Governance News

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

1 November 2023

Contents

Boards and Directors

(Re)building trust in UK business: The UK IoD has launched a 'Commission' to develop a Director Code of Conduct

- The UK Institute of Company Directors has convened a new 16 member 'Commission', Chaired by Lord Iain McNicol, and tasked it with developing a Code of Conduct for directors.
- It's envisioned that the Code (once developed) will be adopted (on a voluntary basis) by directors from all types of corporate entities.
- It's hoped that signing on to the Code will be recognised as a signal of the signatories' 'willingness to apply high ethical behavioural standards in their governance and leadership activities'.
- The move to establish the Code was prompted by the drop in the level of public trust in business as a result of recent corporate scandals and as revealed in the results of the latest Edelman Trust Barometer. This found that the level of trust in UK business was below that of a number of other countries (at only 50%).
- The Commission is due to report its findings in April 2024.

[Sources: IoD media release 25/10/2023]

Disclosure and Reporting

Two financial services companies have been charged with multiple criminal offences over their (alleged) failure to lodge financial accounts with ASIC

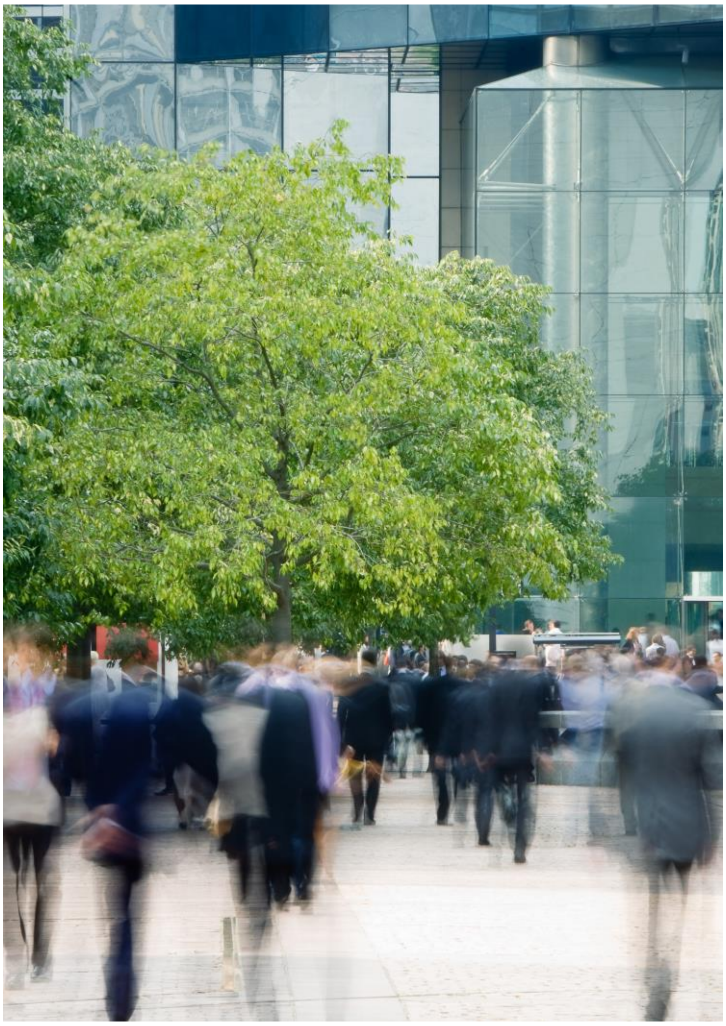
- Following an investigation by the Australian Securities and Investments Commission (ASIC), two financial services companies have been charged in separate proceedings with multiple criminal offences over their (alleged) failure to lodge financial accounts with ASIC for each of the financial years from 30 June 2020 to 30 June 2022.
- ASIC states that it is

  > 'actively targeting breaches of financial reporting obligations as required by the Corporations Act. Failure to lodge audited financial statements may result in cancellation of a licensee's Australian financial services (AFS) licence'.

[Source: ASIC media release 30/10/2023]

Shareholder Activism

$19 billion investor coalition pushes Yum! Brands for disclosure of lobbying activity/expenditure



- A $19 billion investor coalition (coordinated by SOC Investment Group) has written to Yum! Brands (operator of a number of fast food chains) to express concern over what the group considers to be a lack of transparency around the company's lobbying activities – especially at a local and state level.
- Investors consider having ready access to accurate and comprehensive information about companies' lobbying activity is important from a risk-management standpoint. The letter explains:

  > 'In 2022, the food and beverage industry spent nearly $28 million on federal lobbying. With such significant spending on political issues, comes significant risk to investors. Lobbying activity that is unaligned with a company's stated goals and values can have negative effects on shareholder value. Robust and publicly accessible federal lobbying disclosure requirements allow investors to protect themselves from the risks of corporate lobbying activity on the federal level. However, when investors attempt to protect themselves from the risks linked to state and local level corporate lobbying activities, they face a Sisyphean task'.

- The investors point to the recent spate of vote results backing shareholder proposals calling for increased disclosure of companies' lobbying activities/expenditure – including the proposal at Yum! Brands with secured the support of 41.9% of votes cast – as evidence of the level of shareholder concern/support for transparency on the issue.
- The investors have called on Yum! Brands to report annually disclosing various information including:
  - The policies and procedures in place to govern direct, indirect and 'grassroots' lobbying
  - Details of management's decision-making processes and board oversight of lobbying expenditure by the company
  - Details of the payments made by the company to fund direct, indirect and grassroots lobbying (including fees/other payments made to trade associations)
- Investors have asked that the company respond by 18 November 2023.

  [Source: SOC Letter to Yum! Brands 30/10/2023]

In Brief | Activist group Follow This has criticised Chevron's purchase of oil and gas producer Hess as being at odds with the goals of the Paris Agreement and exposing the company to reputational and (potential) litigation risk

[Source: Follow This media release 23/10/2023]

Meetings and Proxy Advisers

Modernising business communications | New regulations registered

- Following the passage of Treasury Laws Amendment (Modernising Business Communications and other Measures) Act 2023 (Cth) (the Act) (summarised), new regulations – Treasury Laws Amendment (Modernising Business Communications) Regulations 2023 (Cth) – have been registered.
- Broadly, the purpose of the new regulations is to 'reduce regulatory burden and improve technology neutrality by amending requirements in Treasury laws that are consequential to the passage of the Treasury Laws Amendment (Modernising Business Communications and other Measures) Act 2023'.
- Key changes include:
  - ensuring that certain documents can be sent in either physical or electronic form. This includes repealing regulation 5.1.02 of the Corporations Regulations 2001 (Corporations Regulations) (Cth) to ensure that notices sent by companies to dissenting shareholders can be sent in both electronic and physical form.
  - replacing existing 'prescriptive' requirements for notices to be published in newspapers with technology neutral requirements
- The changes (generally) apply from 28 October 2023. However, changes in Schedule 2 (which primarily deal with publication requirements) do not commence until 1 January 2024 (the commencement date of Part 4 Schedule 1 to the Act).

[Source: Treasury Laws Amendment (Modernising Business Communications) Regulations 2023 (Cth)]

Shareholders 'strike' on pay at Woolworths, APA Group, Tabcorp

Woolworths AGM

All resolutions were carried at the 26 October 2023 Woolworths AGM.

However there was a strong protest vote (28%) against the remuneration report, constituting a first 'strike'.

[Note: For context, the 'two strikes rule' means that boards face the prospect of being 'spilled' if 25% or more of shareholders vote against the resolution to approve the company's remuneration report at two consecutive AGMs – that is, if there are two consecutive 'strikes' (25% or more 'against' votes) against the company's remuneration report. For more on the operation of the two strikes rule see: Executive remuneration: a quick guide – Parliament of Australia (aph.gov.au).]

The result may be connected with the company's handling of/response to the deaths of two workers.

In opening remarks to the meeting Woolworths Chair Scott Perkins explained that the board had responded to the two fatal incidents (in the context of short term incentives) by adopting a 'two-stage approach'. Mr Perkins said that the board applied a 10% absolute reduction in the group's short term incentive for 'the vast majority of above-store salaried team members for FY23' and that the board has committed to 'determine a further response' once investigations to establish the cause of each of the incidents is complete.

Despite the 'strike' a number of investors supported the remuneration report (as detailed in the table below).

