Governance News

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

14 June 2023

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Remuneration

Report finds C Suite pay has jumped significantly in Australia over the past year

The Governance Institute of Australia and McGuirk Management Consultants have released their latest report tracking executive pay across C suite executive positions at public, private and not-for-profit organisations.

Announcing the release of the report, the Governance Institute highlighted there has been a 'significant' uptick in executive pay over the past 12 months, particularly for executives at ASX 200 companies.

For example:

- 42% of ASX board directors and 71% of ASX senior executives received a pay rise in the last 12 months
- Company secretaries received an average increase of 11% (increasing to 13% for those working at ASX 200 companies and increasing again to 24% for those working in large listed companies)
- Pay for risk managers also increased significantly with risk managers receiving an average increase of 15% over the last year.
- Both company secretaries and risk managers were also eligible for higher bonuses with risk managers from ASX 200 companies able to receive up to 45% of their fixed salary in bonuses.

Commenting specifically on the spike in risk manager and company secretary pay Governance Institute of Australia CEO Megan Motto said the increases reflect the level of demand for these skill sets. Ms Motto stated:

> 'These skills too are in hot demand. There are currently around 2500 jobs being advertised nationally for the role of "risk manager". This is even though there is no actual job classification with this title…Remuneration is a key factor for candidates, and with roles like Company Secretary now on the skills shortage list, it's not surprising we're seeing some really big jumps in base salaries.'

Commenting generally on the uptick in executive pay over the past 12 months, Ms Motto identified the tight labour market and cost of living pressures as key drivers. Ms Motto added that from a board perspective, boards should ensure that communication to investors around the justification for executive pay increases is clear. Ms Motto stated:

> 'These are significant increases off the back of several years of relatively small rises in fixed pay for executives…With AGM season looming, boards will need to have a strong narrative around their remuneration policies to stand up to shareholder scrutiny and manage reputation risks.'

> [Source: Governance Institute of Australia media release 14/06/2023]

Netflix shareholders vote down 'Say on Pay' proposal at Netflix

Netflix shareholders rejected the advisory (non-binding) proposal (Proposal 3 in the Notice) to approve the pay packages for the top executives compensation at the 1 June 2023 shareholder meeting. Proposal 3 looks to have secured just 29% support.

The structure and quantum of awards appears to be a key factor in the result

Legal and General Investment Management (LGIM) cited insufficient focus on long-term performance and insufficient rigour around the equity awards and annual bonuses among its reasons for voting 'against' the proposal. LGIM states:

> 'A vote against is applied as LGIM expects a sufficient portion of share incentive awards to be assessed against long term performance conditions to ensure alignment of remuneration with company performance. Remuneration - Performance period: A vote against is applied as LGIM expects performance to be measured over a three year period. Remuneration - Shareholding Guidelines: A vote against is applied as the company does not have a shareholding guideline in place for executives. LGIM believes a shareholding requirement is a good way to align with long term shareholder interests because executives are expected to maintain a proportion of earned shares at risk over the medium term. Remuneration - Malus and Clawback: A vote against is applied as LGIM expects all incentives to be subject to clawback if the vested award is later deemed to be unjustified. There are ongoing concerns regarding the pay structure. Though improvements were made to ensure that base salaries for co-CEOs remain at a reasonable level, salaries for other NEOs may still be exceedingly large depending on their selected allocation of payment. In addition, equity awards, which remain a significant portion of executive pay, continue to lack pre-set performance vesting criteria, and the introduction of annual bonuses only covers the co-CEOs. In light of these concerns, a vote AGAINST this proposal is warranted'.

Storebrand, which also voted 'against' the proposal, also raised structural concerns as well as what were perceived to be overly generous awards. Storebrand stated that:

> 'Following a failed say-on-pay vote result, the company disclosed its engagement efforts with shareholders, noted shareholder feedback, and made substantive changes to the pay program. This indicates sufficient responsiveness by the compensation committee. Nevertheless, there are ongoing concerns regarding the pay structure. Though improvements were made to ensure that base salaries for co-CEOs remain at a reasonable level, salaries for other NEOs may still be exceedingly large depending on their selected allocation of payment. In addition, equity awards, which remain a significant portion of executive pay, continue to lack pre-set performance vesting criteria, and the introduction of annual bonuses only covers the co-CEOs. In light of these concerns, a vote AGAINST this proposal is warranted'.

Writers' strike?

Ahead of the vote, the Writers Guild of America (WGA) had urged Netflix investors to vote down the proposal in solidarity with striking writers' demands over pay/working conditions. The WGA's letter stated:

> 'Approval of this compensation package is inappropriate in light of the ongoing WGA writers' strike and the associated risks that Netflix executives are creating for investors. Shareholders should send a message to Netflix that if the company could afford to spend $166 million on executive compensation last year, it can afford to pay the estimated $68 million per year that writers are asking for in contract improvements and put an end to the disruptive strike'.

> [Sources: Netflix Inc Notice of Meeting; Results of meeting]

Shareholder Activism

Shareholder lobbying proposal (just) falls short of passing at the McDonalds shareholder meeting

McDonald's shareholders voted on seven shareholder ESG proposals, none of which had board backing, at the 2023 annual meeting. One of the proposals (Proposal 9 in the Notice) calling for disclosure around the company's lobbying activities and expenditure came close to passing (you can find further details on this in the table below).

For context, lobbying has been identified by As You Sow as a key shareholder concern this proxy season with multiple proposals filed on the issue (p 37-38 of As You Sow's report is a table listing the companies targeted with lobbying proposals this proxy season).

The table below provides an overview of each of the shareholder proposals, the vote result in each case and an indication of how investors voted.

MCDONALD'S		
PROPOSAL	**APPROX, RESULT**	**HOW INVESTORS VOTED**
Antibiotics policy: Proposal 5 in the Notice, filed by Green Century Capital Management, called on the company to: 'adopt an enterprise-wide policy to phase out the use of medically important antibiotics for disease prevention purposes in its beef and pork supply chains'. The proposal calls for the policy to include timelines, metrics for measuring progress and third party verification.	▪ 16% support	▪ Norges Bank Investment Management (NBIM) voted against ▪ CalPERS voted against ▪ CalSTRS voted against ▪ Legal and General Investment Management (LGIM) voted in support stating that: ' A vote in favour is applied as LGIM considers AMR a systemic risk. While the company is taking action and have re-set targets on the use of antibiotics in their supply chain for beef, LGIM considers additional steps such as a complete phase-out of medically important antimicrobials within their supply chain.' ▪ Storebrand voted in support stating that: ' A vote FOR this proposal is warranted because there are industry and regulatory trends to move towards antibiotic-free meat production as the science more clearly shows the routine use of antibiotics in food farms contributing to the global problem of antibiotic resistance.'
Comply with WHO guidelines on antibiotic use: Proposal 6 in the Notice, filed by Shareholder Commons calls for the board to	▪ 18% support	▪ NBIM voted in support stating that: 'The board should account for material sustainability risks facing the company, and the broader environmental and

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PROPOSAL	APPROX, RESULT	HOW INVESTORS VOTED
'institute a policy that the Company ("McDonald's") comply with World Health Organization ("WHO") Guidelines on Use of Medically Important Antimicrobials in Food-Producing Animals ("WHO Guidelines") throughout McDonald's supply chains'.		social consequences of its operations and products. Sustainability disclosures should be aligned with applicable global reporting standards and frameworks to support investors in their analysis of risks and opportunities' ▪ CalPERS voted against ▪ CalSTRS voted against ▪ LGIM (one of the co-filers of the proposal) voted in support stating that: 'LGIM considers AMR a systemic risk. The overuse of antibiotics, one form of antimicrobial, is known to exacerbate AMR. The majority of antibiotics used globally are for animals not humans, it is essential to limit the employment of antimicrobials, and in particular antibiotics, to stem the speed by which AMR is occurring. The World Bank estimates that AMR could result in a 3.8% loss in global GDP, an impact comparable to that of the 2008 financial crisis, and in an AMR worst-case scenario, additional healthcare expenditures could amount to $1.2 trillion globally on an annual basis. Further, in a study published in January 2022 in the Lancet it was established that in 2019 1.27 million deaths occurred due to bacterial AMR, and 4.95 million deaths were indirectly linked to AMR. This is why LGIM has filed this resolution, and will be supporting the resolution.' ▪ Storebrand voted in support stating that: 'A vote FOR this proposal is warranted as there are industry trends towards phasing out the use of antimicrobials in animal-related food production based on evidence that their routine use in food production

MCDONALD'S		
PROPOSAL	APPROX, RESULT	HOW INVESTORS VOTED
		contributes to the global problem of antibiotic resistance. Additionally, lack of compliance with WHO guidelines could potentially expose the company to both reputational and regulatory risks.'
Annual report on 'Communist China': Proposal 7 in the Notice, filed by the National Legal and Policy Center calls on the company to report annually (from 2023) on: 'the nature and extent to which corporate operations depend on, and are vulnerable to, Communist China, which is a serial human rights violator, a geopolitical threat, and an adversary to the United States. The report should exclude confidential business information but provide shareholders with a sense of the Company's reliance on activities conducted within, and under control of, the Communist Chinese government'.	▪ 3% support	▪ NBIM voted against ▪ CalPERS voted against ▪ CalSTRS voted against ▪ LGIM voted against stating that: 'A vote AGAINST this proposal is warranted. The company appears to provide shareholders with sufficient disclosure to assess its management of risks related to its operations in China and to have policies in place that seem to address human rights concerns raised by the proponent'. ▪ Storebrand voted against giving the same justification as LGIM (in almost identical words): 'A vote AGAINST this proposal is warranted. The company appears to provide shareholders with sufficient disclosure to assess its management of risks related to its operations in China and to have policies in place that seem to address human rights concerns raised by the proponent'.
(Anti-ESG proposal) Civil rights/DEI (Merits) Audit: Proposal 8 in the Notice filed by the National Center for Public Policy Research (HCPPR), calls on the board to: 'commission [and publish a report on] an audit analysing the impacts of the Company's Diversity, Equity & Inclusion policies on civil rights, non-discrimination and returns to merit, and the impacts of those issues on the Company's business. The audit may, in the Board's discretion, be conducted by an independent and unbiased third party with input from civil rights organisations, public-	▪ 2% support	▪ NBIM voted against ▪ CalPERS voted against ▪ CalSTRS voted against ▪ LGIM voted against stating that: 'A vote AGAINST this resolution is warranted as the company's current policies and disclosures provide adequate information for shareholders to determine whether its employee programs and training materials are having a reverse discrimination effect'.

