, the mixed messages from the government on the green transition have potential to undermine investor confidence, thereby putting achievement of the UK's near and longer term climate targets at risk.

Investors write:

> 'Recent public debates have cast doubt on the UK's 2030 phase-out of new petrol and diesel cars and 2035 phase-out of gas boilers, while the reforms to the UK's carbon markets, energy efficiency standards for the private rented sector, and plans to issue new oil and gas licences in the North Sea all cast uncertainty on

> government's commitment to the UK's near and longer-term climate targets. As investors and financial institutions, we need confidence in the government's long-term commitment to this agenda to allow us and our investee companies to make multi-billion-pound investments in the UK's sustainable economy of the future. We have concerns that recent events and signals risk eroding this trust, potentially delaying net zero-related investment'.

The letter calls on the government to provide long term policy certainty around its sustainability commitments and make clear that 'important pillars driving investment' - eg carbon pricing mechanisms, the transition to net zero emissions vehicles - will not be 'changed abruptly'.

Investors have offered to meet with the Prime Minister/government to discuss their concerns.

[Source: UK Sustainable Investment and Finance Association Letter]

NZAOA opens consultation on a fourth edition of its target setting protocol

A new edition of the Net Zero Asset Owner Alliance's (NZAOA) target setting protocol has been released for consultation.

The protocol outlines how the NZAOA members are to set their science-based intermediate targets. Proposed changes include new:

- Target-setting methodologies for private debt funds;
- Target-setting methodologies for real estate debt funds and residential mortgages (including approaches on embodied carbon and energy efficiency);
- Performance assessment of sovereign debt holdings through qualitative indicators

The due date for submissions is 29 September 2023.

[Source: NZAOA media release 29/08/2023]

IAASB consultation on draft global sustainability assurance standard: New stakeholder survey released

- The International Auditing and Assurance Standards Board (IAASB) is consulting on a draft over-arching sustainability assurance standard – [Draft] ISSA 5000 General Requirements for Sustainability Assurance Engagements –which is intended to provide a global baseline for sustainability assurance.
- Draft ISSA 5000 is a principles-based standard, intended for use by accountant and non-accountant assurance practitioners when performing sustainability assurance engagements.
- IAASB considers the draft standard is:

  > 'suitable for both limited and reasonable assurance engagements on sustainability information reported across any sustainability topic'.

- The draft standard has also been drafted to work with sustainability information prepared under any 'suitable reporting framework' (eg ISSB, GRI).
- The due date for submissions is 1 December 2023.

Stakeholder survey released

- Ahead of the close of the consultation, the IAASB has launched an alternate means for stakeholders to provide feedback – a stakeholder survey. This is intended to enable the IAASB to:

  > 'obtain the views of stakeholders who may not ordinarily respond to IAASB consultations, including preparers of sustainability information, those with the oversight of its preparation, investors and other users of the sustainability information, sustainability reporting standard setters and members of the academic community'.

- The IAASB will also hold a series of webinars/events on the proposed standard. You can find details here.

[Sources: IAASB media release 02/08/2023; Draft standard and explanatory materials; IAASB media release 29/08/2023]

In Brief | A blueprint for collaboration with government on climate: The IGCC has released an action plan covering the period September 2023 to December 2025, outlining the four key objectives it will undertake to 'stimulate investment in' and 'drive economy-wide adaption and resilience to the physical damages and disruption of climate change'. It's hoped that IGCC members will 'adapt this strategy, take ownership of it and look for practical ways to implement and improve it' within their own organisations

[Sources: IGCC media release 22/08/2023; IGCC report: Road to Resilience: An investor action plan for an adaptive and resilient economy. Physical Risk Strategy, 2023–25]

In Brief | Intergenerational Report 2023 released: The report identities climate change and the net zero transformation as one of five major trends that will shape the Australian economy over the coming decades. As well as flagging the potential climate impacts on labour productivity, crop yields, tourism and natural disasters the report also flags opportunities flowing from the energy transition eg opportunities for the critical minerals sector to 'scale up' to meet anticipated demand

[Source: Treasury 2023 Intergenerational report]

In Brief | International disclosure standards for human capital and human rights issues should be top of the ISSB's agenda: A 24 strong investor coalition managing one trillion USD+ (led by ShareAction) has urged the ISSB to prioritise researching human capital and human rights disclosure standards in its upcoming two-year work plan

[Source: ShareAction media release 29/08/2023]

In Brief | ISS analysis highlights that shareholder proposals calling for an independent board chair spiked 113% in H1 2023 across the Russell 3000. To put this in context, this means that one in four S&P 500 companies chaired by a non-independent director received a shareholder proposal calling for change. Interestingly, the increase in volume of proposals was not matched by an increase in support – according to ISS support has remained steady (between 29-35%) over the past ten years – though despite this, combined Chair and CEO roles are becoming steadily less common (less than 50%) across all US indices

[Source: ISS media release 24/08/2023]

Regulators

Leadership changes announced at ASIC

Three new Commissioners appointed

The government has announced the appointment of three new full time Australian Securities and Investments Commission (ASIC) Commissioners for a five year term:

- Simone Constant (Chief Risk Officer, Institutional Bank and Markets and the CBA)
- Alan Kirkland (CHOICE CEO)
- Katherine O'Rourke (First Assistant Secretary of the Small and Family Business Division, Department of Treasury)

Ms O'Rourke will assume her role on 11 September 2023, followed by Ms Constant and Mr Kirkland on 20 November 2023.

The three new Commissioners will replace outgoing Commissioners Danielle Press, Sean Hughes and Karen Chester.

Announcing the appointments, Treasurer Jim Chalmers said that the new Commissioners will 'refresh and renew the leadership at ASIC and ensure our corporations, financial services sector and markets are effectively regulated'.

Separately, ASIC Chair Joe Longo welcomed the new appointments, commenting that the new Commissioners would 'strengthen and reinforce the expertise of the Commission at a time of significant and complex change' in the regulatory environment.

Other leadership changes

Separately, ASIC announced a raft of changes to its leadership team as part of a broader changes to its organisational changes (as previously foreshadowed by the regulator).