PROPOSAL	VOTE RESULT	HOW (SOME) INVESTORS VOTED
Proposal 3 in the Notice: Approve Remuneration Report	▪ 70.78% support (% 28.2 against)	▪ Legal and General Investment Management (LGIM) voted in support ▪ Norges Bank Investment Management (NBIM) voted in support ▪ California Public Employees Retirement System (CalPERS) voted in support ▪ California State Teachers Retirement System (CalSTRS) voted in support ▪ NYC pension funds (new York City Board of Education Retirement, New York City Employees Retirement System, New York City Fire Pension Fund, New York City Police Pension Fund, Teachers Retirement System of the City of New York) voted in support.

Despite some reservations – including that the three year length of the Long Term Incentive vesting period is too short and the 'quantum of remuneration' – the Australian Shareholders Association (ASA) also recommended shareholders vote to approve the remuneration report.

[Source: Woolworths: Notice of meeting; Results of meeting]

Tabcorp AGM

Tabcorp Holdings Ltd (Tabcorp) held its AGM on 25 October 2023.

34% of shareholders voted 'against' approving the remuneration report, delivering a 'first strike'. Notably, this was the only protest vote - all other proposals were carried with strong (97% or more) support.

The table below provides a snapshot of the vote outcome on the two remuneration-related proposals and an indication of how some investors voted.

PROPOSAL	VOTE RESULT	HOW (SOME) INVESTORS VOTED
Proposal 3 in the Notice: Approve Remuneration Report	▪ 65.57% support (34.08% against)	▪ Legal and General Investment Management (LGIM) voted against chiefly over concerns pay was 'excessive'. LGIM states that: 'A vote against is applied as the changes to salary would significantly increase total pay. A vote AGAINST the resolution is warranted. The company pay structure increased significantly as a result of remuneration benchmarking undertaken by the board where Tabcorp merger with Tatts Group. Subsequently, the company has retained this excessive pay structure from its time as a larger entity despite the demerger of The Lottery Corporation.- Fixed CEO remuneration appears to be twice the median average for market cap peers in the ASX 151-175 group;- STI bonuses are approximately three times the median of this peer group;- Weighting of financial measures from 50 percent to 40 percent in FY23 may be seen to reduce alignment between shareholders and pay for performance, and inconsistent with shareholder interests.- The FY23 LTI grant for the CEO is excessive, being 9.0 times the median of the company's market capitalisation peers. Shareholders may have concerns that if pay arrangements continue at these levels without a commensurate increate in performance and material misalignment of pay and performance may arise. The reduced weighting to financial STI measures in FY23 and beyond exacerbates concerns for inconsistency with market practice and shareholder interests'. ▪ NYC pension funds (new York City Board of Education Retirement, New York City Employees Retirement System, New York City Fire Pension Fund, New York City Police Pension Fund, Teachers Retirement System of the City of New York) voted against ▪ Norges Bank Investment Management (NBIM) voted in support ▪ California Public Employees Retirement System (CalPERS) voted in support ▪ California State Teachers Retirement System (CalSTRS) voted in support
Proposal 4 in the Notice: Approve grant of performance rights to the Managing Director and CEO	▪ 97.29% support (2.34% against)	▪ LGIM voted in support ▪ NBIM voted in support ▪ CalPERS voted in support ▪ CalSTRS voted in support ▪ NYC pension funds voted in support

Why the strong protest vote?

A main driver behind the 'against' vote appears to be concerns over quantum (though as other investors have not provided reasons for their voting decisions, it is not clear that this was necessarily the motivator for all investors).

Ahead of the meeting, the Australian Shareholders Association advised shareholders oppose the remuneration report and the grant of options to CEO/Managing Director chiefly because it considers 'the remuneration levels of the CEO and Chairman are excessive'. The ASA writes:

> 'The key issue is that Tabcorp's remuneration framework has not reflected the reduction in size and complexity of the company after the de-merger with The Lottery Corporation. We consider the remuneration levels of the CEO and Chairman are excessive. This is best illustrated by Tabcorp market capitalisation shrinking by 77% post de-merger, yet CEO remuneration is down only around 10% and Chairman fees down 15%. When the reverse happened in 2017 (Tabcorp acquiring Tatts), the CEO remuneration increased by 43% and the Chairman fee increased by 37%.
>
> The company argues that they have to pay 'above median' benchmarks because they are not competing on a level playing field, they are transitioning the company, and there is a higher degree of personal risk and exposure working in the gambling industry. Even allowing for 'above median' at the 75th percentile level, the pay is too high'.

As flagged in the table, LGIM raised similar concerns.

[Sources: Tabcorp Holding Ltd: Notice of Meeting; Results of AGM]

APA Group AGM

All resolutions were carried at utility company APA Group's 26 October 2023 AGM.

However there was a protest vote (25.79%) against the remuneration report, constituting a first 'strike'.

This was the only resolution that attracted a significant (10% or more) vote 'against'.

The AFR suggests the results reflect concern that the performance targets set were too weak. In his opening address to the meeting, APA's Group Chair briefly noted that some shareholders had 'raised concerns in relation to certain aspects of our remuneration arrangements' but did not provide specifics.

Ahead of the meeting, the Australian Shareholders Association (ASA) advised shareholders to support all resolutions – including the resolution to approve the remuneration report.

Investors appear divided on the issue (as detailed in the table below).

PROPOSAL	VOTE RESULT	HOW (SOME) INVESTORS VOTED
Proposal 1 in the Notice: Approve Remuneration Report	▪ 73.57% support (25.79% against)	▪ Legal and General Investment Management (LGIM) voted in support ▪ Norges Bank Investment Management (NBIM) voted in support ▪ NYC pension funds (new York City Board of Education Retirement, New York City Employees Retirement System, New York City Fire Pension Fund, New York City Police Pension Fund, Teachers Retirement System of the City of New York) voted in support. ▪ California Public Employees Retirement System (CalPERS) voted against ▪ California State Teachers Retirement System (CalSTRS) voted against

[Source: APA Group: Results of meeting]

Mini pay protest at Boral

All resolutions were carried at the Boral Ltd (Boral) 26 October 2023 AGM. Just over 10% of shareholders voted 'against' the remuneration report – the only resolution to secure less than 97% support. As shown in the table below, a number of investors voted 'against'.

PROPOSAL	VOTE RESULT	HOW (SOME) INVESTORS VOTED
Proposal 3 in the Notice: Approve Remuneration Report	▪ 89.82% support (10.18% against)	▪ Legal and General Investment Management (LGIM) voted against, over concerns about the quantum and design of incentives. LGIM states that: 'A vote against is applied as LGIM believes that the approved remuneration policy should be sufficient to retain and motivate executives. Remuneration: Performance conditions: A vote against is applied as the level of disclosures in respect of performance conditions does not allow shareholders to make a fully informed assessment of remuneration. A vote AGAINST this resolution is warranted due to the following concerns: - The new CEO received a sign-on award equivalent to 100 percent of his fixed remuneration ($1.5 million) delivered in time-based equity, with 50 percent vesting after two years and 50 percent after three years. A sign-on bonus or a similar award coupled with a lack of any performance condition is not consistent with good governance standards in the Australian market. The quantum also appears excessive, especially when considered in combination with the executive's FY23 LTI. - The new CEO received LTI awards effective 1 September 2022, which was before his commencement of employment, and the company has failed to put his LTI awards in FY23 up for shareholder consideration and approval, materially inconsistent with good governance and market practice. - The new CFO also received a sign-on award delivered in time-based equity that vest after completion of two years. - The poor disclosure practices and the high weighting of non-financial performance measures in the STI award'. ▪ Norges Bank Investment Management (NBIM) voted against. The rationale given is that: 'The board is responsible for attracting the right CEO and setting appropriate remuneration. A substantial proportion of annual remuneration should be provided as shares that are locked in for five to ten years, regardless of resignation or retirement. The board should provide transparency on total remuneration to avoid unacceptable outcomes. The board should ensure that all benefits have a clear business rationale. Pensionable income should constitute a minor part of total remuneration'. ▪ NYC pension funds (new York City Board of Education Retirement, New York City Employees Retirement System, New York City Fire Pension Fund, New York City Police Pension Fund, Teachers Retirement System of the City of New York) voted against. ▪ California Public Employees Retirement System (CalPERS) voted against. ▪ California State Teachers Retirement System (CalSTRS) voted against.

[Source: Boral Ltd Results of meeting]

Whitehaven AGM: Shareholders deliver first 'strike' at Whitehaven, shareholder climate proposal secures 18% support

All management-proposed resolutions were carried at the Whitehaven Coal Ltd 26 October 2023 AGM – though five of seven proposals received 10% or more votes against, with the resolution to approve the remuneration report attracting over 40% opposition (a first 'strike').