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PROPOSAL	**APPROX, RESULT**	**HOW INVESTORS VOTED**
interest litigation groups, employees and shareholders of a wide spectrum of viewpoints and perspectives.' For context, the supporting statement from the NCPPR submits that DEI practices 'create massive reputational, legal and financial risk. If the company is, in the name of so-called 'equity' committing illegal or unconscionable discrimination against employees deemed 'non-diverse' then the company will suffer in myriad ways – all of them both unforgiveable and avoidable'.		▪ Storebrand voted against stating that: 'A vote AGAINST this resolution is warranted as the company's current policies and disclosures provide adequate information for shareholders to determine whether its employee programs and training materials are having a reverse discrimination effect'.
Disclosure of lobbying activity/expenditure: Proposal 9 in the Notice, filed by SOC Investment Group, calls on the company to report annually disclosing: 'Company policy and procedures governing lobbying, both direct and indirect, and grassroots lobbying communications. Payments by the Company used for (a) direct or indirect lobbying or (b) grassroots lobbying communications, in each case including the amount of the payment and the recipient. Description of management's decision-making process and the Board's oversight for making payments described above'.	▪ 50% support according to the SEC filing (however, a LinkedIn post from SOC Investment Group notes that 'as McDonald's counts abstentions as AGAINST votes, the final tally was 49.75% FOR and the proposal was not approved')	▪ NBIM voted in support giving the same justification as was provided for its support of proposal 6 above. ▪ LGIM voted in support stating that: 'A vote in favour is applied as LGIM expects companies to provide sufficient disclosure on such contributions'. ▪ Storebrand voted in support stating that: 'A vote FOR this proposal is warranted, as additional disclosure of the company's state level lobbying, indirect lobbying-related expenditures and board oversight mechanisms would help shareholders better assess the risks and benefits associated with the company's participation in the public policy process'. ▪ CalPERS voted in support ▪ CalSTRS voted in support
Disclosure of international political lobbying policy/ activity/expenditure: Proposal 10 in the Notice, filed by John Harrington, calls on the company to report annually on 'global public policy and political influence, disclosing company expenditures and activities outside of the United States. Such report should disclose company funding and in-kind support directed to candidates or electioneering, lobbying, and any charitable donations directed to public policy	▪ 18% support	▪ NBIM voted in support giving the same justification as was provided for its support of proposal 6 above. ▪ CalPERS voted against ▪ CalSTRS voted against ▪ LGIM voted in support stating that: 'A vote in favour is applied as LGIM expects companies to provide sufficient disclosure on such contributions both domestically and internationally'.

MCDONALD'S		
PROPOSAL	**APPROX, RESULT**	**HOW INVESTORS VOTED**
research or influence for the preceding year including: – Recipients and amounts. – The Company's membership in or payments to nongovernmental organizations including trade and business associations, scientific or academic organizations and charities. – The rationale for these activities'.		▪ Storebrand voted in support stating that: 'A vote FOR this resolution is warranted, as increased global transparency and disclosure around its memberships in political organizations and lobbying expenditures, as well as the company's its management- and board-level oversight of spending would help shareholders evaluate the company's management of related risks and benefits'.
Animal welfare disclosure: Proposal 11 in the Notice filed by the Humane Society of the United States calls for disclosure of: 'what exactly the "15 key welfare indicators" being used for the company's animal welfare program are. The disclosure should include specific details about the KWIs and how the company is using each one to measure and improve the welfare of animals in its poultry supply. It should be made within six months of the 2023 annual meeting'.	▪ 38% support	▪ NBIM voted in support giving the same justification as was provided for its support of proposal 6 above. ▪ CalPERS voted in support ▪ CalSTRS voted against ▪ LGIM voted in support stating that: 'A vote FOR this resolution is warranted. Although we acknowledge the steps that McDonald's is reported to be taking already to protect the welfare of animals; we do not believe additional disclosures would harm their business. Adopting and reporting on best practices on animal welfare may improve the company's reputation'. ▪ Storebrand voted in support stating that: 'A vote FOR this resolution is warranted. Additional disclosure on how the key is measuring animal welfare would allow shareholders to better be able to assess the effectiveness of the company's animal welfare efforts and management of related risks'.

[Sources: Notice of Meeting; Results of meeting]

Church of England to support shareholder lobbying proposal at Toyota

- Toyota shareholders will have opportunity to vote on a shareholder climate-lobbying resolution (Resolution 4 in the Notice) – calling for annual reporting on the alignment of the company's climate-related lobbying activities with the goals of the Paris Agreement - at the company's 14 June 2023 AGM.

- The board has recommended shareholders oppose the resolution on the basis that it considers the company's activities are aligned with its 'aggressive goals to achieve carbon neutrality by 2050' and the disclosure provided is sufficient.

CEPB predeclares support of the resolution

- Ahead of the meeting, the Church of England Pensions Board (CEPB) has predeclared its intention to support the resolution.
- Broadly, CEPB considers supporting the resolution is warranted to signal concern that the company's lobbying activity (including indirect lobbying through membership of industry associations) 'may be undermining the goals of the Paris Agreement'.

- CEPB points to both the assessment of the company's direct and indirect climate lobbying activity by InfluenceMap (which found the company opposed the introduction of stronger emissions reduction regulations for automakers in various jurisdictions), and separately assessment by the Climate Action 100+ Net Zero Company Benchmark (which highlighted gaps in its climate lobbying disclosure) in support of this.
- CEPB Director of Climate & Environment Laura Hillis, commented:

  'We are supporting this resolution because we're concerned that Toyota's lobbying, and that of its industry associations, may be undermining the goals of the Paris agreement…While we welcome that Toyota has produced previous disclosures related to climate lobbying, we believe we need more depth and detail to properly understand what Toyota is doing. The resolution, filed by fellow shareholders AkademikerPension, APG, and Storebrand, rightly calls for a greater level of detail – and an assessment of misalignment against the goals of the Paris Agreement. This is aligned with the Global Standard for Corporate Climate Lobbying, which we urge all companies we invest in to adopt in their reporting.'

- Separately, Norges Bank Investment Management (NBIM) has predeclared its intention to vote against the resolution.

  [Source: Church of England Pensions Board media release 06/06/2023]

Disclosure and Reporting

Top Story | Firms should be preparing now for ISSB-aligned reporting requirements says ASIC Chair

ASIC Chair underlines that preparation for the introduction of ISSB-aligned disclosure standards goes well-beyond the TCFD-framework

Key Takeouts

- ASIC expects firms to be preparing now for the expected introduction of ISSB-aligned disclosure requirements (which go beyond the requirements in the TCFD-framework).
- Treasury is expected to release a position paper outlining the government's proposed implementation timeline and approach by the end of June. It's expected that the government will adopt a phased approach to implementation, according to the size of the entity.
- ASIC considers that uncertainty around this (and other ESG-related developments) is no excuse for failing to meet existing disclosure requirements.
- Tackling greenwashing, including greenhushing remains a priority for the regulator.

Our key takeaways from Australian Securities and Investments Commission (ASIC) Chair Joe Longo's 13 June 2023 address to the Committee for Economic Development of Australia (CEDA) State of the Nation conference are below.

'Change isn't just on the horizon, it's already here', so we need to prepare now

The central message running through ASIC Chair Joe Longo's address is that:

> 'environmental, social, and governance (ESG) issues are driving the biggest changes to financial reporting and disclosure standards in a generation…and we need to be ready to meet that change at every step of its development'.

Importantly, Mr Longo emphasised that the change is already happening observing that 'the conventional paradigm in finance is already undergoing a seismic shift'.

Mr Longo pointed to three of the seven 'megatrends' highlighted in the CSIRO's 2022 report – Our Future World – in illustration of the scope of the shift and the (already discernible) direction of travel. Namely:

– 'climate change adaptation and the protection of livelihoods, infrastructure, and people's quality of life as the climate changes.
– the global push to reach net zero, protect biodiversity and use resources more efficiently.
– unlocking the human dimension and elevating diversity, equity and transparency in business, policy, and community decision making'.