Markets Group

- Current Senior Executive Leader for Markets Supervision Calissa Aldridge, has been appointed Executive Director, Markets Group. In her new role, Ms Aldridge has responsibility for 'end-to-end regulation of markets, including supervision, compliance and enforcement of market infrastructure, market intermediaries, corporate finance activities and market surveillance'. Ms Aldridge will report directly to CEO Warren Day. Ms Aldridge formally commenced her new role on 17 August 2023.
- Current Senior Executive Leader for Credit, Banking, and General Insurance Rhys Bollen, has been appointed Senior Executive Leader for Markets Supervision. In his new role, Mr Bollen has responsibility for supervision of market intermediaries and market surveillance. Mr Bollen commenced in his role on 28 August 2023 and will report to Ms Aldridge.
- Ben Cohn-Urbach has been appointed as Acting Senior Executive Leader, Markets Infrastructure, with responsibility for oversight of market infrastructure. Mr Cohn-Urbach also commenced in his new role on 28 August 2023 and will report to Ms Aldridge.

Regulation and Supervision

- Current Senior Executive Leader, Markets Infrastructure Nathan Bourne has been appointed Senior Executive Leader, Credit, Banking and General Insurance. In his role, Mr Bourne will assume responsibility for the day-to-day supervision of regulated entities within the credit, banking, and general insurance industries.

Enforcement and Compliance

- Current Senior Executive Leader, Investigations, Chris Rowe has been appointed Senior Executive Leader Investigation and Enforcement ActionBrett Cra,
- Current Senior Manager, Investigations and Enforcement, Brett Crawford has been appointed Chief Investigator and Senior Executive Leader, Small Business Enforcement.
- Tom O'Shea has been appointed as Senior Executive Leader, Enforcement Inquiries and Compliance.

ASIC CEO Warren Day commented:

> 'I am pleased to announce each of these new appointments which are testament to the strong talent at ASIC, while at the same time reflective of the need for renewal. The economy and broader environment in which ASIC operates is constantly shifting and we are evolving to meet those challenges. These appointments bring us closer to finalising the implementation of ASIC's new organisational structure'.
>
> [Sources: ASIC media release 18/08/2023; 25/08/2023]

Financial Services

Top Story | Operational risk, cyber risk and climate risk flagged as key areas of focus in APRA's latest Corporate Plan

The Australian Prudential Regulation Authority (APRA) has released its 2023-24 Corporate Plan. Our key takeaways are below.

Key Takeouts

- The 'protected today, prepared for tomorrow' themes highlighted in APRA's previous plan have been maintained
- Protecting the safety and resilience of regulated entities remains a key focus. Within this, the actions identified aim to respond to emerging and accelerating risks – many of which are driven by the pace of technological change .
- Key focus areas for the regulator over the next four years include strengthening cyber resilience and operational resilience (including through implementation of CPS 230, and driving compliance with CPS 234) and stepping up focus on climate risk including embedding climate risk into APRA's Supervision Risk and Intensity (SRI) model 'to require ongoing supervisory assessment of this issue'

On 28 August 2023, the Australian Prudential Regulation Authority (APRA)) released its latest corporate plan covering the four years to 2026-27.

Announcing the release of the plan, APRA Chair John Lonsdale observed that the 'twin themes' of safeguarding the resilience of the financial sector - 'protected today' - and ensuring the financial system is 'prepared for tomorrow' by planning and preparing now for key challenges - remain unchanged from the previous plan.

However, the regulator's planned priority actions have been amended in response to various challenges identified in the current environment and emerging and/or accelerating risks including (for example):

- Risks flowing from increased digital interconnectedness including the speed at which a 'bank run' can now occur (as highlighted by the collapse of Silicon Valley Bank earlier in the year)
- Increased cyber security risks and in particular, 'the escalation of hacks and scams'.
- Factors that 'threaten the stability of the financial system' such as rising interest rates, higher inflation and ongoing geopolitical uncertainty
- The impact of increasingly frequent and increasingly severe extreme weather events on insurance affordability (particularly for those in 'at risk' areas)
- 'The expansion of the superannuation pool, which emphasises the need for an efficient and transparent system, good performance outcomes for members and more options for Australians on retirement'.

The plan also responds to the government's recent Statement of Expectation (2023) of APRA and the Financial Regulator Assessment Authority (FRAA) review.

Four key priorities over the next four years

APRA's updated plan seeks to address the following four key challenges over the next four years.

1. System-wide risks

APRA observes that:

> 'Events earlier this year [collapse of Silicon Valley Bank] showed that the interconnected nature of the global financial system means that stress experienced by some American and European banks transmitted rapidly between entities and across borders'.

In response to these challenges, APRA plans (over the next four years) to:

- Develop a cross-industry stress testing framework to 'explore how shocks to the financial system might be mitigated or propagated by the interactions between the banking, insurance, and superannuation industries'.

- Deploy 'macroprudential tools to mitigate risks to financial stability at a system-wide level, whilst continuing to work closely with the Reserve Bank of Australia (RBA)'. APRA will work with the RBA to both:
  - 'Put in place mechanisms by which the RBA will provide formal advice to APRA on APRA's use of its macroprudential tools; and
  - Update the Memorandum of Understanding between APRA and the RBA to continue our close cooperation to manage financial stability risks'.

2. Operational resilience

APRA observes that:

> 'Risks to operational resilience are heightened for regulated entities in the current operating environment, particularly due to a significant rise in cyber-attacks, the increasing interconnectedness of the financial system, along with greater reliance on unregulated third-party service providers'.

In response, APRA plans to step up its focus on both strengthening operational risk management and cyber resilience.

Operational risk management

Implementation of CPS 230: Aligned with the implementation of recently finalised Prudential Standard CPS 230 Operational Risk Management (CPS 230), which will apply from 1 July 2025, APRA intends to:

- 'Heighten expectations on regulated entities to address identified control weaknesses;
- Increase focus on business continuity and third-party risk management to ensure these risks are managed appropriately; and
- Engage with industry to improve the way non-financial risk data is collected and used to assess the effectiveness of regulated entities' operational risk management practices'.

APRA also expects its work in this area will support action being taken by government and other agencies to reduce the impact of scams on the community.

Expanding on this point, the need for organisations to ensure their risk mitigation efforts keep pace with the rapid pace of technological advances, and APRA's expectations around this, was a headline message in APRA member Therese McCarthy Hockey's recent speech: From fires to firewalls: The evolution of operational risk. Ms McCarthy Hockey commented:

> 'The challenge we're now seeing with operational resilience is that not only is the speed of technology and innovation threatening to outpace the ability of businesses to keep up with the risks, but the threat landscape itself is accelerating too. Countering this will take significant time and investment and – importantly – a new mindset to ensure sustainability of practice. By setting a target for entities to aim at and a firm date by which to hit it, our new cross-industry prudential standard CPS 230 is designed to light a fire under our regulated entities so they act with the heightened urgency this issue requires'.