Two shareholder ESG resolutions – the usual constitutional amendment accompanied by a contingent advisory capital protection resolution – both of which were opposed by the board, failed to carry.

[Note: In Australia shareholders typically propose a special resolution – a constitutional amendment (a machinery type resolution to allow shareholders to bring non-binding, advisory resolutions accompanied) - accompanied by separate ordinary (advisory) resolution containing the substantive demand/request of the company. This contingent advisory resolution is only formally put to the meeting if the special resolution secures the 75% or more votes in support to carry. For an explanation of why the legal framework in Australia makes this necessary see: Ramsay, I., & Freeburn, L. An Analysis of ESG Shareholder Resolutions in Australia UNSW Law Journal, 2021 Volume 44(3) at p1146-1149. The Australian Council of Superannuation Investors has long advocated for reform, recommending the introduction of an 'ordinary non-binding shareholder resolution framework'. You can find ACSI's 2017 policy paper on this topic here: Shareholder-resolutions-in-Australia.Oct17.pdf (acsi.org.au).]

However, Proposal 9 (shareholder, capital protection proposal) secured close to 18% proxy support. To put this result in context, a study into the rise of shareholder ESG resolutions in Australia – see: Ramsay, I., & Freeburn, L. An Analysis of ESG Shareholder Resolutions in Australia UNSW Law Journal, 2021 Volume 44(3) 1142-1179 - suggests that even where shareholder ESG resolutions are not passed by a majority of shareholders, or withdrawn, they nevertheless are effective in catalysing a response from companies.

The table below provides a snapshot of the vote results and an indication of how some investors voted on each of the resolutions.

PROPOSAL	VOTE RESULT	HOW (SOME) INVESTORS VOTED
Proposal 1 in the Notice: Approve Remuneration Report	▪ 59.39% support (40.61% against)	▪ Legal and General Investment Management (LGIM) voted against. 'A vote against is applied as the level of disclosures in respect of performance conditions does not allow shareholders to make a fully informed assessment of remuneration. Remuneration: Quantum: A vote against is applied as the changes to salary would significantly increase total pay. Remuneration - Discretion: A vote against is applied as the company has applied discretion to enable an award to vest that would have lapsed due to not meeting the performance conditions that were previously set. LGIM does not consider the rationale for the discretion to be sufficiently robust. A vote AGAINST this resolution is warranted. - Upward discretion was exercised by the board to determine threshold performance for certain performance measures when the threshold hurdle was not achieved. - Substantial increases to the fixed remuneration of the executives and the board fees of non-executive directors, which are well above the average wage growth in Australia and has brought their remuneration to well above peers. - The long-term component of the new incentive plan has incorporated an excessive component of 50 percent weighted to poorly disclosed non-financial performance measures associated with "strategy". The use of poorly disclosed non-financial performance measures for a large portion of a bonus plan increases the upfront risk for excessive board discretion and misalignment of bonuses with performance and shareholder returns'. ▪ NYC pension funds (new York City Board of Education Retirement, New York City Employees Retirement System, New York City Fire Pension Fund, New York City Police

PROPOSAL	VOTE RESULT	HOW (SOME) INVESTORS VOTED
		Pension Fund, Teachers Retirement System of the City of New York) voted against.
Proposal 2 in the Notice: Grant of single incentive plan awards to the managing director	▪ 61.5% support (38.50% against)	▪ NYC pension funds voted against. ▪ Legal and General Investment Management (LGIM) voted against. 'A vote AGAINST this resolution is warranted. The deferred rights and performance rights were determined following assessment of the FY23 performance under the company's new combined incentive plan. - The recommendation is based primarily on the basis that the long-term component of the plan is inconsistent with better market practice and many other large mining and resources industry companies, and the expectations and interests of many shareholders. - Shareholders may be concerned for a heightened risk of excessive board discretion in determining bonuses against the non-financial strategy hurdles and future misalignment with shareholder interests. - Added concerns are raised that in determining the number of deferred rights and performance rights to be granted under this resolution, the board exercised upward discretion to award bonuses in assessing certain FY23 performance measures which were not achieved up to threshold. - There is provision for a dividend equivalent payment, which is inconsistent with the expectations of many shareholders and better market practice'.
Proposal 3 in the Notice: Election of Raymond Zage as a director	▪ 75.42% support (24.58% against)	▪ NYC pension funds voted in support ▪ LGIM voted against on climate grounds, stating that: 'A vote against is applied as the company is deemed to not meet minimum standards with regard to climate risk management. Future World Protection List: A vote against is applied as the company meets the criteria for inclusion in LGIM's Future World Protection List. Companies are incorporated into the List if they fail to meet minimum standards of globally accepted business practices. This includes: companies involved in the manufacture and production of controversial weapons; perennial violators of the United Nations Global Compact (UNGC); and companies involved in thermal coal and oil sands.

PROPOSAL	VOTE RESULT	HOW (SOME) INVESTORS VOTED
		Auditor independence - Accountability: LGIM notes concerns with the auditor's independence given their long tenure and/or excessive non-audit fees being paid. As shareholders are not afforded a separate resolution to vote on the auditor's ratification, a vote against the Audit Committee member is warranted to highlight our concerns'.
Proposal 4 in the Notice: Election of Nicole Brook as a director	▪ 89.83% support (10.17% against)	▪ NYC pension funds voted in support ▪ LGIM voted in support
Proposal 5 in the Notice: Election of Wallis Graham as a director	▪ 89.62% support (10.38% against)	▪ NYC pension funds voted in support ▪ LGIM voted in support
Proposal 6 in the Notice: Election of Tony Mason as a director	▪ 98.66% support (1.34% against)	▪ NYC pension funds voted in support ▪ LGIM voted in support
Proposal 7 in the Notice: Renewal of on-market share buy-back authority	▪ 98.86% support (1.14% against)	▪ NYC pension funds voted in support ▪ LGIM voted in support
(Shareholder) Proposal 8 in the Notice: Amendment to the Constitution The proposal, filed by Market Forces called on the company to amend the constitution to enable shareholders to put an ordinary resolution to a general meeting. The proposal is a special resolution (75% or more votes in support are required for the resolution to be carried).	▪ 3.63% support (96.37% against)	▪ NYC pension funds voted against. ▪ LGIM voted in support, stating that: 'A vote in favour is applied as LGIM supports increased shareholder rights'.
(Shareholder) Climate Proposal 9 in the Notice: Capital Protection The proposal calls on the company to 'disclose, in subsequent annual reporting, information that demonstrates how the company's capital expenditure and operations pertaining to coal assets will be managed in a manner consistent with a scenario in which global energy emissions reach net zero by 2050'. The proposal is an ordinary advisory proposal that is contingent on the passage of the constitutional amendment - in order to be formally put before the meeting, the constitutional amendment (Proposal 8 would need to be carried).	▪ 17.81% proxy support (81.55% against)	▪ NYC pension funds voted in support ▪ LGIM voted in support, stating that: 'Climate Change: A vote in favour is applied, as we believe investors would benefit from additional information as to how the company intends to ensure its capital allocation is robust among potential risks of demand destruction'.

PROPOSAL	VOTE RESULT	HOW (SOME) INVESTORS VOTED
The chief justification given for the board's 'against' recommendation for both proposals 8 and 9 is that it: 'does not consider it would be in the best interests of shareholders to limit business strategy to a single scenario which is subject to considerable uncertainty. The Board therefore is firmly of the view that these resolutions are unnecessary and not in the interests of the company for the reasons set out in the Notice of Meeting'.		

Why the strong protest votes?

Activist group Market Forces (which coordinated the two shareholder proposals) considers that the vote results overall (including the 'strike' against the remuneration report) reflect the high level of investor concern around Whitehaven's strategic direction, and in particular its 'reckless "growth at all costs" approach'. Market Forces writes:

> 'Whitehaven has demonstrated more clearly than ever that it is betting everything on the failure of the world to limit warming to 1.5°C, breaking ground on a new thermal coal mine and adding two operating coal mines and more mining tenements to its portfolio of existing and planned projects. Just a month ago, Whitehaven had almost $2.7 billion in cash after a surge in coal prices following Russia's invasion of Ukraine. These windfall profits dragged Whitehaven out of years of debt – Whitehaven was almost $1 billion in the red before the war. Rather than use this cash to fix its debt position, then pass the rest onto investors (as many shareholders desired and have been vocally demanding for months), Whitehaven has decided to gamble it all on buying up and building new coal mines. This strategy not only risks shareholder value, but also our chances of a stable climate future.