Mr Longo cited the expected release by the International Sustainability Standards Board (ISSB) of its first two global sustainability standards at the end of June 2023, in illustration of how these themes are beginning to 'play out globally'.

'The signal is clear: major transformational change has begun. And we all need to be ready'

Mr Longo recapped some of the initiatives on foot to support the government's broader net zero by 2050 'ambition' including:

- the development of new standards or taxonomies for sustainable investment;
- 'further initiatives to reduce greenwashing and strengthen ESG labelling'; and
- funding in the 2023/24 Federal Budget for sustainable finance initiatives (including additional financial support for ASIC to undertake its greenwashing enforcement work).

These developments, Mr Longo said, 'add further weight to the increasing profile of ESG issues as a priority for investors and companies' and serve to underline the need for companies to prepare.

In making this point, Mr Longo acknowledged that many ASX 100 companies have already taken steps in this direction, including voluntarily adopting/reporting against the TCFD framework. However, Mr Longo emphasised that this alone is insufficient in the face of the accelerating demands of international capital markets. Mr Longo commented.

> 'ESG is not a static space, and the bar is continually being raised ever higher. As such, there is a need for companies to reflect on and review governance standards, to ensure stronger support for disclosure'.

Preparation of ISSB-aligned standards 'should be starting now'

Mr Longo reiterated that ASIC continues to encourage voluntary reporting under the recommendations of the TCFD for the current financial year.

He emphasised however, that ASIC expects firms to be preparing now for the expected introduction of more rigorous ISSB-aligned requirements. ASIC's expectation is that:

> 'Firms should be well advanced in embedding robust corporate governance practices ahead of more rigorous reporting requirements that are imminent in the standards being released by the ISSB in two weeks. These ambitious standards will require companies to adopt a systematic approach to collecting and analysing data across the company itself, and its supply chains. Preparation for that should be starting now'.

Mr Longo also flagged that Treasury is expected to release a position paper on these standards 'within the next fortnight' which will outline the proposed implementation timeline. On this point, Mr Longo said that 'a scaled introduction, depending on the size of the entity, is expected'.

Tackling greenwashing (including greenhushing) remains a key focus

Mr Longo reiterated the points made in his 5 June 2023 keynote address to the AFR ESG Summit (summarised) concerning the regulator's continued focus on maintaining 'high standards of governance disclosure' in line with existing requirements, and more particularly the priority ASIC is according to tackling greenwashing.

Mr Longo also reiterated ASIC's views on 'greenhushing' - ie where companies cease all voluntary ESG-disclosure out of purported concern about the regulatory response to such disclosures.

Mr Longo observed that:

> '"greenhushing", is in our view just another form of greenwashing, and risks misleading by omission. Silence from firms and failing to engage isn't the answer'.

Guidance for boards

- ASIC has released an information sheet (INFO 271) offering guidance on how to avoid greenwashing. ASIC has since released ASIC report 763 (summarised) which is intended to supplement the guidance in INFO 271 through providing examples of when ASIC has intervened.
- MinterEllison has also produced a guide on the topic: Navigating the rising tide of greenwashing - Insight – MinterEllison
- Ahead of the introduction of new mandatory ISSB-aligned sustainability reporting requirements in Australia, the AICD, in conjunction with Deloitte and MinterEllison, have produced a new guide outlining what is known about the forthcoming requirements, the questions yet to be determined by government, and the steps boards can take now in preparation.

[Source: ASIC Chair Joe Longo address to the CEDA State of the Nation Conference 13/06/2023]

ISSB standards to launch on 26 June 2023

- The International Sustainability Standards Board (ISSB) is set to release its initial two sustainability standards - – IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information (General Requirements Exposure Draft) and IFRS S2 Climate-related Disclosures – at a series of launch events starting on 26 June 2023.
- Ahead of the expected introduction of mandatory ISSB-aligned sustainability reporting requirements in Australia, the AICD, in conjunction with Deloitte and MinterEllison, have produced a new guide outlining what is known about the forthcoming requirements, the questions yet to be determined by government, and the steps boards can take now in preparation.

- For context, consultation (summarised) on how and when a new mandatory sustainability reporting regime will be introduced in Australia closed on 17 February 2023. Treasury's consultation paper suggests that mandatory climate reporting is likely to commence in Australia from the 2024/2025 financial year (though it is not yet clear which entities will be required to report within this timeframe).
- In a 13 June 2023 speech, ASIC Chair Joe Longo flagged that the Australian Treasury is expected to release a position paper on the government's approach to the implementation of the standards in Australia 'within the next fortnight' which will outline the proposed implementation timeline. On this point, Mr Longo said that 'a scaled introduction, depending on the size of the entity, is expected'.

  [Source: LinkedIn post: https://www.linkedin.com/posts/international-sustainability-standards-board_issbstandards-ifrssustainability-ifrs-activity-7072578283241910272-EzFk?utm_source=share&utm_medium=member_desktop]

Greenwashing: UK watchdog moves to ban ads from three large energy companies over greenwashing concerns

- The UK Advertising Standards Authority (ASA) has recently taken action to ban certain advisements from Shell, Petronas and Repsol over greenwashing concerns.
- For example the regulator has ruled that:
  - An ad broadcast by Petroliam Nasional Berhad t/a PETRONAS could not be broadcast again in its current form because it 'exaggerated the total environmental benefit of the advertiser's products and services and therefore was misleading' (in breach of BCAP Code rules 3.1, 3.2 (Misleading advertising), and 9.2 (Environmental claims)). More particularly, the ASA's concerns hinged on the omission of information about the overall impact of the company's activities, emissions and the pathway for emissions reduction. The company's submission that the ad was about 'ambition and planned change' (and therefore not misleading) was rejected.
  - An ad from energy company Repsol SA could not appear again in its current form because:
    - the ad omitted information about the overall impact of the company's business activities (which includes ongoing fossil fuel production); and
    - because the claim – 'At Repsol, we are developing biofuels and synthetic fuels to achieve net zero emissions' was not clear (because the role that biofuels are planned to play in Repsol's net zero emissions plan was not clear from the text of the ad itself).

    That consumers could access further information on the company's website was not accepted as sufficient to address these concerns. The ASA states that:

    > 'further information to contextualise how and when Repsol would achieve net zero emissions, and the role that the development of biofuels would play in that plan, was material to consumers' understanding of the ad's overall message, and should have appeared in the ad itself'.
  - Three ads from Shell UK Ltd t/a Shell could not be not appear again in their current form. Again, the key issue is that the ASA considered the ads omitted significant information about the overall environmental impact of the company's business activities.

  [Sources: ASA rulings: Petroliam Nasional Berhad t/a PETRONAS; Repsol SA; Shell UK Ltd]

ESG

45 governments endorse IEA goal of doubling global energy efficiency progress by 2030

- Following the International Energy Agency's (IEA) 8th Global Conference on Energy Efficiency, 45 governments (including Australia) have endorsed the aim of doubling the average global rate of energy efficiency improvements by 2030. This means annual energy efficiency would need to improve by over 4% annually by 2030 (up from 2.2% annually now).
- According to the joint statement:

  'The pace of global energy intensity improvements noticeably slowed in the second half of the last decade. Based on International Energy Agency (IEA) analysis, there is potential for the annual energy intensity improvement rate to double from its current level, so as to ensure prosperity and sustainable economic growth and in order to be in line with global climate goals'.

  [Source: IEA media release 09/06/2023]

Australia and NZ agree to work together to maximise the financial opportunities flowing from the net zero transition

- Representatives from the Australian and New Zealand governments have signed a joint statement outlining how the two countries will work together to 'maximise the economic opportunities of the net zero transformation and accelerate climate action across the Indo-Pacific'.
- The statement includes the following five commitments:
  - 'Coordinate efforts to increase electric vehicles (EVs) in the Australasian market, including collaborating on accelerating the uptake of zero emissions vehicles in government fleets, and improving charging infrastructure.
  - Support development of the internationally aligned Guarantee of Origin Scheme, to track and verify emissions associated with hydrogen and renewable electricity, including exploring options for adoption of Australia's Guarantee of Origin Scheme in New Zealand.
  - Establish a Net Zero Government Working Group to support decarbonising public services, climate-related disclosures and sustainable procurement.
  - Align sustainable finance frameworks and tools across the Tasman to enhance interoperability and support businesses operating across the region.
  - Collaborate on efforts to reduce and prevent greenwashing and strengthen public sector leadership on sustainable finance'.

On the second point above (Guarantee of Origin Scheme) the Treasurer and Minister for Climate Change opined that:

  'New Zealand's commitment to explore adoption of Australia's Guarantee of Origin Scheme reiterates Australia's renewed climate credibility, and that Australia is doing what is needed to seize economic and trade opportunities in cleaner, cheaper energy'.

- The Australian and New Zealand governments have also agreed to hold annual climate talks - the 'Australia-New Zealand 2+2 Climate and Finance Dialogue' - and to establish a working group to support policy implementation. Australia is set to host the next round of talks in 2024.
- The governments of both nations acknowledged the importance of addressing 'climate change and energy security' in the Pacific more broadly and committed to:

  'further coordinate our efforts to support partner countries in the Pacific in addressing the impacts of climate change and amplifying Pacific voices in international climate and energy discussions. Ministers welcomed the opportunity to draw global attention to the unique challenges faced by the region, accelerate global climate action, securing a sustainable energy future and capturing the economic opportunities of the transition'.