Ms McCarthy Hockey made clear that APRA expects organisations to start work now in preparing for implementation of the new standard, emphasising that they should expect APRA to engage with APRA on their progress in the lead up to the commencement date.

> [Note: For our key takeaways from Ms McCarthy Hockey's address see: Governance News 30 August 2023.]

Continued focus on strengthening GCRA: APRA observes that its focus to date 'organisational resilience has addressed recommendations related to governance, culture, remuneration and accountability' (GCRA) made by the Hayne Commission. APRA considers that the actions implemented already have 'increased the focus of boards and senior managers of regulated entities on the financial outcomes of the community, and sharpened accountability to prevent poor outcomes'. APRA plans to continue this work over the next four years through:

- Ensuring regulated entities are 'embedding changes to their organisation following risk transformation programs, particularly where an entity has been subject to an operational risk capital charge or licence conditions'
- Working with the Australian Securities and Investments Commission (ASIC) to implement the Financial Accountability Regime (FAR) (subject to the passage of the necessary legislation to establish the new regime)

  [Note: Legislation to introduce the long-awaited FAR - the Financial Accountability Regime (Consequential Amendments) Bill 2023 and Financial Accountability Regime Bill 2023 – is currently before the Senate. The Senate is not due to sit again until 4 September 2023. Though the Bills are listed in the latest Senate Notice paper, it is not certain that they will necessarily be considered/passed during the September sittings]

- Amending Prudential Standard CPS 510 Governance, CPS 520 Fit and Proper and CPS 220 Risk Management to clarify expectations of boards, simplify the prudential framework and reduce regulatory burden

Strengthening cyber resilience

The plan identifies the following actions to strengthen cyber resilience:

- 'Act on breaches of Prudential Standard CPS 234 Information Security (CPS 234) to strengthen minimum cyber standards;
- Ensure regulated entities are taking action to address issues identified in CPS 234 independent assessments;
- Assess the effectiveness of boards to oversee actions taken by regulated entities to mitigate cyber risk;
- Set clear expectations for specific cyber issues where action by regulated entities is needed to adopt better practices;
- Intensify data-driven supervision for cyber risk to optimise the use of technical specialists on higher risk regulated entities; and
- Focus on supervisory crisis preparedness to ensure a coordinated response to unexpected disruption to critical financial services'.

Again, APRA member Therese McCarthy Hockey has separately underlined APRA's expectation that organisations do more to meet the requirements in CPS 234, and in particular, that boards step up their engagement with/oversight.

Ms McCarthy Hockey cautioned that:

> 'APRA is rapidly running out of patience with the slow pace of uplift. Three years after CPS 234 was implemented, and with the backdrop of a growing list of cyber incidents, entities should expect to see APRA taking strong action. Where an entity is found to be significantly wanting in its compliance with our information security requirements, additional capital requirements of the kind imposed on Medibank may well be a likely outcome'.

3. Climate-related financial risks

The plan identifies the following actions to embed consideration of climate risk into APRA's regulatory approach and gain insights into climate impacts on the financial system:

- 'Conduct a Climate Vulnerability Assessment to assess the impact of climate risk on access and affordability of general insurance;
- Embed climate risk in our Supervision Risk and Intensity (SRI) model to require ongoing supervisory assessment of this issue; and
- Use existing and new data collections for climate risk to prepare and develop insights on emerging issues and best practices'.

4. Superannuation – improving member outcomes

The final key priority identified is industry specific –

> 'improving superannuation transparency to provide members with enhanced insights about investment performance and increasing APRA's focus on retirement outcomes'.

In line with this, over the next four years, APRA plans to:

- 'Maintain focus on reducing unacceptable product performance by increasing expectations on trustees to close high fee, poorly performing products;
- Drive trustees to improve member retirement outcomes through targeted supervision of the implementation of the retirement income covenant;
- Increase transparency of performance across the superannuation industry by releasing new and expanded statistical publications and conducting the annual performance test;
- Simplify core superannuation requirements in updates proposed to Prudential Standard SPS 515 Strategic Planning Member Outcomes to foster a culture of continuous improvement for trustees; and
- Assess trustee self-assessments against the strengthened Prudential Standard SPS 530 Investment Governance, particularly in respect of the approach taken by trustees to liquidity management, stress testing, and asset valuation'.

Other industry specific actions

Banking sector

To ensure the ongoing 'safety and resilience' of the banking sector, and act on 'lessons learned from recent market disruption' the plan flags the following three actions:

- 'Risk-based reviews of financial risk and targeted changes to liquidity and interest rate in the banking book prudential requirements to ensure these risks are being managed appropriately;
- Incorporate relevant learnings from the Basel Committee's review of recent banking stress, including consideration of options to improve the effectiveness of Additional Tier 1 capital instruments in Australia1; and
- Engage with the Government, Treasury, and other CFR agencies on reforms to modernise the payments regulatory framework'.

Insurance

Key challenges for the insurance sector highlighted in the plan include:

- Ensuring 'insurers are financially strong, with the financial capacity to pay legitimate claims to Australian policyholders' (though APRA notes that the industry 'remains well-capitalised)
- Responding to profitability, and accessibility challenges which are being driven by increased costs.

Over the next four years, APRA plans to:

- 'Address challenges in the reinsurance market for general insurers by reviewing prudential requirements for reinsurance to ensure they remain fit for purpose;
- Maintain focus on the sustainability of individual disability income insurance policies offered by life insurers, particularly in respect to prudential expectations related to governance, strategy, product design and data; and
- Intensify focus on operational resilience for private health insurers, with activities targeted towards cyber resilience and third-party supplier risks for critical outsourced functions'.

Lifting APRA's internal capability

The plan also highlights a number of actions aimed at strengthening 'the key enablers that support our [ie APRA's] primary functions as a prudential regulator to drive the evolution of the organisation'. Namely:

Continuing work on Modernising the Prudential Architecture (MPA)

- Transforming the way technology and data is used to better 'enable data driven risk-based supervision, improve insights and transparency, and streamline the data collection process'
- 'Cultivating an agile and engaged organisation to ensure that we remain fit for the future'

[Sources: APRA media release 29/08/2023; APRA Corporate Plan 2023-27]

CPS 230 implementation: APRA says it wants to 'light a fire' under organisations when it comes to managing operational risk

Our key takeaways from APRA member Therese McCarthy Hockey's 23 August 2023 speech - From fires to firewalls: The evolution of operational risk – are below.