Market Forces suggests that these concerns are shared by other shareholders including activist investor Bell Rock Capital Management. Ahead of the meeting, Bell Rock Capital Management (reportedly) urged shareholders (through direct mail outs and newspaper advertisements), to vote 'against' the remuneration report in protest over the company's acquisition off two coking coal mines (instead of returning cash to shareholders).

Commenting directly on the level of support for Proposal 9 (shareholder capital protection proposal), Market Forces writes:

> 'This is a clear demonstration to Whitehaven's management that a significant proportion of investors want the company not to spend its windfall on making the climate crisis worse, but rather return capital to shareholders while ensuring a just transition for workers and the community.
>
> [Sources: Whitehaven Coal Ltd: Notice of Meeting; Results of Meeting]

ESG

ACT government to legislate the right to a healthy environment

Context: International recognition of a right to a healthy environment

In July 2022, the UN General Assembly recognised the right to a healthy environment as a universal human right. See: What is the Right to a Healthy Environment? Information Note.

For discussion of the potential implications of this in the Australian context see: The UN says access to a healthy environment is a human right. Here's what it means for Australia (theconversation.com)

ACT Bill introduced

Following earlier consultation, the ACT government has introduced a new Bill – Human Rights (Healthy Environment) Amendment Bill 2023 (ACT) - which if enacted, would enshrine the right to a 'clean, healthy and sustainable environment' in the Human Rights Act 2004 (ACT).

Broadly, the (proposed) right would include (but is not limited to) the right to:

> 'clean air, a safe climate, access to safe water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work, study and play, and healthy biodiversity and eco-systems'

This is intended to:

> 'ensure that environmental and climate impacts are given proper consideration in the exercise of all public authority functions, including in the development of legislation, policy and decision making. This will institutionalise greater understanding of human rights and environmental considerations across Government, building and strengthening the ACT's human rights culture'.

For example, the amendment would mean (among other things) that there would need to be 'prior assessment of possible environmental impacts of proposed projects and policies, including their potential effects on human rights'.

No penalties for the first five years

In addition, the Bill includes the ability to report breaches of the (proposed) right to the ACT Human Rights Commission – though it does not provide for any penalties for breach or remedies at this stage.

According to the explanatory memorandum this is to allow:

> 'public authorities time to fully understand, implement and institutionalise the right to a healthy environment in decision-making, policies and legislation, the direct right of action to the ACT Supreme Court for a breach of public authority obligations, and the ability to raise public authority breaches as part of other litigation, set out in section 40C of the HR Act, will not initially apply to this right'.

This will be subject to a mandatory statutory review, the results of which are required to be tabled 'as soon as practicable after five years from commencement of the new right'.

Human Rights Law Centre welcomes the move

The Human Rights Law Centre has welcomed the introduction of the Bill as a significant step 'towards the urgent change needed in the face of the existential triple-threats of climate change, rampant pollution and escalating environmental degradation'.

The Human Rights Law Centre writes that the change will 'not only help safeguard the environment for future generations, it will set the standard across Australia and the region.'

> [Sources: ACT Minister for Human Rights Tara Cheyne media release 26/10/2023; Human Rights (Healthy Environment) Amendment Bill 2023 (ACT)]

Global Sustainability Assurance Standard | The IAASB has released FAQs on the application of materiality in proposed ISSA 5000

- The International Auditing and Assurance Standards Board (IAASB) is currently 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. The due date for submissions is 1 December 2023.
- Ahead of this, the IAASB has issued a set of Frequently Asked Questions on the application of materiality in the context of proposed f(ISSA) 5000 in response to stakeholder requests.
- Among other issues, the FAQs address: a) how the concept of materiality if proposed to apply to sustainability reporting and assurance; b) the definition of 'double materiality'; and c) how assurance practitioners would consider an organisation's "materiality process" during a sustainability assurance engagement.

[Source: IAASB media release 25/10/2023]

SEC's proposed climate disclosure rule: US Chamber of commerce reiterates concerns about compliance costs

In March 2022 the US Securities and Exchange Commission (SEC) released a draft climate disclosure rule for consultation. Broadly, under the proposed rule, registrants (which typically include publicly traded companies) would be required to disclose information about the actual or likely 'material' impacts of climate-related risk on their business, strategy and outlook including material GHG emissions across all Scopes. On releasing the proposed rule, SEC noted that the proposed disclosures are 'similar to those that many companies already provide based on broadly accepted disclosure frameworks, such as the Task Force on Climate-Related Financial Disclosures and the Greenhouse Gas Protocol'.

It is unclear when the SEC is likely to finalise the rule – based on comments from SEC Chair Gary Gensler at a recent US Chamber of Commerce event, Forbes suggests this is unlikely to occur until 2024 (with the new requirements likely to apply from 2026).

US Chamber of Commerce reiterates concerns

Following (what appears to be the same event), the US Chamber of Commerce has issued a statement reiterating its concerns about the potential costs impact of the proposed new climate disclosure requirements on US companies.

Specifically, the US Chamber Commerce is concerned that the proposed rule would:

> 'impose costs equal to all disclosures companies already make, and, worse, that it significantly underestimates the actual compliance costs for companies'.

The statement also submits that the rule (and associated costs, especially costs for small business) are not necessary given that businesses are 'already moving forward in responsibly disclosing material climate risks'.

For a fuller explanation of the Chamber's concerns see: What to Know About the SEC's Climate Rule | U.S. Chamber of Commerce (uschamber.com)

Activists urge SEC to move forward

Conversely, activist groups (Americans for Financial Reform Education Fund, Public Citizen, and Sierra Club) query whether this is a valid concern.

In support, the groups point to a report (which they have jointly commissioned) which found that there should be no added compliance costs for most (75%) of the largest public companies in complying with the SEC's proposed rule chiefly because of the extent of overlap between recently enacted Californian climate disclosure regime and the fact that many companies will likely be caught by it.

[Sources: US Chamber of Commerce media release 26/10/2023; Sierra Club media release 26/10/2023]

US regulators finalise principles for climate-related financial risk management for large financial institutions

- In the interests of promoting a 'consistency in their climate-related financial risk management guidance' the US Federal Reserve Board of Governors (Fed), Office of the Comptroller of the Currency (OCC), and Federal Deposit Insurance Corporation (FDIC) have jointly released new principles to 'provide a high-level framework for the safe and sound management of exposures to climate-related financial risks for large financial institutions'.
- For clarity, the principles are intended to apply to the largest financial institutions (those with over $100 billion in total consolidated assets).

- Broadly, the high-level principles cover the following six areas:
  - Governance
  - Policies, Procedures, and Limits
  - Strategic Planning
  - Risk Management
  - Data, Risk Measurement, and Reporting
  - Climate-Related Scenario Analysis
- In addition, the principles outline 'how climate-related financial risks can be addressed in the management of traditional risk areas [eg credit, market, liquidity, operational, and legal risks]'.

Support not universal

In a statement announcing the release of (and his support for) the principles, Federal Reserve Chair Jerome Powell underlined that the guidance is 'squarely focused on prudent and appropriate risk management' and does not cross into climate policy. Mr Powell said:

> 'The Federal Reserve is not and will not be a "climate policymaker." Decisions about policies to address climate change must be made by the elected branches of government. Over time, we must be vigilant to avoid crossing or blurring that line. It is not the Fed's role to tell banks which businesses they can and cannot lend to, and this guidance is not intended to do so. The guidance clearly articulates this fundamental principle—an important addition to the proposal'.

Similarly, Vice Chair Michael Barr emphasised that the principles focus on promoting prudent risk management.

However, this view was not universal - neither Governors Michelle Bowman or Christopher Waller supported the Principles. Governor Bowman said this is because:

> 'In my view the final guidance will create confusion about supervisory expectations and will result in increased compliance cost and burden without a commensurate improvement to the safety and soundness of financial institutions or to the financial stability of the United States'.

Governor Waller said that this is because:

> 'Climate change is real, but I disagree with the premise that it poses a serious risk to the safety and soundness of large banks and the financial stability of the United States. As I detailed in a speech earlier this year, I don't believe the risks posed by climate change are sufficiently unique or material to merit special treatment relative to other risks'.