  [Source: Joint media release: Treasurer Jim Chalmers, Minister for Climate Change and Energy Chris Bowen 08/06/2023; Inaugural Australia – New Zealand 2+2 Climate and Finance Dialogue Joint Statement 0806/2023]

New tools for climate engagement launched: IIGCC and TPI Centre launch new Net Zero Standard for Banks and Net Zero Banking Assessment Framework

- The Institutional Investors Group on Climate Change (IIGCC), in consultation with the Transition Pathway Initiative Global Climate Transition Centre (TPI Centre), has released a new Net Zero Standard for Banks setting out investor expectations on banks' transition to net zero.
- The Standard, which has been developed to complement the net Zero Investment Framework (NZIF), is intended to

  > 'support constructive engagement with banks to aid ongoing implementation of climate commitments'.

- Broadly, the standard sets expectations around banks': net zero commitments; targets, exposure and emissions disclosure; historical emissions performance; decarbonisation strategy; support for 'climate solutions' (ie 'all forms of low carbon technologies and associated infrastructure necessary to build a low carbon economy'); lobbying/policy engagement; climate governance; just transition; and annual reporting and accounting disclosures.
- Separately, the TPI Centre has launched a Net Zero Banking Assessment Framework which is a tool for assessing banks' alignment with the goals of the Paris Agreement and the progress banks are making on implementation of their stated climate-related policies/plans.

Next steps

- This new assessment framework is planned to be used to assess 26 global banks across Europe, North America and Asia annually. These inaugural assessments are planned to be published in 'summer 2023'.
- Through its Net Zero Banks Working Group, IIGCC will support investor engagement with a focus list of 20 banks in Europe, Canada and Asia.

  [Source: Transition Pathway Initiative 05/06/2023; IGCC media release 05/06/2023]

ICCR releases open letter to members of US Congress, urging them to safeguard institutional investors' freedom to consider ESG

- The Interfaith Center for Corporate Responsibility (ICCR) has released an open letter (endorsed by 78 investors) to members of both houses of US Congress, calling for their:

  'leadership in forcefully speaking out against, and opposing, any anti-ESG legislation or regulation at both the state and federal levels to ensure that institutional investors retain the freedom to make prudent and thoughtful long-term investment choices for their beneficiaries.

- The letter was prompted by what the letter describes as

  'a surge in legislative, regulatory, and legal threats seeking to undermine the practice of ESG investing' including 'a rash of bills introduced and laws passed at the state level seeking to prohibit state and municipal pension funds from implementing ESG investing strategies or utilising asset managers that do so'.

- According to investors, anti-ESG Bills have been introduced into 32 states to date, with 'a number' of these Bills now law. For example, a law in Texas requiring state pension funds 'cut ties with investment firms seen to be "boycotting" fossil fuel companies by addressing climate risk in their portfolios.'
- The letter argues that these laws have potential to 'cause significant financial harm to pension beneficiaries and taxpayers' pointing to a number of studies into the impact of the Bills that conclude that the introduction of such measures will incur significant costs. For example, a Wharton study into the likely impact of the anti-ESG Bill in Texas found that the state would pay up to $532 million in additional municipal bond costs as a result of banning some of the largest bond underwriters on ESG grounds. Further studies into the likely impact in other states have similarly confirmed (according to the letter) the significant financial costs of anti-ESG legislation.
- The central message running through the letter is that consideration and management of ESG risk is a necessary part of prudent risk management. The letter states:

  'Ensuring that these impacts can be properly considered in investment decision-making by fiduciaries and addressed by companies, not only safeguards the financial security of pension beneficiaries, but also reduces overall market risk and strengthens our economy, our infrastructure, and our communities. Actions that would constrain investors in the pursuit of ESG investing are antithetical to the public interest and to foundational free market concepts'.

  [Sources: ICCR media release 05/06/2023; Full text letter 01/06/2023]

ISS is 'not an activist or advocacy organisation' says President and CEO

- In a 13 June 2023 statement, President and CEO of influential proxy advice firm Institutional Shareholder (ISS) Services Gary Retelny has rejected criticisms branding ISS as 'work activists and social engineers pushing an ESG agenda'.
- Mr Retelny states that:

  'ISS is not an activist or advocacy organisation. Rather, we are an impartial, federally regulated service provider to institutional investors who direct and control their own proxy voting decisions. Our mission is to provide high-quality, independent, and timely proxy research and advice based on the voting guidelines our clients, not we, select…

  By offering these choices, we respect the fact that our clients are not monolithic, but have diverse, sometimes conflicting perspectives and investment strategies that require different approaches to voting and other forms of capital stewardship. This is how free markets, normally championed by many who criticise us, are supposed to work'.

- Mr Retelny points to ISS' recent voting recommendation record in support of his assertion that the proxy firm is not 'pushing an ESG agenda'. According to Mr Retelny, ISS issued 'for' recommendations for over 96% of all management-proposed management resolutions in 2022. In contrast, ISS supported only 52% of all shareholder E & S proposals over the same period.
- Mr Retelny also submits that calls to ban consideration of ESG are part of what he considers to be 'a broader, highly partisan attack on ESG investing', and are not justified. Mr Retelny writes:

  'these well-funded and concerted efforts have included assertions that proxy advisers' recommendations in support of certain ESG proposals, though based on investors' proxy voting choices, violate investors' fiduciary duties…Certain state legislatures and regulators…want to limit or eliminate the use of ESG factors, whether in the investment process or in proxy voting, regardless of the impact of such factors on shareholder value and investment returns. These proposals seek to "cure" alleged improprieties in the use of ESG considerations without providing evidence that such considerations are being misused. Imposing heightened duties on investors, investment managers, and proxy advisers who consider ESG criteria and thwarting investors' access to research and analysis that incorporate such criteria may further a political agenda, but they do not encourage fiduciary conduct'.
- The statement concludes with the comment that ISS has no plans to alter its approach. Mr Retelny states:

  'ISS recognizes that any proxy vote recommendation that includes a consideration of ESG factors will continue to be attacked, just as any failure to support an ESG proposal may be attacked by an unsuccessful shareholder proponent. But we are not engaged in a popularity contest. ISS will continue to operate independently and thoughtfully in a manner that best serves our clients, as we have done for more than thirty-five years'.

  [Source: ISS media release 13/06/2023]

Climate Action 100+ sharpens focus on climate action, tightens signatory requirements

The Climate action 100+ initiative was established in 2017 for an initial period of five years. Given the continued urgent case for climate action, a decision has been made to extend the initiative to 2030.

In doing so, Climate Action 100+ has announced various changes in its approach. Key among them are:

- A stronger focus on climate action (implementation of transition plans) rather than (primarily) pushing for climate-disclosure.
- In addition, lead investors will also be expected to be more transparent around their engagement activities, including submitting an annual schedule of engagements 'specifying actions and escalation strategies they intend to deploy' as well as disclosing votes and rationales on Climate Action 100+ flagged votes (where practicable)

You can find Climate Action 100+'s detailed summary of the changes under this second phase of the initiative here.

[Sources: Climate Action 100+ media release 08/06/2023; Climate Action 100+ Summary of changes]

A 'smoke signal' to US Banks? NYC Comptroller Brad Ladner calls on major banks and insurers to commit to climate action

- Citing the very poor air quality (as a result of recent wildfires) in New York as evidence that the 'climate crisis is here and we aren't ready', New York City Comptroller Brad Ladner has urged people to take to Twitter to call on Morgan Chase, Bank of America, Goldman Sachs and Royal Bank of Canada to 'stop financing new fossil fuel infrastructure or set real targets to reduce the emissions of their investments'.
- According to Mr Ladner, the four banks have 'lent over $1 trillion for new fossil fuel supply projects'.
- The same four banks were targeted with shareholder GHG proposals (filed by three NYC pension funds this year). None of these proposals secured the necessary support to be carried.