- **Risk mitigation efforts are failing to keep pace:** Ms McCarthy Hockey observed that the nature of operational risk has evolved over time, with technological advances and an ever-increasing reliance on technology, a major driver. Ms McCarthy Hockey raised concerns that risk mitigation efforts are not keeping up with the pace of these changes. Implementation of APRA's new operational risk standard - CPS 230 - is intended to push organisations to step up their efforts and shift their approach. Ms McCarthy Hockey commented:

  > 'The challenge we're now seeing with operational resilience is that not only is the speed of technology and innovation threatening to outpace the ability of businesses to keep up with the risks, but the threat landscape itself is accelerating too. Countering this will take significant time and investment and – importantly – a new mindset to ensure sustainability of practice. By setting a target for entities to aim at and a firm date by which to hit it, our new cross-industry prudential standard CPS 230 is designed to light a fire under our regulated entities so they act with the heightened urgency this issue requires'.

- **Compliance with CPS 234 continues to lag:.** Ms McCarthy Hockey observed that APRA's recent analysis from the first tranche of independent assessments against the information security standard (CPS 234) indicates that 'many banks, insurers and superannuation trustees are still struggling to meet their minimum requirements' for various reasons including the complexity of responding to a rapidly and continually evolving threat environment and historical underinvestment. However, Ms McCarthy Hockey underlined that:

  > 'Understanding these reasons is not the same as accepting them, and APRA is rapidly running out of patience with the slow pace of uplift. Three years after CPS 234 was implemented, and with the backdrop of a growing list of cyber incidents, entities should expect to see APRA taking strong action. Where an entity is found to be significantly wanting in its compliance with our information security requirements, additional capital requirements of the kind imposed on Medibank may well be a likely outcome5'.

Implementation of CPS 230

What is CPS 230?

On 17 July 2023, the Australian Prudential Regulation Authority (APRA) released its long-awaited new cross industry operational risk standard – CPS 230 – to 'strengthen the management of operational risk across APRA's regulated operation'. The new standard which will apply to all APRA-regulated entities, will replace five existing standards (CPS 231 Outsourcing, CPS 232 Business Continuity Management, SPS 232 Business Continuity Management, and HPS Outsourcing) and will apply from 1July 2025.

For more on the new standard see:

- CPS 230 | Consultation on strengthening operational risk management begins - Insight - MinterEllison
- APRA's new operational risk standard finalised - POST - MinterEllison
- CPS 230: The Practical Playbook - Insight - MinterEllison

APRA's expectations around implementation

Ms McCarthy Hockey raised concerns that:

> 'Given the close connection between information security and operational risk, we're conscious of the potential for the same types of compliance gaps we've seen on cyber to emerge with our newest standard'.

These concerns are reflected in APRA's approach to implementation of the new standard – APRA expects to engage with entities in the lead up to the commencement of CPS 230.

Accordingly, Ms McCarthy Hockey said that boards should be taking action now to prepare for the implementation of CPS 230:

> 'APRA won't be waiting for the implementation date to examine industry readiness. We will be assessing entities' preparedness for the new standard throughout 2024, starting in less than six months. Prudent boards should not be waiting until the new year to start thinking about how to meet their new commitments. They need to move now'.

Three key actions for boards

Specifically, APRA expects boards to:

- Put 'the right governance arrangements in place' – that is, ensure 'robust governance over the change management process to successfully implement the requirements of the standard' are in place. Ms McCarthy Hockey observed that this would 'typically be supported by a formal change management plan that includes key milestones correlating to the requirements of the standard'. Further, APRA expects boards and management to turn their minds to ensuring the required resources are in place to meet the new requirements (eg financial capacity and 'also potentially ensuring they have enough people with the right skills and expertise').
- Identify critical operations and material service providers, by the middle of 2024 and be 'well positioned' to set tolerance levels by the end of 2024. APRA also expects entities to undertake detailed gap analysis against the new requirement to identify any barriers to implementation and put in place actions to address them.
- Begin 'to develop a new organisational mindset'. On this point Ms McCarthy Hockey observed that the new standard will mean that:

  > 'APRA-regulated entities will no longer need to simply be aware of their own internal operational vulnerabilities and have plans to mitigate them. From 1 July 2025, they must have the same level of

understanding of their most critical third-party service providers – as well as their most critical fourth-party service providers. Those providers will need to be seen almost as a part of their own operation. An insurer may not be directly responsible for its website going offline when a network gateway fails, but it will be responsible for the outcome – which is the inability of customers to lodge claims or access other services'.

Engaging with organisations on their CPS 230 preparedness

Ms McCarthy Hockey said that in the lead up to the commencement of CPS 230, entities can expect APRA to ask about:

- 'the outcomes of any gap analysis undertaken by them or their external assurance provider;
- the progress made against the change management or transition plan for compliance against the new standard;
- their plan for demonstrating compliance against operational risk, business continuity management and service provision elements as well as any key challenges or blockers to this; and
- any lessons learned in the process to date'.

A proportional approach

Ms McCarthy Hockey underlined that

> 'APRA is aware of instances where entities have recognised that they simply don't have the size or financial heft to do this on their own and have looked for merger partners. To assist the smaller end of town, APRA has indicated that it does not expect an identical approach to resilience activities at all entities, but rather expects to see each entity applying the standard in a way that is commensurate with the size, business mix and complexity of its operations'.

Additional (less formal) guidance

In addition to formal guidance to support implementation of CPS 230 (which is currently at consultation stage), Ms McCarthy Hocky indicated that APRA is considering how to provide 'timely insights on current practice and what uplift is needed less formally' ie outside of formal prudential guidance. Ms McCarthy Hocky pointed to the insights provided by APRA into the themes from the independent information security exercise as an example of the form this might take.

[Source: APRA Member Therese McCarthy Hockey, Speech at GRC2023, From fires to firewalls: The evolution of operational risk 23/08/2023]

Top Story | Supply Chain Cyber Risk Management Best Practice Guidelines

MinterEllison has released an article providing insights into best practices for monitoring and managing suppliers and service providers and how following these recommendations helps support compliance with existing APRA requirements under CPS 234 as well as the incoming CPS 230 (which will apply from 1 July 2025).

You can access the full text here: Supply Chain Cyber Risk Management Best Practice Guidelines - Insight - MinterEllison

Top Story | Consumer protection is again the key theme in ASIC's latest corporate plan

The Australian Securities and Investments Commission (ASIC) released its 2023-2027 Corporate Plan. Our key takeaways are below.