Ceres has called on the agencies to go further

In a statement welcoming the release of the principles, Ceres makes clear that it would like to see the agencies go further, as outlined in its comment letter on the draft Principles Ceres writes:

> '…the Principles have several key shortcomings, including limiting the principles to banks with over $100 billion in assets, not explicitly requiring banks to consider and take action to reduce or limit impacts on LMI and other disadvantaged communities, and not discussing transition plans, among others….Ceres encourages the Fed, OCC, and FDIC to take additional steps to support this guidance and recommends the actions outlined in our 2023 Climate Risk Scorecard'.
>
> [Source: Joint press release Board of Governors of the Federal Serve System, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency 24/10/2023]

Greenwashing | The Swiss Department of Finance has announced plans to develop new anti-greenwashing labelling regulations

- The Swiss Federal Department of Finance (FDF) has announced plans to develop a proposal for principles-based anti-greenwashing state regulation in line with the approach set out in the Federal Council's December 2022 position paper on greenwashing prevention.
- The Federal Council considers there is 'a need for a common understanding in the financial sector about the general criteria permitting investment objectives, and hence products and services, to be labelled as sustainable'.
- Broadly, the changes would mean that:

'Financial products or services that are labelled as sustainable or as having sustainable characteristics must also pursue at least one of the following investment objectives in addition to their financial goals:

(i) Alignment with one or more specific sustainability goals, or

(ii) Contribution to achieving one or more specific sustainability goals.

Financial products and services that are aimed at reducing ESG risks or optimising performance follow purely financial investment objectives and should therefore not be described as sustainable, unless they also pursue one of the investment objectives outlined above. Indeed, ESG risks should rather be taken into account as part of fiduciary duties'.

- The FDF plans to submit a consultation draft to the Federal Council by the end of August 2024 (though the project will be abandoned if the financial industry 'presents a self-regulation solution that implement's the Federal Council's position effectively').

[Source: Swiss Federal Council media release 25/10/2023]

CEOs issue call on governments ahead of COP28 to address what they see as they key barriers to accelerating private sector climate action

Ahead of the 28th session of the Conference of Parties (COP 28), 107 CEOs from Alliance of CEO Climate Leaders have released an open letter calling for on the world's governments to address what the group considers to be key barriers to accelerating/upscaling private sector ambition and action on climate.

The group has called on governments to:

- 'Massively scale up investment in renewable energy and power networks and streamline permitting and regulatory processes'
- 'Phase out fossil fuel subsidies in a just and equitable way' with focus transferred to funding 'funding clean energy and bio-based solutions through incentives such as the US Inflation Reduction Act and the EU Net Zero Industry Act, and the reskilling of workers in the energy transition'.
- Cut green tape – ie address 'cumbersome permitting processes [that] are slowing down decarbonisation efforts' – to 'accelerate renewable energy projects and infrastructure'.
- 'Set ambitious, science-based [low-emitting] procurement targets to create demand drivers and support the development of supply chains.

- 'Set appropriate carbon-removal targets, include them in their nationally determined contributions (NDCs) and National Biodiversity Strategies and Action Plans (NBSAPs), and develop supportive regulation for the conservation and regeneration of existing carbon sinks'.
- 'Incentivise corporate investments through an enabling regulatory environment and carbon markets'
- (For standard setters, including the International Sustainability Standards Board) to prioritise the harmonisation and simplification of climate disclosure and measuring standards.

In addition the group calls on other business leaders to 'raise their ambition' including through: setting science-based targets; publicly disclosing their emissions data through entities such as the CDP; engaging with their suppliers and customers to advance emissions reductions across their entire value chains; and increasing investments in energy efficiency, carbon reduction technology and nature-based removals.

[Source: World Economic Forum: Alliance of CEO Climate Leaders share open letter to world leaders for COP28 24/10/2023]

RIAA NZ Aotearoa Collaborative Working Group to promote and advance responsible investing in New Zealand

- Following the success of working groups in Australia, the Responsible Investment Association Australasia (RIAA) has announced the establishment of a new Aotearoa Collaborative Working Group to advance responsible investing in New Zealand through facilitating sharing of expertise/knowledge.
- Open initially to Asset Owner, Asset Manager, Banking and Trust members of RIAA, it's envisaged that the working group will leverage and build on the knowledge and resources of existing RIAA working groups, but apply it in a New Zealand context.
- Announcing this RIAA Executive Manager Dean Hegarty said the new working group would

  'provide members with an opportunity to share ideas and challenges that enable stronger collaboration across our market on responsible investment issues, including on corporate engagements specific to the New Zealand market…At the same time it will also provide a structured, in person forum for those engaged across the various RIAA working groups, to consolidate knowledge, and increase the opportunity to contribute to ongoing work.

  [Source: RIAA media release 24/10/2023]

In Brief | Update on Bills to establish a nature repair market in Australia: The Environment and Communications Legislation Committee has requested an extension of time to report on the Nature Repair Market Bill 2023 (Cth) and the Nature Repair Market (Consequential Amendments) Bill 2023 (Cth) from 1 November 2023 until 18 April 2024 to allow more time to consider the evidence received and to 'conclude its deliberations'

[Note: For more on the Bills see MinterEllison's update here: Australia's biodiversity agenda: Nature Repair Market - Insight - MinterEllison]

[Source: Inquiry into the Nature Repair Market Bill 2023 and Nature Repair Market (Consequential Amendments) Bill 2023 [Provisions] Progress Report 24/10/2023]

In Brief | ISSB-aligned sustainability reporting: The Brazilian Ministry of Finance and the Comissão de Valores Mobiliários (CVM) have announced plans to incorporate the ISSB sustainability standards into the Brazilian regulatory framework with plans to mandate reporting under the new requirements from 1 January 2026 (with voluntary adoption encouraged from 2024)

[Source: IFRS media release 20/10/2023]

Financial Services

Reportable situations regime: ASIC's second report finds 'little improvement'

Key takeaways from ASIC Report 775: Insights from the reportable situations Regime: July 2022 to June 2023

Under the reportable situations regime, the Australian Securities and Investments Commission (ASIC) is required to report annually on the information lodged by licensees in the interests of transparency - to 'assist industry and customers identify where significant breaches are occurring'.

ASIC Report 775: Insights from the reportable situations Regime: July 2022 to June 2023 (REP 775) is the second publication released by the regulator under since the commencement of regime. It provides high-level insights into the trends observed in reports lodged by licensees in the 12 months to 30 June 2023.

'Little improvement' since the last report

ASIC considers that:

> 'little improvement has been made in key areas of concern that ASIC highlighted in the first publication on insights from this regime last year'.

For more on the findings of ASIC's initial report (REP 740) see: ASIC's first insights from the Reportable Situations Regime - Insight - MinterEllison

In particular, ASIC highlights the following five issues as areas of continuing concern.

1. Only a low proportion of the licensee population is reporting

ASIC found that only 11% of the licensee population has lodged a report since the commencement of the regime in October 2021 with 'mostly the larger licensees…now reporting under the regime'.

ASIC considers that this an indication that 'some licensees may not have in place the systems and processes required to detect and report breaches'.

Looking ahead, ASIC's expectation is that:

> 'all licensees, regardless of size, to have robust systems and processes in place to ensure timely detection and reporting of any non-compliance. If there are reasonable grounds to believe that a reportable situation has arisen, it is a legal obligation for licensees of any size to lodge a report with ASIC. Failing to report to ASIC when a reportable situation has arisen can attract both civil and criminal penalties'

ASIC states that it has commenced surveillance focusing on licensees 'who are not reporting or are reporting significantly less than expected given their nature, scale, complexity, and when compared to peers'.

2. Time taken to identify and investigate breaches is considered to be 'too long'

ASIC found that:

- In the case of 820 reports, licensees took more than five years to identify and commence an investigation into a breach
- In the case of 2671 reports, licensees more than a year to identify and commence an investigation into a breach.

ASIC considers this demonstrates that 'further improvement is required for licensees to identify and commence investigations into breaches in a timely manner'.

ASIC also raises concerns about the potential knock-impacts of delays in identifying and investigating breaches for customers – in particular, that customers are likely to have to wait longer for remediation.

3. 'A significant number of remediation activities are still taking too long to complete'

ASIC found that in 8% of the total reports involving compensation to customers received, the time taken or estimated to take to finalise compensation was over 12 months.

ASIC reiterates that it will consider taking 'regulatory action where licensees fail to deliver fair and timely remediation to affected customers'.

4. Scope to improve identification and reporting the root causes of breaches

The report identifies staff 'negligence or error' as the most common root cause for reported breaches, with licensees attributing 66% of reports to this root cause. Further, in over 60% of cases, staff negligence and/or error' was nominated as the sole root cause even through licensees had previously reported similar breaches and/or grouped multiple breaches into the relevant report.