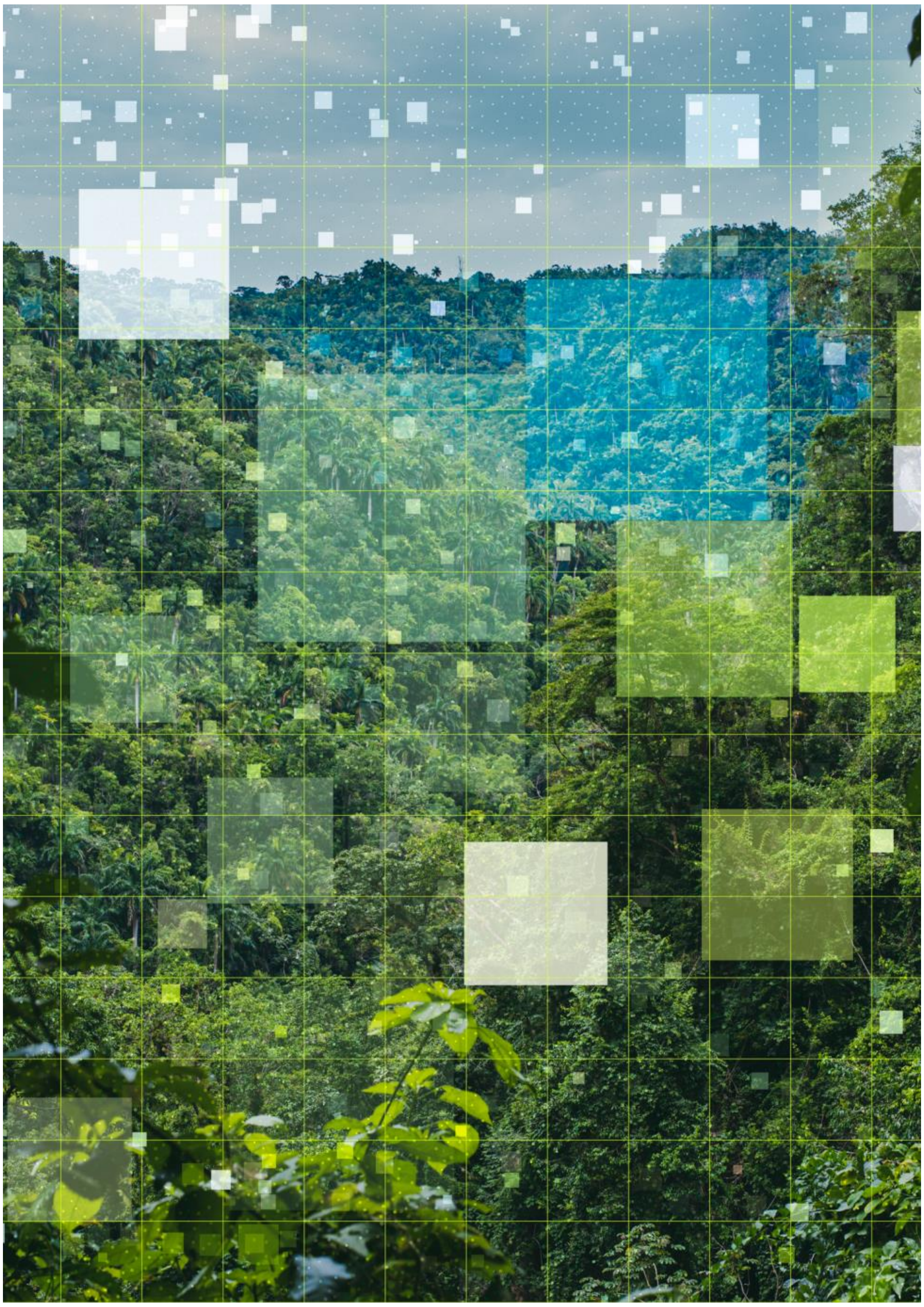
  [Source: Email sent from New York City Comptroller Brad Ladner 09/06/2023]

Regulators

Government mandates APRA consider climate risk

New statement of intent makes explicit the government's expectation that APRA consider climate risk for the first time

Announcing the release of the release of an updated Statement of Expectations for the Australian Prudential Regulation Authority (APRA), Treasurer Jim Chalmers said that the focus is on APRA's role in ensuring a 'safe resilient and competitive financial system'. The Treasurer also highlighted that the following two new expectations have been added to the statement:



- the expectation that APRA considers climate-related risks as part of its work. Under 4.4 of the statement, APRA is expected to:

  > 'promote prudent practices and transparency in relation to climate-related financial risks and the adoption of climate reporting standards by regulated entities'

- the expectation that APRA is 'mindful of the relative size and business models of regulated entities' in carrying out its role. Under 4.3 of the updated statement, APAR is expected to:

  > 'minimise the costs and burdens of regulatory requirements for regulated entities, including by applying proportionate requirements, considering different businesses models and taking a principles-based approach to regulation, ultimately to benefit consumers'.

The statement also includes an expectation (under 4.7) that APRA

> 'encourage regulated entities to create robust cybersecurity measures to ensure the safety of Australians' money and data, as well as the financial and operational resilience of those entities'.

APRA released a Statement of Intent, setting out how it will meet the government's expectations.

[Source: Treasurer Jim Chalmers media release 07/06/2023]

Financial Services

Top Story | Government response to the Quality of Advice Review

Key Takeouts

- The Australian government has accepted (in full or in principle) 14 of the 22 Quality of Advice Review (QAR) recommendations for the overhaul of financial advice regulation. The government's written response to the QAR is available here.
- The government's priorities for reform are: a) increasing the pool of qualified advisers; b) streamlining documentation requirements; and c) expanding access to retirement income advice (though enabling superannuation funds to provide more information to consumers).
- Recommendations to expand the ability of banks and insurers to provide advice are viewed as less urgent to progress, and the government believes further consultation is required on other recommendations, including the proposal to replace the existing best interests duty with a duty to provide 'good advice'.
- Legislation to implement the recommendations accepted by the government is planned for the second half of 2023 and early 2024'.
- The government also flagged its intention to introduce a Bill into parliament this week to remove the need for experienced advisers to obtain a formal qualification. The Bill - Treasury Laws Amendment (2023 Measures No. 3) Bill 2023 – was introduced into the House of Representatives on 14 June 2023.

Increasing the number of qualified advisers is a priority: legislation introduced

In an address to the Association of Superannuation Funds of Australia on 13 June, Assistant Treasurer and Minister for Financial Services Stephen Jones identified increasing the pool of qualified advisors as a key priority for the government. To this end, he said that the government plans to introduce legislation into parliament 'this week' (13-16 June 2023 sitting week) to:

> 'follow through on the government's election commitment to create a pathway for experienced advisers with a clean record to continue practising without the need to undertake further education'.

Consultation on a proposed experience pathway for financial advisers closed on 3 May 2023. Broadly, the proposed changes would mean that an adviser (who does not currently meet the required education requirements) would be deemed to have done so if they:

- have 10 years (cumulative) experience providing advice between 1 January 2007 and 31 December 2021; and
- have not had any disciplinary action recorded against them on the Financial Advisers Register before 31 December 2021; and
- pass the exam.

Mr Jones said that this would 'soften the landing as the sector transitions towards a fully professional industry' while also not compromising standards.

> [Note: The Bill - Treasury Laws Amendment (2023 Measures No. 3) Bill 2023 – was introduced into the House of Representatives on 14 June 2023.]

Initial response to the Quality of Advice Review

Mr Jones said that in responding to the Quality of Advice Review, the government has sought to prioritise the most 'urgent' areas for reform over those that are 'important' (but less urgent). In doing so, he said, the government hopes to be able to move quickly on the most urgent issues, without having to reach agreement on 'everything else'.

With this in mind, Mr Jones said that the government has agreed to adopt 14 of the 22 review recommendations in full or in principle. On the remaining recommendations, Mr Jones made clear that the government

> 'is not ruling out any recommendations and will finalise our position on the remaining recommendations before the end of the year'.

The government plans to progress implementation of these recommendations through three work streams outlined briefly below.

Stream One – 'Removing red tape'

The first work stream will focus on making the process of giving advice simpler and more efficient to address the unintended consequences – eg increased cost to consumers – of existing rules that require advisers to provide voluminous documentation to consumers.

This is planned to include:

- Replacing 'unwieldy statements of advice with something that is fit for purpose'. The government's written response to the review states that statements of advice are to be 'replaced with an advice record that is more fit-for-purpose, with consultation to determine the final design of the replacement'. The government's written response to the QAR also flags plans to introduce 'more flexibility…in how financial service guide requirements can be met'.

Replacing existing prescription with a more flexible statement of advice model has the potential to significantly reduce the cost of providing advice. However, it can be beneficial for consumers to have access to a record of the advice they are given. In our view, at a minimum, clients should be notified that they can obtain a copy, and be provided with one, regardless of whether they request it.

- Streamlining existing consent requirements to 'remove uncertainty and unnecessary paperwork'. The government's written response states that ongoing fee renewal and consent requirements will 'be streamlined into a single form, and the requirement to provide a fee disclosure statement will be removed'

These reforms should have a significant positive impact in terms of reduction in costs, without causing any notable detriment to consumers, especially if the law is crafted to allow greater flexibility (and less prescription) in designing the approved form.

- Removing 'legalistic safe harbour steps so that advisers focus on the outcomes for consumers'. The government's written response states that the government proposes to remove the Safe Harbour steps from the Best Interest Duty. The government plans to consult on the details around how this should be implemented (and also to consult on the 'implications of adopting the remaining parts of recommendation 5). For context, recommendation 5 recommended that:

  > 'The existing best interests duty and related obligations (the duty to give appropriate advice assuming the best interests duty is satisfied, the duty to warn the client if the advice is based on inadequate or insufficient information and the duty of priority if there is a conflict) should be replaced with a new statutory best interests duty. The new best interests duty would be a true fiduciary duty that reflects the general law and will not include a safe harbour. This duty will apply only to financial advisers (relevant providers)'.

The Safe Harbour did have the benefit of providing certainty about the steps required to satisfy the Best Interest Duty. It will be crucial for ASIC to provide good and practical guidance about how to comply with the duty once this change is made and it will be important for planners and licensees to review their compliance systems designed to address the Safe Harbour requirements.