Key Takeouts

- ASIC's latest corporate plan signals the regulator's intention to maintains its focus on the four core priorities announced last year: 1) enforcement of product design and distribution obligations; 2) 'sustainable finance'; 3) retirement decision making; and 4) technology risks with a focus on digitally enabled misconduct.
- The plan identifies six 'core strategic projects' (in addition to other shorter term projects), each of which is centred around progressing one or more of ASIC's four core priorities. These six projects are: 1) disrupting/combatting scams; 2) improving sustainable finance practices (including combatting greenwashing); 3) protecting investors from crypto-asset related harms; 4) enforcing design and distribution obligations (DDO); 5); strengthening cyber and operational resilience; and 6) lifting ASIC's own digital/technical capabilities.

- Announcing the release of the plan, ASIC Chair Joe Longo underlined ASIC's continuing commitment to enforcement, pointing to the regulator's 'strong' enforcement record throughout 2022-23 in illustration. In particular, Mr Longo said the regulator will 'take further enforcement action to protect Australian consumers and small businesses in an environment where scams, digitally-enabled misconduct and predatory lending practices are increasingly prevalent'.

Overview

On 28 August 2023, the Australian Securities and Investments Commission (ASIC) released its latest corporate plan outlining the regulator's key priorities for the four-year period from 2023-27 and key areas of focus for the year ahead. Our high level summary is below.

Four key strategic priorities underpin the plan

The four key strategic priorities identified in last year's plan are unchanged. To recap these are as follows:

- Product design and distribution: ASIC has flagged reducing the risk of consumer harm caused by poor product design, distribution and marketing, with a focus on 'driving compliance with the new requirements' as a key strategic focus.
- Sustainable finance: Enforcing existing obligations to 'reduce harms from greenwashing' is a key focus.
- Retirement decision making: ASIC will focus on protecting consumers planning for retirement with a focus on superannuation products, management investments and financial advice.
- Technology risks: Addressing 'digitally enabled misconduct' (eg scam activity), driving good cyber risk and operational resilience practices and focusing on the 'impacts of technology in financial markets and services' is the final strategic priority highlighted in the plan.

Six 'Core strategic projects'

The following six 'core strategic projects' are intended to progress the priorities outlined above.

1. Disrupting investment scam activity

Planned actions listed under this project include:

- working with external service provider to 'identify and take down' phishing websites and investment scams
- working with other agencies to coordinate disruption strategies, including working in 'fusion cells' (eg the National Anti-Scam Centre investment scam fusion cell)
- identifying ways for regulated entities including authorised deposit-taking institutions and superannuation trustees, to 'strengthen their anti-scam practices, leveraging insights from REP 761' (For our summary of REP 761 see: Banks and 'corporate Australia' on notice: ASIC calls on banks (and encourages other organisations) to improve their approach to scams - POST - MinterEllison)
- 'developing our communications, including through social media, to help consumers be more aware of how to detect and avoid investment scams'
- 'taking targeted enforcement action to deter scams'.

2. Sustainable finance practices

Actions highlighted under this project include:

- supporting the government's sustainable finance strategy (eg proposals to introduce ISSB-aligned mandatory climate-related disclosure requirements)
- 'undertaking targeted surveillances and oversight of sustainability-related disclosure and governance practices across regulated entities'
- 'taking enforcement action against misconduct, including in relation to poor governance, misleading marketing and greenwashing by entities'
- 'licensing and supervision of carbon and related markets'
- 'working with peer domestic and international regulators on sustainable finance developments (eg through the Council of Financial Regulators Climate Working Group and the IOSCO Sustainable Finance Taskforce)'

3. Crypto-assets

ASIC has flagged it will take action to protect investors from harms posed by crypto assets that fall within ASIC's remit including through:

- monitoring product disclosure statements and target market determinations of 'major crypto offerings' within ASIC's jurisdiction
- 'taking enforcement action to protect consumers from harms associated with crypto-assets, including those that mimic traditional products but seek to circumvent regulation, and offerings within our jurisdiction that involve misleading promotion of high-risk investments or inadequate risk disclosures'
- 'supporting the development of an effective regulatory framework focused on consumer protection and market integrity following the consultation by Treasury'
- 'monitoring the regulatory model for exchange traded products with underlying crypto investments'
- 'raising public awareness of the risks inherent in crypto-assets and decentralised finance (DeFi)'
- 'working with domestic and international peers to monitor risks, develop coordinated responses to issues, and develop international policy regarding crypto-assets and DeFi'

4. Design and Distribution Obligations (DDO) compliance

Planned actions include:

- reporting the outcomes of the review into how issuers of over-the-counter (OTC) derivatives are meeting their DDOs
- 'conducting further targeted surveillance of market intermediaries compliance with the obligations'
- 'conducting surveillance of poor design and distribution practices across insurance products, particularly low-value insurance products'
- 'collecting data from credit card issuers to assess compliance with the obligations and to identify improvements to consumer outcomes'
- 'reviewing the product governance arrangements of selected credit card providers, including the data and metrics that inform review triggers'
- 'taking disruptive and enforcement action, including by issuing stop orders, to address poor design and distribution of products, including in relation to investment, insurance, superannuation, credit and other financial products'

5. Supporting enhanced cyber and operational resilience

Planned actions include:

- 'conducting targeted surveillances to monitor cyber and operational resilience among our regulated entities'
- 'engaging with our regulated entities to promote good practices and support initiatives that enhance cyber resilience, including by leveraging insights from the cyber pulse survey results'
- 'developing supervisory approaches for emerging operational risks, including artificial intelligence and quantum computing'
- 'partnering with other financial regulators to support whole-of-government cyber-resilience initiatives and incident responses, where appropriate'
- 'partnering with financial regulators on key cyber-resilience initiatives, including the Trans-Tasman Council of Banking Supervision's cyber-attack protocol and the Council of Financial Regulator's Cyber and Operational Resilience Intelligence-led Exercises (CORIE)'
- 'monitoring market resilience and the implementation of the new technology and operational resilience market integrity rules for market participants and market operators'
- 'taking enforcement action where there are egregious failures to mitigate the risks of cyber attacks and governance failures relating to cyber resilience'

6. Harnessing digital technology and data

The final 'core strategic project' identified in the plan is an internal priority focused on lifting ASIC's own digital/technology capabilities to enable it to be a 'leading digitally enabled, data-informed regulator'.

Closely aligned with this is a strong focus on organisational efficiency and lifting staff capability.