On this point, ASIC underlines its expectation that licensees:

> 'ensure that there are no other underlying root causes or broader failures in their systems, policies or processes that may be contributing to the high incidence of staff negligence and/or error' [in line with the guidance in RG 78]

ASIC expects compliance with the regime

Announcing the release of the report, ASIC Chair Joe Longo flagged a shift in ASIC stance stating that:

> 'Since its commencement, ASIC has been working with stakeholders to improve the operation of the reportable situations regime, including through providing guidance and modifications. ASIC will now move to taking stronger regulatory action to drive improved compliance with the regime, including enforcement action where appropriate.'

ASIC states that it has commenced surveillance activity 'targeting licensees who may not be meeting their obligations' with a particular focus on:

> 'licensees who are not reporting or are reporting significantly less than expected given their nature, scale, complexity, and when compared to peers'.
>
> [Source: ASIC media release 31/10/2023]

Insurers' 2022 flood response: Independent review makes seven recommendations for improvement

- The Insurance Council of Australia (ICA) has released the findings of an independent review (undertaken by Deloitte) into insurers' response to the 2022 floods which for context, were the second largest insured event in the world in 2022.
- The review was based on Deloitte's assessment of the operations of eight insurers who together received around 99% of all home and contents, motor, and small business claims related to the floods.
- Key findings include that:
  - The scale of the event 'exposed vulnerabilities in insurers' claims and complaint handling responses, particularly in catastrophe planning, resourcing, processes and technology, communications, and governance'.
  - 'Claim closure rates varied considerably across insurers' though it's also noted that 'speed is not the only measure of insurer performance as other factors impacted closure timeframes, such as exposure to the event, policy definitions, and the mix of claims types'.
  - Though insurers have already taken steps toward actioning on the lessons learned from the event, 'there is more work that can be done to continue to improve customer outcomes'.

Seven recommendations

- The report makes the following seven recommendations – all of which have been accepted by the ICA – to improve insurers' level of preparedness/response to the next event.
  - 'Preparedness - Insurers should improve their catastrophe planning, particularly their preparedness for extreme catastrophes like Cat 221.
  - Customer experience - Insurers should improve the customer experience during catastrophes through better communication with policyholders and by delivering a consistent experience through claim handling and complaints.
  - Resourcing - Insurers should redesign resourcing capability for catastrophe events, with a particular focus on workforce planning and resourcing and onboarding during catastrophes.
  - Operational response - Insurers should assess what operational efficiencies could be delivered in catastrophes through process, technology, and infrastructure investments.

- – Governance and transparency - Insurers should improve their ability to capture and leverage data and insights to understand the impact of internal and external factors on performance during catastrophes.
- – Coordination with government - More effective coordination between government and the insurance industry is required to provide faster access to government funding, consistent approaches to clean-up and debris removal, and co-incentivise investment in resilience and adaptation measures.
- – Code review - The Extraordinary Catastrophe definition in the General Insurance Code of Practice should be reworked as part of the upcoming independent review'.

Next steps

- The ICA has said it will lead the work to improve with government and will refer the recommendation regarding the Extraordinary Catastrophe definition to the upcoming review of the General Insurance Code of Practice.
- The ICA has also flagged that an independent review of implementation progress will be undertaken in the second half of 2024.
- The Labor-Chaired House of Representatives Standing Committee on Economics is currently conducting an inquiry into insurers' responses to the 2022 floods. The due date for submissions was 31 October 2023. The Committee is due to report by 30 September 2024.

[Source: ICA media release 31/10/2023]

APRA responds to consultation on proposed amendments to capital adequacy reporting standard

- The Australian Prudential Regulation Authority (APRA) has plans to implement proposed changes (outlined here) to Reporting Standard ARS 180.0 Counterparty Credit Risk (ARS 180.0) and with the creation of a new Reporting Standard ARS 226.0 Margining and risk mitigation for non-centrally cleared derivatives (ARS 226.0), as previously proposed (with no changes).
- APRA plans to determine the revised ARS 180.0 and the new reporting standard ARS 226.0 such that they will be effective from the reporting period ending 30 September 2023.
- APRA states that the changes 'will not result in a change to the current reporting requirements, due to the current reporting arrangements already in place'.

Proportionate regulation: APRA to consider ABA's suggested 'broader changes'

- Only one submission was received – from the Australian Banking Association - in response to the consultation, and this was supportive of APRA's proposed approach.
- The submission also suggested what APRA describes as 'broader changes to APRA's reporting framework to further embed a proportionate approach to regulation'. More particularly, the submission recommended replacing the two tiers of significant financial institutions (SFI) and non-SFIs (used in a number of APRA prudential standards) with 'additional and more granular tiering'.
- APRA has indicated that it will 'consider this as part of broader considerations on the design of proportionality in the prudential framework'.

[Source: APRA media release 30/10/2023]

Financial hardship | ABA launches publicity campaign urging people struggling with loan repayments to contact their bank

- In recognition of mounting cost of living pressures, the Australian Banking Association (ABA) has launched a four week publicity campaign urging people struggling with loan repayments to contact their banks to potential options for assistance.
- Some of the assistance on offer may include (for example): temporarily lowering home or credit card loan repayments or moving customers to interest-only payments; restructuring the length of a loan, or deferring payments for a set period.
- The ABA also noted the recent re-launch of the Financial Assistance Hub (first launched during COVID-19) with updated information for customers moving from fixed rate mortgages/struggling to repay buy now, pay later loans.

- ABA CEO Anna Blight noted that despite the fact that most customers appear to be keeping up with their payments so far, those concerned about falling behind or finding it difficult to navigate the current conditions, should contact their bank to seek options to assist in the short or long term.

Banks' handling of financial hardship applications a focus for ASIC

The Australian Securities and Investments Commission (ASIC) has flagged banks' handling of financial hardship applications as among its top priorities in the consumer credit context.

Following the public release of a letter from ASIC (which was also sent to the CEOs of 30 of the largest lenders in Australia) highlighting ASIC's expectations around compliance their financial hardship obligations, ASIC has:

- Flagged plans to collect information from these lenders relating to financial hardship applications
- Commenced a review of 10 large home lenders to understand their approach to financial hardship with findings expected to be published in 'early to mid-2024'.

ASIC has also underlined its readiness to take enforcement action to address non-compliance in this context, pointing to the regulator's record of doing so to date in support.

[Source: ABA media release 30/10/2023]

Assistant Treasurer recaps the government's focus areas for the super sector

In his 31 October 2023 address to the AFR Super and Wealth Summit, Assistant Treasurer and Minister for Financial Services reiterated the government's priorities and expectations of the superannuation sector.

Here are our key takeaways.

'Establishing that political consensus by legislating the objective of the system'

Mr Jones said that feedback on the government's proposed objective for superannuation – 'to preserve savings to deliver income for a dignified retirement, alongside government support, in an equitable and sustainable way' – has been 'overwhelmingly positive'.

Mr Jones said that the government is currently reviewing feedback on draft legislation to enact this change. No timeframe was given on when the government plans to introduce the legislation.

Superannuation performance – lifting standards

Mr Jones pointed to the success of the annual performance test in the MySuper context and its recent extension to Choice products as important measures that have increased transparency around fund performance and helped to lift standards.

Mr Jones flagged that going forward, the test is expected to 'evolve':

> 'As the worst performers exit, the performance test will need to evolve into a more enduring test. But the test will remain. Trustees should be able to demonstrate the value they provide. And that every dollar is being spent in the best financial interests of members'.

Call for industry to sharpen its focus on customer service

Mr Jones said that 'funds are going to need to do more' when it comes to meeting member needs.

In support, Mr Jones pointed to the results of a recent survey into how members feel their fund is serving them published in the AFR, found that the average fund was rated 50 (on a scale of 0-100).