- 'Clarifying the rules on conflicted remuneration and improving transparency where advisers receive commissions on products'. On this point, the government's written response flags plans to:
  - introduce 'standardised consumer consent requirements' to 'classify a consumer as a wholesale or sophisticated client'
  - introduce 'standardised consumer consent requirements…for life, general and consumer credit insurance commissions'
  - simplify or remove 'certain exemptions to the ban on conflicted remuneration' including:
    - 'clarifying that monetary or non-monetary benefits given by a client are not conflicted remuneration along with the removal of consequential exceptions (accept recommendations 13.1 and 13.3);
    - removing an exception to conflicted remuneration rules for the issue of financial products where advice has not been provided in the previous 12 months (accept recommendation 13.4); and
    - removing an exception to conflicted remuneration rules for agents or employees of Australian Authorised Deposit-Taking Institutions

Stream Two – Expanding access to retirement income advice

Mr Jones characterised expanding access to retirement income advice through superannuation funds as 'the most significant burning deck in the financial advice space' given the number of Australians nearing retirement age and existing barriers to accessing advice.

Mr Jones confirmed that the government will adopt the review's recommendation for superannuation funds to 'expand their provision of advice' (recommendation 6). According to the government's written response to the review, this will include amending existing restrictions on collective charging to allow superannuation funds to provide 'more retirement advice and information' to their members'.

Recommendation 6 of the QAR recommended that:

> 'Superannuation fund trustees should be able to provide personal advice to their members about their interests in the fund, including when they are transitioning to retirement. In doing so, trustees will be required to take into account the member's personal circumstances, including their family situation and social security entitlements if that is relevant to the advice. Superannuation fund trustees should have the power to decide how to charge members for personal advice they provide to members and the restrictions on collective charging of fees should be removed'.

Mr Jones said that the government plans to 'work with industry' to finalise details around this 'in coming weeks' including settling:

- the scope of advice that funds will be able to provide,
- the education standards that fund employees/representatives will need to meet in order to provide advice; and
- how those providing advice will be held 'to an appropriate duty'.

We think there is scope to further enhance the role played by superannuation in the provision of advice to consumers. For example:

- *creating some capacity to provide advice on a person's overall financial position rather than having to limit the advice by reference to the sole purpose test;*
- *reforming the anti-hawking regime to ensure that it does not create an impediment to superannuation trustees who wish to proactively contact their members to alert them to options that may be beneficial to them;*
- *removing the ban on payment of ongoing advice fees from MySuper accounts, to eliminate the perverse incentive this creates for an adviser to recommend a member switch out of the MySuper option.*

Stream Three – Expanding advice channels

Mr Jones said that while Treasury is working on implementing the recommendations for superannuation funds to provide more advice it will also

> 'explore with industry what would be required to tailor the model for other institutions'.

Mr Jones said that of the three workstreams outlined, he regards the potential for banks/insurers to provide more information/advice to consumers as the least urgent of the potential areas for reform observing that:

> 'I'm not compelled that the model that has been proposed in the review is fit-for-purpose for these other sectors as is, even where there is a need…But I'm not ruling it out'.

The government's written response flags that the consultation with industry on these potential reforms is also planned to include consideration of how the following recommendations 'might operate under different advice models, including digital advice models, and across sectors':

- Introduction of a 'good advice' duty to replace the existing best interests duty (recommendation 4)
- Broadening the definition of personal advice (recommendation 1)
- Removal of the general advice warning (recommendation 2)
- Allowing non-relevant providers to provide personal advice (recommendation 3)
- Amending the Design and Distribution Obligations (recommendations 12.1 and 12.2)

'Consultation will also consider practical policy design and implementation issues, including in relation to consumer protections'.

In terms of timing, the government's response document states that the government plans to issue its 'final response on the Delivering Better Financial Outcomes package later in 2023'.

Cautious welcome

- The Financial Services Council has welcomed the government's response and in particular, the priority being accorded to 'stream one' reforms which focus on eliminating 'costly red tape'. The FSC has also welcomed the planned further consultation with industry on the other work streams, and has urged the government to ' remain open to applying the Quality of Advice Review recommendations beyond the superannuation sector'.
- Consumer group Super Consumers Australia is also cautiously optimistic. Xavier O'Halloran, Director of Super Consumers Australia stated:

  'We welcome the Government's considered approach to meeting the needs of Australians planning for retirement. The careful path forward recognises the risk of harm from super funds dressing up product selling and retention strategies as 'retirement advice'. We look forward to engaging with the process to define what and how retirement advice and information can be provided by super funds'.

  [Source: Assistant Treasurer and Minister for Financial Services Stephen Jones Address to the Association of Superannuation Funds of Australia 13/06/2023]

Assessing borrowing capacity: APRA cautions that exceptions to the 3% serviceability buffer are expected to be 'limited and clearly justified'

- The Australian Prudential Regulation Authority (APRA) has written to banks setting out its expectations around how they approach exceptions to housing lending policy, and in particular, how they approach granting exceptions to borrowers who do not meet minimum home loan serviceability criteria such as the 3% serviceability buffer.
- The central message from the regulator is that where exceptions are granted, it should not be on a large scale, (given the risks inherent in this approach), and there should be robust systems/processes in place to enable close oversight/monitoring of the impact. APRA states that

  'the intent of the letter is to reinforce to banks the importance of ensuring exceptions to policy are prudent, limited and clearly justified so as not to undermine the core intent of APRA's guidance on credit risk management'.

Risky: Exceptions to policy should be 'managed prudently and limited'

- The letter underlines the importance of the 3% serviceability buffer in the context of assessing a borrower's repayment capacity, noting that in the current environment APRA views it an 'important risk mitigant'.
- APRA observes that some banks have made changes to their 'exceptions processes' to support borrowers who may be facing challenges in refinancing with another lender'. APRA further notes that banks have the option to use 'exceptions to policy [ie to approve a loan that does not meet standard loan criteria, such as the serviceability buffer] if these are managed prudently and limited'.
- The letter underlines APRA's expectation that banks have 'prudent policies and processes for dealing with such 'exceptions to policy'. On this point APRA observes that:

  'Large volumes of exceptions can create risks by weakening banks' risk profiles and increasing the vulnerability of their loan books to future shocks. Historically, serviceability policy exceptions have accounted for a small share of banks' total housing lending, at between 2 and 3 per cent'.
- APRA adds that:

  'In using exceptions, APRA expects banks to make a prudent assessment of repayment capacity so that there is a good outcome for borrowers and the financial system. Prudent banks would have acceptable reasons and clear justifications for loans written outside policy. It is also important that banks have considered their Responsible Lending Obligations, which are administered by the Australian Securities and Investments Commission'.
- The letter states that loans written as exceptions need to be regularly reported to the appropriate governance body internally, and monitored against risk appetite limits. APRA suggests that:

  'Prudent boards would assess the impact of any proposed changes to exceptions processes on the bank's risk profile and risk appetite. This includes understanding the types of loans that are being written outside policy, such as like-for-like refinancing.'

Next steps

- APRA has requests banks to notify their APRA supervisor ahead of making material changes to the exceptions process.
- APRA states that it will be

  > 'monitoring exceptions trends closely and may request additional information to assess how banks are managing risks. Banks reporting large volumes of policy exceptions will be subject to heightened supervisory attention'.
  >
  > [Source: APRA letter to industry: Housing lending standards: Reinforcing guidance on exceptions 09/06/2023]

Deceased estates: BCCC identifies 'widespread poor practices and noncompliance' by banks, three banks under ongoing investigation

The Banking Code Compliance Committee (BCCC) which is responsible for monitoring compliance with the Banking Code of Practice (Banking Code) has released the findings of a report into how banks manage deceased estates.

The report analyses compliance by six banks with the obligations in Chapter 45 of the Banking Code setting out banks' obligations for dealing with deceased customer accounts and deceased customers representatives.

The key takeaway that the:

> 'inquiry found widespread poor practices and non-compliance with obligations in the Code, which contributed to the difficulty of managing a deceased estate'.

The table below provides a brief overview of the three key issues identified in the report.

THREE KEY ISSUES	DETAILS
▪ 'Fees and charges for services no longer provided – Banks continuing to apply fees and charges to accounts of deceased customers despite being notified of their passing.'	▪ The report found instances in which all six banks charged fees on the accounts of customers that should not have been charged. ▪ The report attributes this in the main to inadequate systems/processes which did not allow banks to accurately identify or stop fees being charged and/or issue refunds. ▪ The BCCC's expectation is that banks 'regularly review the systems they use to identify, stop and refund fees and charges to ensure key elements of the process are not routinely being missed' ▪ Lack of 'clear definitions of fees in training and guidance materials' and generally 'insufficient guidance and support for staff' is also identified in the report as a contributing factor as was fragmentation of processes/procedures and lack of effective quality assurance processes.
▪ 'Failing to act within timeframes – Banks failing to act on requests or instructions within the obligatory 14 days of receiving the necessary information.'	▪ Under the Code, banks are required to provide access to information about a deceased customer's accounts to an eligible person, and to act on instructions from a representative (of the deceased) within 14 days once the representative has provided necessary information. ▪ The report found that: 'Through a combination of factors, including insufficient controls, a lack of comprehensive quality assurance, and trouble identifying legitimate representatives, the banks we examined demonstrated non-compliance to varying degrees with these Code obligations'. ▪ For example, due to 'poor data management' practices, referrals/notifications across different teams, 'did not always occur, which contributed to delays in responses and action'.