Among other things, ASIC flags plans to increase its use of 'data analytics, machine learning and artificial intelligence, to enable earlier detection of harm'.

ASIC also plans to (among other things) continue to support the modernisation of business registers (in line with the government's response to the independent review of the MBR project).

Shorter term strategic projects

In addition to the eight core strategic projects identified above, the plan also identifies a number of shorter term, cross-sector and industry specific projects.

Cross sector strategic projects

Over the next year (or more), ASIC will:

- continue to work closely with APRA to implement the Financial Accountability Regime (FAR) including through 'providing guidance, engaging with industry and developing effective registration and other processes' (subject to the passage of the legislation).

[Note: Legislation to introduce the long-awaited FAR - the Financial Accountability Regime (Consequential Amendments) Bill 2023 and Financial Accountability Regime Bill 2023 – is currently before the Senate. The Senate is not due to sit again until 4 September 2023. Though the Bills are listed in the latest Senate Notice paper, it is not certain that they will necessarily be considered/passed during the September sittings]

- focus on ensuring the objectives of the reportable situation regime are met. This work is planned to include:
  - Working with stakeholders to 'improve the consistency and quality of reporting practices'
  - Undertaking 'a targeted surveillance of licensees with low numbers of reportable situations' and taking enforcement action 'where appropriate'
  - Developing and implementing a 'framework for ongoing publication of information about the reports received'.
- focus on promoting the ethical use of consumer data and artificial intelligence. This work is planned to include reviewing the risks of consumer harm flowing from the potential misuse of consumer data, algorithms and artificial intelligence in financial services and examining how institutions are seeking to mitigate these risks.
- 'take action against failures of internal dispute resolution (IDR) systems to address complaints, delays, and poor communication and record keeping'. ASIC also plans to investigate non-responses to the AFCA under the external dispute resolution scheme.
- take enforcement action 'against misconduct that exploits financial market volatility in the current economic environment and results in large investor losses and business failures'.
- 'take enforcement action against misconduct involving unfair contract terms with a focus on the insurance and credit sectors'
- 'take enforcement action in relation to high-risk property schemes that expose investors to significant losses, by addressing mismanagement, including governance and responsible entity failures'.
- implementing the Compensation Scheme of Last Resort (CSLR), including working with Treasury and AFCA to deliver regulatory guidance and administering a levy system (as determined by the CSLR operator)
- complete the review of superannuation trustees' distribution practices in relation to choice superannuation products and the role of financial advisers and their licensees in the distribution of underperforming choice products.

Over the next two years (or more), ASIC expects to focus on:

- deterring cold-calling superannuation-switching business models including through: taking enforcement action to protect consumers from cold-calling practices that induce inappropriate superannuation-switching and result in the erosion of superannuation balances.
- addressing misconduct that 'unfairly' impacts small business including through taking enforcement action 'in relation to unfair contract terms, insolvency and the promotion and supply of high-risk or unsuitable products'. ASIC also flags plans to work with the Australian Tax Office's Phoenix Taskforce members to target illegal phoenix activity and address issues in the small business sector.
- taking 'enforcement action, against companies and AFS licensees who do not comply with obligations to lodge financial reports'.
- 'monitor and take action in relation to failures to comply with: director identification (ID) requirements; obligations to give written consent to be appointed as a director; other ABRS compliance programs'.

Sector specific priorities

Some of the shorter-term sector specific priorities flagged by ASIC include the following.

Credit and Banking

ASIC flags the following as key priorities over the next 12 months:

- Taking enforcement action to protect financially vulnerable consumers impacted by: 'predatory lending practices; non-compliance with new consumer protections relating to small amount credit contracts and consumer leases; high-cost credit (including conduct by unlicensed or 'fringe' entities); and debt collection misconduct'.
- Reviewing consumer hardship arrangements with a view to making recommendations to improve their effectiveness and suitability. ASIC also cautions that it intends to take enforcement action 'where there has been serious lender non-compliance with hardship requirements'.

- Undertaking 'a targeted review of the policies, practices and procedures of high-risk debt management firms' and taking enforcement action where misconduct results in consumer harm.
- Taking enforcement action 'against car-financing misconduct, particularly misconduct that affects vulnerable consumers and First Nations peoples'
- Supporting Treasury's work to implement a regulatory framework for the buy now pay later (BNPL) sector

General insurance

ASIC flags the following as key priorities over the next 12 months:

- Acting against misconduct in general insurance claims handling and pricing: Over the next year (or more) ASIC intends to review 'poor claims handling practices' with a focus on delays, poor communication and record keeping as well as 'inappropriate use of 'wear and tear exclusions'. ASIC states that it will take enforcement action against misconduct, with 'a particular focus on home insurance'.
- Reviewing the direct sale of life insurance: ASIC plans to conduct a review of direct sales of life insurance products with a focus on low-value products. Again, ASIC flags it stands reading to take enforcement action to address 'harmful practices' where these are identified.
- Reviewing life insurance premium levels: ASIC will continue work with APRA on assessing life insurers' compliance with their obligations in in relation to the setting of premiums, with a focus on premium increase practices, disclosure and marketing, and sustainable product design. ASIC states that it will communicate the findings of this assessment, and stands ready to take action against misconduct.

Superannuation

Over the next year, ASIC plans to focus on:

- 'Improving the delivery of member services by superannuation funds' including through reviewing industry practices and compliance with laws in relation to trustee administration and contact centres'.
- 'Monitoring implementation of superannuation fund financial reporting and audit requirements'
- Completing the review of 'superannuation trustees' distribution practices in relation to Choice superannuation products and the role of financial advisers and their licensees in the distribution of underperforming choice products' with a view to 'reducing harm caused by poor performance and harmful distribution of choice products'.

Financial Advisers

- Adviser registration: Over the next 12 months, ASIC expects to focus on facilitating the registration of relevant providers and ensuring licensees and advisers understand and comply with their new registration obligations.
- Reviewing SMSF establishment advice compliance: ASIC will review advice in relation to the establishment of SMSFs and take action, where appropriate.

Corporations

Consistent with last year's plan, over the next year (or more) ASIC plans to 'take action where we identify misleading conduct and poor governance in the corporate sector, and harms arising from the offering and marketing of investment products'.

Registered liquidators

- Over the next 18 months, ASIC expects to focus on identifying and acting against 'poor behaviour by registered liquidators, including behaviour related to independence, remuneration and competence'.
- Over the next 12 months, ASIC plans to publish grant opportunities, inviting registered liquidators to apply for membership of the Abandoned Company and Reviewing Liquidator panels.