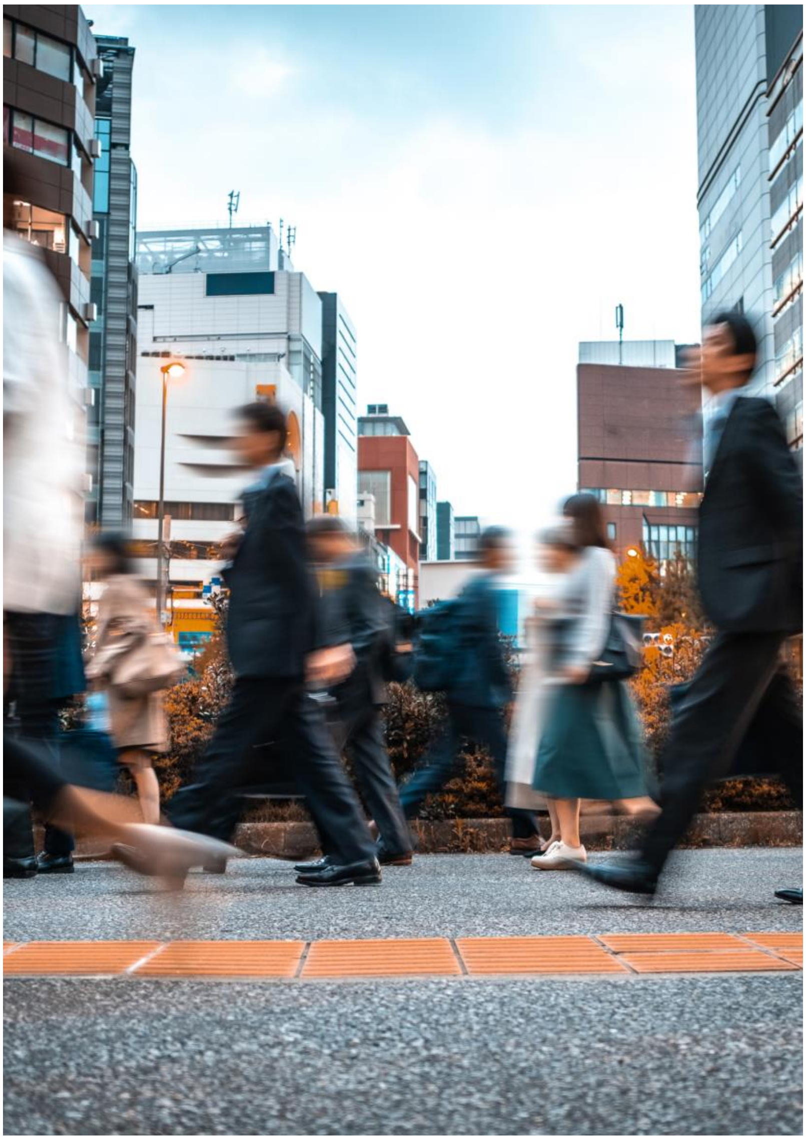
Mr Jones said that this result 'simply confirms the catalogue of poor customer experiences that have been revealed in the last 12 months' including:

- ASIC's findings that 20% of funds failed to consistently respond to complaints within the required timeframes.
- ASIC/APRA's assessment that funds are lagging when it comes to meeting their obligations under the Retirement Income Covenant
- The 32% uptick in super-related complaints to the Australian Financial Complaints Authority (AFCA) over the past 12 months including a 136% increase in complaints about claim delays, including the payment of death benefits.

Mr Jones emphasised in particular, the imperative for funds to 'lift their game' when it comes to meeting the needs of the five million members either retiring or approaching retirement.

Mr Jones said:

> 'For 30 years, the superannuation industry has done an excellent job of building larger and larger retirement balances for members. And funds will need to continue to do that, into the future, for their younger members. But they will also need to help their older members start to draw down on their savings in a way that best meets their needs. In short, funds are going to need to do more'.



Financial advice

Mr Jones reiterated the government's plans to expand the role that superannuation funds play in providing personal financial advice, stating that

> 'lack of advice and information around retirement incomes is clearly the biggest gap in the advice market'.

No reference was made to the timing around these plans.

> [Source: Assistant Treasurer and Minister for Financial Services Stephen Jones Address to the AFR Super and Wealth Summit 2023 31/10/2023]

Key takeaways from APRA Chair's opening statement to the Senate Committee

Our key takeaways from Australian Prudential Regulation Authority (APRA) Chair John Lonsdale's 26 October 2023 opening remarks to the Economics Legislation Committee hearing are below.

- Mr Lonsdale said that recent stresses on the Australian financial system – eg global banking stresses in March 2023 – demonstrate that the Australian financial system remains 'sound'. Mr Lonsdale attributed this to 'years of continuous work to build up resilience and manage current and emerging risks'.
- Referencing the release of APRA's latest Corporate Plan, Mr Lonsdale said that it has been shaped by the following four 'external considerations': a) rising interest rates and high inflation; b) geopolitical instability; c) the growing threat of cyber-attacks and scams; and d) the increased frequency of natural disasters including those linked to climate change.
- Initiatives in response include:
  - enhancing cross-industry stress-testing
  - sharpening regulatory focus on operational resilience, including: cyber resilience, crisis management and operational management
  - moving to further strengthen the banking system to 'ensure that our banks' liquidity and capital buffers work as intended and that stress at one entity doesn't have an outsized impact on the system'
  - conducting a Climate Vulnerability Assessment for general insurers, and embedding climate risk into APRA's approach to supervision
  - 'improving superannuation transparency to provide members with enhanced insights about investment performance and increasing APRA's focus on retirement outcomes'.

- Mr Lonsdale added that APRA is also progressing plans to 'modernise the prudential architecture, transform its technology and use of data to sharpen industry supervision and increase transparency' as well as working to lift APRA's internal capabilities.
- Mr Lonsdale also briefly touched on APRA's response to the findings in the Financial Regulators Assessment Authority report which focused on the effectiveness and capability of APRA's supervision and resolution work in superannuation. Mr Lonsdale reiterated that APRA accepts the FRAA's findings that APRA's supervision function in this context is 'effective and capable' and that its resolution function is 'less developed'. Mr Lonsdale said that APRA supports the five recommendations made by the FRAA to strengthen APRA's approach.
- Touching on APRA's regulatory approach more broadly, Mr Lonsdale:
  - emphasised that taking a 'proportionate' approach to regulation, considering the regulatory burden on business' continues to be a key focus for APRA. Mr Lonsdale pointed to the approach taken by the regulator to the introduction of the new capital framework, the new operational risk standard (CPS 230) and standard on recovery and exit planning (CPS 190) in illustration of this.
  - said that APRA is also focused on 'how to build efficiency in regulatory operations' – as illustrated by APRA's work to modernise the prudential architecture and cooperate with peer regulators (eg in the context of preparing for the new Financial Accountability Regime (FAR)).
- Mr Lonsdale emphasised that APRA will continue to take a tougher approach on some issues:

  'Some risks…require mitigation to the same minimum standard and this needs to be reflected in the prudential framework and in strong supervisory practices. Alongside safety and stability, promoting cyber resilience and sound credit risk management are other areas where a uniformly high bar of risk management is required'.

  [Source: APRA Chair John Lonsdale opening statement to the Senate Economics Legislation Committee 26 October 2023]

100 individuals fined $430,000+ in H1 2023 over failure to assist registered liquidators

- The Australian Securities and Investments Commission (ASIC) has announced that during the first six months of 2023 it has prosecuted 100 individuals for 194 offences under the Corporations Act 2001 (Cth) for failing to assist liquidators.
- These individuals were fined more than $430,000.
- Commenting on this, ASIC Deputy Chair Sarah Court said,

  'After a period of low corporate insolvencies in recent years, insolvency numbers have continued to rise over the last six months. Company officers are required to provide reports and company books to liquidators so the liquidator can quickly and accurately determine an entity's financial position and the best outcome for creditors. ASIC will take action where directors fail to meet these fundamental obligations.'

  [Source: ASIC media release 27/10/2023]

In Brief | APRA has imposed an additional $20 million capital requirement on an insurer following a governance prudential review which revealed 'significant weaknesses in areas of outsourcing controls, conflict management and board decision making'. This will remain in place until the insurers' action plan is completed and 'sustainably embedded'

[Source: APRA media release 01/11/2023]

In Brief | ASIC has launched a public awareness campaign urging retail investors to be 'particularly cautious and aware of the inherent volatility and complexities of market trading'. The campaign coincides with the Australian release of the film Dumb Money – the story of the GameStop short squeeze episode in 2021.

[Source: ASIC media release 26/10/2023]

Risk Management

Top Story | Investors' insights for navigating project risks

MinterEllison has released an article exploring how current market conditions – labour market conditions, supply chain disruptions and the increased demand for 'green' investments - are impacting risk allocation and what this means for equity and debt investors.

You can find the full text here: Investors' insights for navigating project risks - Insight - MinterEllison

Top Story | ACMA further raises the Spam Act stakes

The Australian Communications and Media Authority (ACMA) has issued another significant fine (this time against Ticketek) for Spam Act breaches in the context of a largely 'factual' email. This latest action follows ACMA issuing string of significant fines to organisations over the past 18 months for breaches of the Spam Act.