THREE KEY ISSUES	DETAILS
	▪ In terms of addressing this issue, one of the instances of 'good practice' highlighted in the report is the use of exception reports by one bank within the deceased estates team as a means of monitoring compliance with the 14 day timeframe. The BCCC suggests that there may be benefit in considering rolling out this (and other instances of 'good practices' identified at p23 of the report) to other relevant teams within banks.
▪ 'Lack of respect and compassion – Banks failing to treat representatives and family of deceased customers with the respect and compassion expected in the circumstances'.	▪ The primary way in which this issue manifested was through lack of communication/poor communication with customers, failure to pass on notifications internally in a timely manner/at all in some instances. ▪ Lack of transparency for deceased representatives around bank processes for notifying the bank of the death and 'onerous' identification processes (relying on hardcopy identification) were also identified in the report as examples of poor practice in this context.

Underlying causes

As flagged in the table above, the report found that these issues stem from:

- flawed automated and manual systems and processes
- 'fragmented' systems within banks with processes often spread across multiple teams and departments and a lack of consistency in the processes followed by different teams/departments
- inadequate monitoring of compliance with Code obligations/inadequate quality assurance processes. The BCCC considers this led to a lack of accountability
- inadequate staff training on Code obligations.

Nine recommended changes for 'all banks to consider'

The report includes the following nine recommendations to address the issues identified and ensure Code compliance. Most of the recommendations are aimed at addressing the underlying causes flagged above.

- 'Ensure systems and processes, across all business units and subsidiary brands, provide a comprehensive view of each customer.
- Ensure systems and processes accurately identify the suite of products and services, including legacy products, of a deceased estate.
- Have a documented end-to-end quality assurance and control system that covers each part of the process of managing deceased estates.
- Have rigorous quality assurance in place to make sure that all relevant fees and charges are identified before a matter is closed.
- Ensure front-line staff and members of any deceased estates team are trained to communicate with the sensitivity, respect and compassion required for representatives of deceased customers.
- Review and analyse delays to requests for information or instructions from representatives of deceased customers to understand their root causes and work on improvements.
- Accept a broad range of identity documents to verify representatives of deceased customers in line with AUSTRAC guidance on flexible approaches to identity verification.
- Ensure systems support effective record-keeping, including records on requests for information and instructions from representatives of deceased customers.
- Ensure the information provided to representatives of deceased customers is clear and accessible, and the process for managing a deceased estate is as easy to navigate as possible'.

Next steps

- The BCCC has flagged it is progressing 'investigations into three banks on potential serious and systemic breaches of the Code we identified during this inquiry'.
- The BCCC also intends to follow up with all banks on their progress and implementation of the nine recommendations in the next 18 months
- The BCCC's expectation is that all banks, will review their overall management of deceased estates as part of audit programs within 18 months and consider implementing the recommendations.

[Source: BCCC media release 09/06/2023; Full text report: More work to do: A BCCC report on the management of deceased estates]

CDR | Assistant Treasurer provides a CDR status update, highlights areas of focus following the statutory review

In his 7 June 2023 address to the Committee for Economic Development in Australia, Assistant Treasurer and Minister for Financial Services Stephen Jones provided a status update on the consumer data right (CDR) and the government's approach to the initiative going forward.

Our key takeaways from the address are below.

- CEDA heard that the government sees value in the CDR and is committed to progressing it. Mr Jones observed:

  'We don't need to be convinced of the potential benefits of CDR, for competition, for innovation and for the adoption of new technologies, business ideas and partnerships'.

- The Assistant Treasurer observed however that the CDR 'was not in good shape' when Labor came into government because: 1) the initiative lacked sufficient funding maintain and/or improve or expand the system; and 2) takeup has been slower than anticipated.
- Mr Jones added that the Statutory Review of the CDR identified the pace of the rollout as an issue. Mr Jones quoted recommendation 2.5 from the report:

  'The current pace of CDR rollout into new sectors has not allowed enough time for the system to mature and capitalise on the lessons learnt. Focussing on improving CDR functionality and data quality within already designated sectors should be prioritised, balanced with overall forward momentum into new sectors over time'

- In response to these issues, Mr Jones said that:
  - The government considers the funding issue has been addressed in the latest Federal Budget ($88.8 million)
  - The government has decided to implement a two year pause on the expansion of the CDR into the superannuation, insurance, and telecommunications sectors in order to 'support take up and deepen its place in the sectors where it is already operating'. For clarity, implementation into the non-bank lending sector will continue but the Treasurer underlined that 'non-bank lending will be the only expansion over the next two years'.
- Mr Jones said that over the next two years the government will focus on:
  - 'improving data quality and deepening participation in the existing sectors: banking and energy;
  - cyber security improvements across all CDR agencies to reflect the evolving data landscape; and
  - expanding awareness of CDR as a data-sharing model that allows consumers to easily identify CDR-enabled providers, products and services'.
- On progressing 'CDR action initiation' – ie a secure way for consumers to instruct a firm to initiate actions on their behalf (eg make payments) with their consent - Mr Jones said that the government is in agreement with the Senate Committee (that considered the Bill currently before parliament) that 'extensive consultation and consideration, road mapping and a measured rollout of action initiation will be required' in order to the intended benefits to be realised'.
- In light of this, Mr Jones said that the government plans to undertake a strategic assessment 'at the end of 2024'. It's envisioned that 'further developments and further expansions' of the CDR will be considered as part of this process.
- Mr Jones reiterated that combatting online scams/fraud is a priority for the government, pointing to the '$86.5 million anti-Scams package' included in the latest budget in support. Given the cybersecurity risks of screen scraping (eg identity theft and other forms of financial fraud), Mr Jones flagged that the government plans to consult on policy options to regulate screen scraping, including the role of CDR in this context, in H2 2023.

[Note: Recommendation 2.1 of the Statutory Review into the CDR recommended 'screen scraping should be banned in the near future in sectors where the CDR is a viable alternative'. The government's response to the review confirms the government's intention to conduct a consultation on options to regulate screen scaping commencing in the banking sector and starting with the planned release of a discussion paper in H2 2023. The government's response stops short of endorsing a ban on screen scraping. The government states: 'As the CDR framework matures and data quality is enhanced (refer to the response to recommendation 2.5), the CDR is expected to become the alternative of choice compared to screen scraping'.]

Formal response to the statutory review

Separately the government has released its formal response to the Statutory Review of the Consumer Data Right.

The government has 'agreed' with the following seven review recommendations and 'noted' the remaining recommendations.

The table at p5 outlines the government's response to each of the review recommendations in full.

- 1.2 - Streamlined mechanism to update a designation instrument for technical/minor considerations
- 1.4 – Greater transparency on consultation processes and a timeline of expected future developments
- 1.5 – Greater visibility of success measures and system objectives
- 2.3 – Improving coordination and making it easier for participants to resolve issues and seek advice
- 2.5 – Focusing on system maturity, functionality and data quality in response to this recommendation)
- 2.6 – Cyber security assessment (In its response, the government states that following the release of the Statutory Review report, it 'progressed a whole of ecosystem cyber security assessment as a matter of priority'. Funding was also included in the 2023/24 Budget for delivery of cybersecurity improvements across CDR agencies)
- 4.1 – Further consider other issues raised in the Statutory Review in ongoing future work

[Sources: Assistant Treasurer and Minister for Financial Services Stephen Jones address to the Committee for Economic Development of Australia 07/06/2023; Government statement in response to the Statutory Review of the CDR 07/06/2023]

Insurance | ASIC grants relief from certain transaction confirmation requirements

The Australian Securities and Investments Commission (ASIC) has granted relief to life and general insurers to provide modifications and exemptions from the confirmation of transaction requirements contained in section 1017F of the Corporations Act 2001 (Cth) (Corporations Act) in certain circumstances.

The relief is contained in the following two legislative instruments.

Confirming transactions – deceased life insurance policyholder

For context, under s1017F confirmation of transactions is required to be provided to the holder of the insurance product after the transaction occurs and this must include information allowing the holder to understand the nature of the transaction.

The purpose of ASIC Corporations (Confirming Transactions—Deceased Life Insurance Policyholder) Instrument 2023/437) is to:

> 'provide legal certainty [to insurers] that confirmation of transactions is not required to be given to the life insurance policyholder if the policyholder is deceased, and avoid any perceived impediment to insurers giving confirmation of transactions to third party beneficiaries making claims on the deceased policyholder's life insurance policy'.

The relief will expire on 1 July 2028. ASIC has said that it will 'review the operation and appropriateness of the instruments' prior to this date.

Confirming transactions – recurring insurance benefit payments

For certain recurring benefit claims, ASIC Corporations (Confirming Transactions—Recurring Insurance Benefit Payments) 2023/438 operates to enable life and general insurers to provide confirmation of the transaction, in the form of a statement given before (not after) a recurring benefit claim payment has occurred.

That is, the instrument exempts insurers from:

'having to comply with subsection 1017F(5) of the Corporations Act for a transaction that is a payment under a recurring benefit claim, defined in the Instrument as 'a claim under a life policy or a general insurance product for benefit payments (other than a claim for a single lump sum payment) where the holder is unable to work because of illness, injury or unemployment'.

The relief applies where:

– 'confirmation has already been given in the form of a statement that covers future payments under the recurring benefit claim for a period of no more than six months, and
– the statement complies with subsections 1017F(6)-(8) of the Corporations Act 2001 in relation to the payment and each other payment covered by the statement'.

The measure aims to reduce the regulatory burden insurers.

The relief will expire on 1 July 2028. ASIC has said that it will 'review the operation and appropriateness of the instruments' prior to this date.