Financial reporting and audit

- Over the next 12 months, ASIC plans to 'enhance' its 'ability to identify risks in financial reports and audits' through use of data and natural language processing.
- ASIC flags that a continuing area of focus will be disclosures by directors in their operating and financial reviews 'particularly in relation to their risk management strategies and future prospects'.

Market supervision

Over the next year APRA plans to:

- 'continue to review AI and machine learning practices, risks and controls among market intermediaries'. ASIC also plans to 'develop automated order processing rules and guidance for futures market participants'.
- 'conduct targeted surveillances of market intermediaries: use of digital engagement practices (DEPs), and marketing and distribution practices.

Market Infrastructure

Over the next five years (or more) ASIC plans to:

- continue to 'closely supervise' ASX's implementation of the CHESS replacement project to ensure 'the market has a high degree of confidence in a revised go-live date'.
- continue to monitor ASX Clear and ASX Settlement's compliance with additional licence conditions, and ASX's continued investment in/maintenance of, the current CHESS system until 'at least, the CHESS replacement revised go-live date'.
- 'continue to analyse and assess the changes to the ASX operating rules that are necessary for the CHESS replacement, providing ASIC's advice to the Minister's delegate on whether to disallow all or parts of the changes'.
- Updating trade reporting rules: Over the next year (or more) ASIC plans to continue to work on aligning Australian OTC derivatives trade reporting requirements with international requirements, including for the Unique Transaction Identifier (UTI), the Unique Product Identifier (UPI) and Critical Data Elements (CDE). ASIC also plans to 'enhance data aggregation and surveillance capabilities, and effective information sharing'.
- Developing a policy framework for competition in clearing and settlement: Over the next three (or more years) and subject to the passage of legislation, ASIC plans to 'develop and implement rules to achieve competitive outcomes in the provision of clearing and settlement services by a monopoly provider, and to ensure safe and effective competition should a competitor emerge'.

[Sources: ASIC media release 28/08/2023; ASIC Corporate Plan 2023-27 Focus 2023-4]

Top Story | Results of ASIC review of general insurance TMDs

ASIC has outlined the findings of its recent review of Target Market Determinations (TMDs) for general and life insurance products. MinterEllison has released an article highlighting the key takeaways. You can find the full text of the article here: Results of ASIC review of general insurance TMDs - Insight - MinterEllison

ASIC has written to 30 large lenders calling on them to ensure they 'appropriately support customers experiencing financial hardship'

The Australian Securities and Investments Commission (ASIC) has written to 30 large lenders calling on them to ensure they have appropriate arrangements in place to respond to requests for assistance from customers experiencing financial hardship.

The letter was prompted by the shift in the economic environment over the past year which has led to increasing numbers of people experiencing financial distress/difficulty due to cost of living pressures.

ASIC states that

> 'In response to higher interest rates and cost-of-living pressures, financial hardship will be an area of increased focus for ASIC over the next 12 months'.

The letter sets out ASIC's expectations around how lenders can meet their legal obligations at Appendix A.

The letter also makes clear that ASIC expects boards to engage with the expectations included in the letter, including engaging in discussion around the steps their organisation 'is taking to ensure it has appropriate arrangements in place to support and respond to consumers experiencing financial hardship'.

Ongoing work on financial hardship

ASIC notes that its ongoing work on financial hardship is planned to include a data collection from 30 large lenders about their handling of hardship applications.

In addition, ASIC is undertaking a review of ten large home lenders 'to understand their approach to financial hardship'. ASIC expects to release findings from this review in early to mid-2024.

[Note: ASIC's latest corporate plan flags the regulator's intention to review consumer hardship arrangements with a view to making recommendations to improve their effectiveness and suitability. ASIC also cautioned that it intends to take enforcement action 'where there has been serious lender non-compliance with hardship requirements'.]

[Source: ASIC media release 30/08/2023]

In Brief | Ensuring insurers deliver on their pricing promises: ASIC has taken court action over an insurers' (alleged) failure to deliver on home contents insurance pricing promises – in essence, ASIC alleges that the insurer 'misled' customers about the extent of the 'loyalty discount' they would receive. This is the latest enforcement action by the regulator over pricing issues – responding to failures to deliver on pricing promises is one of ASIC's enforcement priorities

[Note: ASIC's Report 765 When the price is not right: Making good on insurance pricing promises, outlines a range of 'pricing failures' identified by general insurers after an ASIC-initiated review of their pricing practices, as well as outlining ASIC's expectations around what is needed to address these issues. For our summary of REP 765 see: ASIC calls on general insurers to sharpen their focus on nonfinancial risk in light of ongoing 'systemic pricing failures' - Report Overview - MinterEllison]

[Source: ASIC media release 25/08/2023]

In Brief | Appearing before the inquiry into promoting economic dynamism, competition and business formation, former ASIC and IOSCO Chair Greg Medcraft underlined 'the need for a more competitive banking system'. Mr Medcraft suggested that 'the key to securing this is a public residential mortgage-backed security scheme [for example, of the kind in place in Canada], which would reshape competition in the Australian residential lending market'

[Source: Standing Committee on Economics: Inquiry into promoting economic dynamism, competition and business formation, Transcript, 23/08/2023]

Risk Management

Government launches two year review of competition policy settings

The government has announced a two year review into competition policy settings.

The focus is on ensuring 'competition laws, policies and institutions' remain 'fit for purpose, with a focus on reforms that would increase productivity, reduce the cost of living and boost wages'.

Scope of the review

Initially the review will consider:

- 'proposals put forward by the Australian Competition and Consumer Commission around merger reform, as well as other competition law issues
- options for coordinated reform with states and territories, to be progressed through the Council on Federal Financial Relations
- non-compete and related clauses that restrict workers from shifting to a better-paying job
- providing advice on competition issues raised by new technologies, the net zero transformation and growth in the care economy'

Assistant Minister for Competition, Charities and Treasury and Assistant Minister for Employment Andrew Leigh has separately confirmed that the review will not include the aviation sector. The issue of airline competition is planned to be explored in a forthcoming Aviation Green Paper.

The review will be conducted by a Competition Taskforce within Treasury and will involve 'targeted public consultation'. The Taskforce will be supported by an expert panel with members including the CEO of the Grattan Institute, Danielle Wood, and former Chair of the ACCC, Rod Sims.

Review to provide 'continuous advice', not a formal report

The review will provide 'continuous advice rather than a formal report, so progress can be made over time'.

BCA cautions against 'overzealous' regulation of merger activity

The Business Council of Australia (BCA) welcomed the 'intent' behind the review, but raised concerns about potential merger reform.

> 'Although the Business Council supports the government's intent, we are cautious about the risks to the economy if merger activity is stifled by overzealous and uncertain regulation at a time where Australian industry needs to scale to compete globally. Mergers are a critical aspect of competitive capital markets….There is a real risk to growth and productivity if merger review processes impede desirable mergers due to the cost, delay or unduly conservative competition assessments'.
>
> [Sources: Joint media release Treasurer Jim Chalmers, Assistant Minister for Competition, Charities and Treasury and Assistant Minister for employment Andrew Leigh 23/08/2023; Treasury Competition Policy Review]

How to fix Australia's whistleblowing laws: Human Rights Law Centre reiterates calls to strengthen protections for whistleblowers

The Human Rights Legal Centre has reiterated calls for an overhaul of legal protections for whistleblowers after a comprehensive review of the outcomes of all whistleblowing cases that have proceeded to judgement across Australia revealed that existing protections are 'paper shields'. The review concluded that:

> 'whistleblowing laws are not working as intended – protections that look good on paper have not translated into practically-accessible, enforceable rights in practice. Australia's whistleblower protections are too often paper shields'.

For example, the report found:

- Only one judgment where the whistleblower was awarded compensation for facing detriment after speaking up.
- There were zero successful judgments under several key, in-force whistleblowing regimes

As flagged, the Human Rights Legal Centre considers this adds further weight to its push for existing protections and support for whistleblowers to be strengthened, including through implementing the recommendations in its joint report with Griffith University and Transparency International Australia: Protecting Australia's Whistleblowers (updated June 2023).

Key recommended changes include (among others):

- The establishment of a whistleblower protection authority. The report notes that the Attorney-General, has committed to a discussion paper in 2023-2024 on the need for a whistleblower protection authority, but only in respect of the public sector. The Human Rights Legal Centre submits that its latest analysis demonstrates that

  > 'the need is already clear, that an authority should be established as a priority, and that, as recommended by past parliamentary committees, the need extends across all sectors, not simply the public sector'.

- Consideration to be given to measures to provide additional support including::
  - Government funding to support whistleblowers to access legal support
  - The introduction of whistleblower rewards schemes in Australia (potentially administered by the whistleblower protection authority)
  - The introduction of a qui tam law in Australia (equivalent to US laws) to provide a financial incentive for law firms to assist whistleblowers to pursue action against fraud in government programs

  [Sources: HRLC media release; HRLC report: The Cost of Courage Fixing Australia's Whistleblower Protections]

Other News

MBR Program scrapped following independent review

The government has announced it will scrap the previous government's Modernising Business Registers (MBR) program, following the completion of an independent review of the project which concluded that:

> 'the MBR Program should be stopped, as the economic benefits from the program do not justify the level of additional expenditure required'.

For context, the MBR Program, which was being implemented by the Australian Taxation Office (ATO) would have (among other things) consolidated more than 30 existing ASIC registers and the Australian Business Register (ABR) into a single location, with a view to streamlining and simplifying the registration process as well as improving transparency.

The project was planned to be rolled out progressively from 2021 – 2024.

The review concluded that delivery of the project would cost up to $2.8 billion (or five times the original estimate to deliver, with most of this spend still ahead) and that the project would not be able to be delivered in full until 2029.

What are the implications of the decision?

The 'preferred alternative' going forward, put forward by the review is:

> 'to revert to the pre-MBR Program operating model for registry services and undertake an additional targeted investment of approximately $105 million in uplifting data integrity and quality on top of the costs of ceasing the program, with a total additional cost of approximately $515 million (Option 5)'.

The government has accepted this approach, underlining that it remains 'committed to making it easy for businesses to register their details and will prioritise the stabilisation of existing registers', including giving consideration to 'options to uplift registries following further analysis'.

In practical terms, this means that business as usual registry operations is set to continue under the Australian Securities and Investments Commission (rather than being consolidated into a single register under the ATO).

The DirectorID regime is not impacted by the government's decision.

Governance Institute has (cautiously) welcomed the government's decision

Modernising Business Registers Business Advisory Group member, the Governance Institute of Australia, has welcomed the decision to scrap what is considers had become an 'untenable' project, but in doing so also underlined the need for 'a new plan' being implemented to support what (in its view), remain important reforms.

In her opening address to the conference, Governance Institute Chair, Pauline Vamos said

> 'We are relieved that the Government has finally decided to end the project and seek a more cost-effective way to improve the governance and management processes of our business registers….Improving infrastructure and reducing regulatory burdens on organisations is one of the Institute's major priorities. Business registers are critical infrastructure and we are well past the time to modernise them…The failure of the MBR project is an unfortunate set-back, but the goals of the project remain critical…Action to rectify the situation is urgent, otherwise we will be left with a patched system that has been straining to operate efficiently for some years.'

The Governance Institue has called for the modernising agenda to be maintained with increased funding to fast-track business productivity reforms.

[Sources: Assistant Treasurer and Minister for Financial Services Stephen Jones media release 28/08/2023; Review of the Modernising Business Registers Program - Final report 28/08/2023; Governance Institute of Australia media release 28/08/2023]

Independent Review of the Franchising Code of Conduct: Consultation paper 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'.

Consultation paper released

The review process will be informed by consultation. On 22 August 2023, Treasury released a consultation paper seeking feedback on a number of question including (among others) views on whether:

- the Franchising Code is fit for purpose/whether the scope of coverage remains appropriate
- the Franchising Code should be retained
- there are any emerging trends (eg technology) which could impact the operation of the Franchising Code
- the ACCC's role in enforcing Code compliance remains appropriate
- additional educational resources provided by regulators are sufficient/effective
- dispute resolution provisions in the Code provide an effective framework for the resolution of disputes

You can find a full list of questions in Appendix B to the consultation paper at p32.

Timing

The due date for submissions on the consultation paper is 29 September 2023.

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; Consultation paper]

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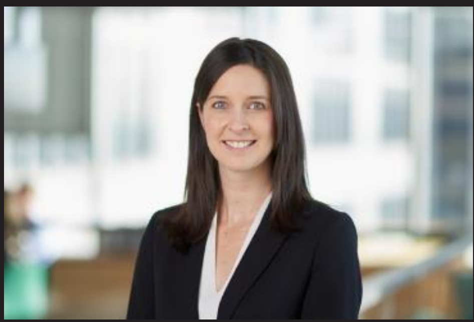

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