[Source: ASIC media release 09/06/2023]

Planned overhaul of the payments system | Cheques to be phased out by the end of the decade (subject to consultation on timing)

- The Treasurer has announced the planned phase out of cheques by 'no later than 2030', and the planned phase out of government usage of cheques by the end of 2028.
- The measure is part of the broader planned overhaul of the payments system (summarised at p29 Governance News 7 June 2023) and will entail the removal of legislative and other requirements that 'entrench payment by cheques'.
- The Treasurer said that the 'seven year transition plan' would 'provide time for banks and financial institutions to assist their customers with adjustment'.
- The timing is indicative only: The Treasurer said that the proposed 2030 end date would be 'subject to further consultation with industry and stakeholders to determine the feasibility of this timing and an appropriate transition plan'. The government plans to consult 'this year' with stakeholders.

[Source: Treasurer Jim Chalmers media release 07/06/2023]

In Brief | 'Experience pathway' Bill introduced: Treasury Laws Amendment (2023 Measures No. 3) Bill 2023 was introduced on 14 June 2023. Schedule 2 to the Bill proposes to implement the government's election commitment to 'better recognise the experience of existing financial advisers as equivalent to tertiary study'

[Source: Treasury Laws Amendment (2023 Measures No. 3) Bill 2023]

In Brief | Crypto crackdown: SEC Chair says crypto investors and issuers are no 'less deserving of the protections of our securities laws' than other investors. Cautions SEC will continue to enforce existing laws to protect consumers

[Source: SEC Chair Gary Gensler speech to the Piper Sandler Global Exchange & Fintech Conference, 'We've Seen This Story Before', 08/06/2023]

Accounting and Audit

US regulator wants auditors to take a more active role in detecting (potential) fraud and other forms of legal noncompliance

- The Public Company Accounting Oversight Board (PCAOB) is consulting on a proposal to strengthen requirements for auditors to identify and communicate (to the appropriate level of management and the audit committee) potential noncompliance with legal requirements as quickly as possible, including instances of potential fraud.
- The PCAOB considers that:

  'By requiring auditors to identify and communicate noncompliance sooner, the proposed amendments, if adopted, would encourage companies to take more timely remedial actions and thereby reduce investor harm caused by legal and regulatory penalties. Another potential benefit would be to lower the likelihood that financial statements are materially misstated due to noncompliance with laws and regulations'.

Proposed changes

- Broadly, if implemented, the proposal would mean that:
  - auditors would be required to 'proactively identify – through inquiry and other procedures – laws and regulations that are applicable to the company and that could have a material effect on the financial statements, if not complied with'. The proposal would also provide certainty that financial statement fraud is a type of noncompliance with laws and regulations.
  - requirements around how auditors evaluate whether noncompliance with laws/regulations has occurred, and the possible impacts of this on financial statements and other aspects of audit would be strengthened in various respects. For example, the proposed standard would require auditors to consider whether 'specialised skill or knowledge is needed to assist…in evaluating information indicating noncompliance has or may have occurred'.
  - clarify that on becoming aware of possible noncompliance, auditors must relay the information to the appropriate level of management and the audit committee. In addition, auditors would need to 'communicate to management and the audit committee the results of the auditor's evaluation of such information' including 'which matters are likely noncompliance and the effect on the financial statements for those matters that are likely noncompliance'.

Next steps

- The deadline for public comment on the proposal is 7 August 2023.
- In terms of when the new requirements would apply, the PCAOB is seeking feedback on how long audit firms would need to implement the proposed requirements. The PCAOB seeks feedback in particular on whether compliance with the proposed changes (if adopted) should be required for:

  'audits of fiscal years beginning in the year after approval by the SEC (or for audits of fiscal years beginning two years after the year of SEC approval, if SEC approval occurs in the fourth quarter of a calendar year).'

  [Source: PCAOB media release 06/06/2023]

In Brief | An independent review of the conduct and disciplinary framework for accountants, commissioned by CA ANZ, makes various recommendations to tighten accountability for misconduct in line with community expectations, including instituting a fivefold increase in maximum fines for certain misconduct

[Source: CA ANZ professional conduct review 07/06/2023]

Risk Management

Cyber resilience: Regulators highlight four 'lessons learnt' from recent cyber attacks

- The fourth Superannuation CEO Roundtable with the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) focused on cyber resilience.
- The official notes from the session include a useful roundup from the regulators on recent regulatory/legislative initiatives aimed at combatting cyber threats (Appendix 1)
- The notes also highlight the following four 'lessons learnt from recent cyber attacks in Australia' both within and outside the super sector, from the regulators:
  - 'To reduce the risk of significant compromise, trustees should have strong data and IT systems governance measures that include the decommissioning of legacy systems and adequate service provider oversight.
  - Preparedness for an incident occurring is also critical. Response plans should be tested and address, at a minimum, governance and decision-making, business continuity and contingency planning, and communication strategies.
  - Simulations of cyber threats and trustee responses can be very effective in ensuring that trustees are well-prepared and response plans are fit for purpose. Clear delineation between board and management responsibilities is important to establish in advance of any real threat scenario.
  - Cyber incidents can have direct negative consequences for members. Trustees must make decisions which are in the best interests of their members and this includes providing members with timely and accurate communications and ensuring adequate resourcing for appropriate member support'.

  [Source: APRA and ASIC host Superannuation CEO Roundtable 09/06/2023]

ASIC Cyber pulse survey: ASIC invites regulated entities to complete a voluntary, multiple choice cyber self-assessment survey

- The Australian Securities and Investments Commission (ASIC) has called on ASIC-regulated entities to complete a voluntary, multiple choice survey designed to help entities self-assess their cyber capabilities and also enable ASIC to 'assess the market's cyber maturity on an anonymous basis, provide feedback and work together with industry to uplift cyber resilience'
- The survey includes questions covering: governance, data security, incident management and recovery planning.
- Entities have the option to opt in to receive an individual report (which they will receive after the survey closes) providing insights into how their responses compare to their industry peers.
- ASIC plans to publish a report on the key findings from the survey 'later this year'. Insights from the survey are also expected to:

  > 'support the Department of Home Affairs to further target advice and assistance to the financial sector, support enhanced partnerships to continue the sector's uplift in cyber security and resilience, and ensure compliance with regulatory requirements'.

- ASIC underlines that all information collected will be 'de-identified and anonymised and cannot be used in any regulatory or enforcement action'.
- No firm deadline is given for completing the survey. ASIC 'anticipates that the survey will close on Sunday, 9 July 2023'.
- The survey is accessible to ASIC regulated entities by logging into the ASIC regulatory portal.

Source of valuable insights for directors

In a recent article, ASIC Commissioner Danielle Press emphasised that ASIC considers effective management/oversight of cyber risk/cybersecurity to be part of the duties of every director. Commissioner Press cautioned that:

> 'Failure to adequately address cyber security risk, or comply with relevant disclosure and reporting requirements may be a breach of directors' duties'.

Commissioner Press encouraged directors to consider the following questions in this context:

- 'is cyber risk included in your organisational risk management framework?
- what is your response and recovery plan, and has it been tested?
- is it clear how you would communicate with customers, regulators and the market when things go wrong?'

Commissioner Press stated that ASIC's cyber pulse survey would 'help you answer these questions and identify any gaps in cyber risk management'.

Commissioner Press also pointed to the Cyber Security Governance Principles (released by the AICD and Cyber Security Cooperative Research Centre) as a source of 'useful guidance on overseeing and engaging with management on cyber security risk'.

[Sources: ASIC article: 'Check your pulse' by ASIC Commissioner Danielle Press 08/04/2023; ASIC Cyber pulse survey; ASIC media release 13/06/2023]

ACMA warns businesses that spam law breaches 'won't be tolerated'

- The Australian Communications and Media Authority (ACMA) has announced that a bank has been fined $3.55 million over sending more than 65 million marketing emails that ACMA considers did not comply with spam laws.
- ACMA alleges that:
  - marketing emails were sent without the consent of the account holder (in alleged contravention of subsection 16(1) of the Spam Act 2003 (Cth) (Spam Act)
  - marketing emails did not include a functional unsubscribe option (in alleged contravention of subsection 18(1) of the Spam Act).
- ACMA has also accepted a three-year court-enforceable undertaking from the bank committing it to an independent review of its e-marketing practices, providing regular compliance reports to ACMA and implementing staff training on compliance with spam laws.

All businesses on notice

- ACMA's announcement underlines that enforcing SMS and email subscribe rules is an 'ongoing compliance priority', pointing to the $11 million in penalties for spam and telemarketing laws breaches paid by businesses over the past 18 months and other enforcement outcomes, in demonstration of its willingness act to address noncompliance.
- ACMA Chair Nerida O'Loughlin cautioned:

  'This action is a further warning to all businesses that non-compliance with Australia's spam laws will not be tolerated'.

  [Source: ACMA media release 07/06/2023]

In Brief | AI global summit: The UK government has announced plans to host the first global summit on Artificial Intelligence in 'autumn' this year. The summit will consider 'the risks of AI, including frontier systems, and discuss how they can be mitigated through internationally coordinated action' as well as providing a platform for countries to 'work together on further developing a shared approach to mitigate these risks'

[Source: UK Prime Minister's Office media release 07/06/2023]

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Contacts

Mark Standen
Consultant

—

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

Siobhan Doherty
Partner

—

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

Kate Hilder
Consultant

—

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