MinterEllison has released an article providing some context for this latest action and reflecting on the 'lessons' for organisations.

You can find the full text here: ACMA further raises the Spam Act stakes - Insight - MinterEllison

US states sue Meta over alleged harm caused to young people by its business practices

- 42 US State Attorneys General (led by Columbia Attorney General Brian L Schwalb) have filed similar lawsuits against Meta in federal and state courts alleging that the company

  > 'knowingly designed Instagram and its other social media platforms with features that lure in and addict children and cause harm to their mental, emotional, and physical health. At the same time, Meta has falsely assured the public that these features are safe for young users, despite its own internal research showing they're not'.

- More specifically, the Columbia state Attorney General's complaint alleges that Meta has violated the District's Consumer Protection Procedures Act (CPPA), which prohibits a wide variety of unfair and deceptive business practices by:
  - 'Profit[ing] by purposely making its platforms addictive to children and teens, designing features and algorithms to maximise user engagement - and therefore its own profits from advertising revenue - at the expense of young people's health'.
  - 'Implement[ing] features like infinite scroll and near-constant alerts with the goal of hooking young users [which it is alleged]…continually lure teens back onto the platform'.
  - 'Deceiv[ing] the public, claiming that its platforms are safe for young users while knowing that the platforms' addictive features harm young people's physical and mental health and while actively concealing the extent of the psychological and health damage suffered by young, addicted users'.
- The complaint seeks injunctive and monetary relief to rectify the harms caused by Meta's social media platforms. You can find full details of the complaint here.

  [Source: Office of the Attorney General for the District of Columbia media release 24/10/2023]

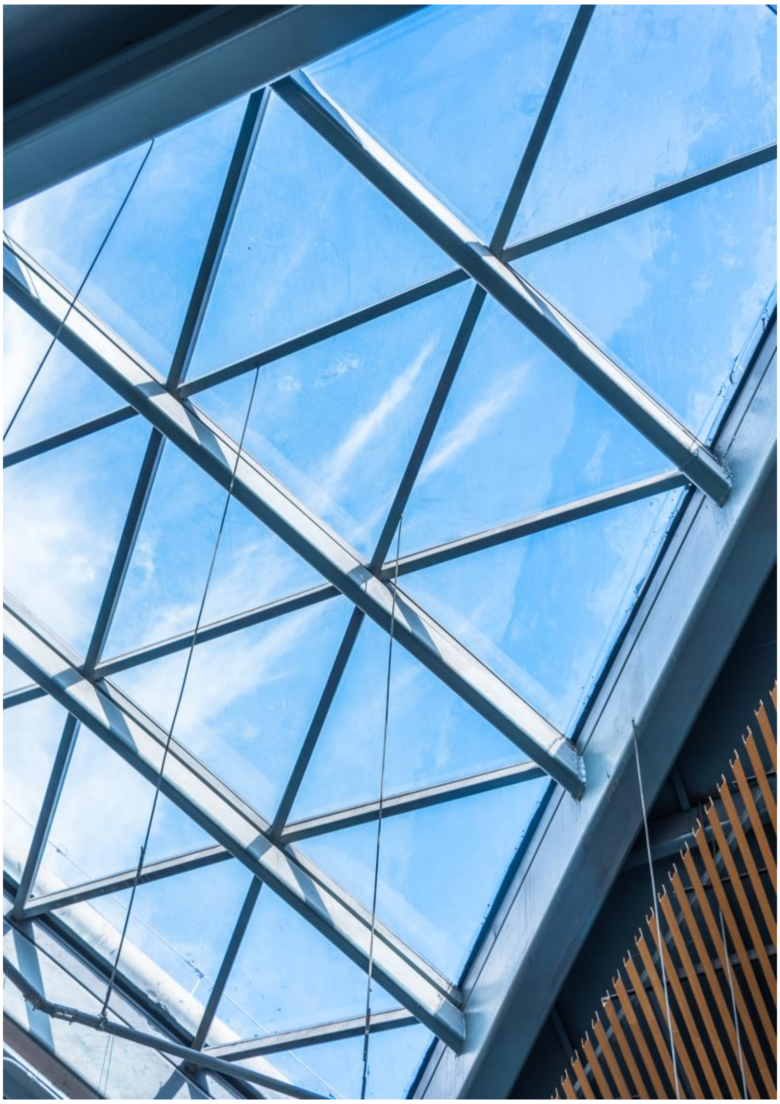
Sunburst cyber attack | US SEC has charged SolarWinds and its CISO with fraud, internal control failures

The Securities and Exchange Commission (SEC) has charged software company SolarWinds Corporation (SolarWinds) and its chief information security officer (CISO) with breaches of the antifraud and internal controls provisions of the Securities Act of 1933 and of the Securities Exchange Act of 1934 over (allegedly) 'overstating SolarWinds' cybersecurity practices and understating or failing to disclose known risks' in the lead up to the Sunburst attack.

Director of the SEC's Division of Enforcement Gurbir S. Grewal summed up the SEC's case as follows:

> 'We allege that, for years, SolarWinds and Brown ignored repeated red flags about SolarWinds' cyber risks, which were well known throughout the company and led one of Brown's [the CISO's] subordinates to

> conclude: "We're so far from being a security minded company,"…Rather than address these vulnerabilities, SolarWinds and Brown engaged in a campaign to paint a false picture of the company's cyber controls environment, thereby depriving investors of accurate material information. Today's enforcement action not only charges SolarWinds and Brown for misleading the investing public and failing to protect the company's 'crown jewel' assets, but also underscores our message to issuers: implement strong controls calibrated to your risk environments and level with investors about known concerns.'



The SEC is seeking permanent injunctive relief, disgorgement with prejudgment interest, civil penalties, and the imposition of an officer and director bar against the CISO.

You can find full details of SEC's complaint here: comp-pr2023-227.pdf (sec.gov)

SolarWinds has issued a statement rejecting the SEC's allegations and confirming its intention 'vigorously oppose' the SEC's action. SolarWinds writes:

> 'How we responded to SUNBURST is exactly what the U.S. government seeks to encourage. So, it is alarming that the Securities and Exchange Commission (SEC) has now filed what we believe is a misguided and improper enforcement action against us, representing a regressive set of views and actions inconsistent with the progress the industry needs to make and the government encourages.
>
> The truth of the matter is that SolarWinds maintained appropriate cybersecurity controls prior to SUNBURST and has led the way ever since in continuously improving enterprise software security based on evolving industry standards and increasingly advanced cybersecurity threats. For these reasons, we will vigorously oppose this action by the SEC'.

SolarWinds also raises concerns that the SEC's decision to proceed with enforcement action jeopardises the willingness of companies (and experts) to share expertise/information. SolarWinds writes:

> 'The SEC's charges now risk the open information-sharing across the industry that cybersecurity experts agree is needed for our collective security. They also risk disenfranchising earnest cybersecurity professionals across the country, taking these cyber warriors off the front lines. I worry these actions will stunt the growth of public-private partnerships and broader information-sharing, making us all even more vulnerable to security attacks. The actions we have taken over the last two and half years motivate us to stay the course and to push back against any efforts that will make our customers and our industry less secure. We will continue to move forward guided by our fundamental principles of transparency, urgency, collaboration, communication, and humility'.
>
> [Source: SEC media release 30/10/2023]

New Principles for AI development and new Code of Conduct welcomed by G7 leaders

Ahead of the UK's AI Safety Summit, G7 leaders have welcomed the release of both

- A (voluntary) International Code of Conduct for Organizations Developing Advanced AI Systems (including the most advanced foundation models and generative AI systems).
- International Guiding Principles for Organizations Developing Advanced AI Systems

developed through the Hiroshima AI process.

The Code (and Principles) are intended to:

> 'promote safe, secure, and trustworthy AI worldwide and will provide voluntary guidance for actions by organizations developing the most advanced AI systems, including the most advanced foundation models and generative AI systems'.

G7 leaders have flagged plans to proceed with developing the Hiroshima AI Process Comprehensive Policy Framework, by the end of the year.

[Source: Ministry of Foreign Affairs of Japan, G7 Leaders' Statement on the Hiroshima AI Process 30/10/2023]

In Brief | US President Joe Biden has issued an Executive Order on 'Safe, Secure, and Trustworthy Artificial Intelligence' setting new standards for AI safety and security. Among other things, the Order directs 'developers of the most powerful AI systems to share their safety test results and other critical information with the US government' and establishes standards and best practices for detecting AI-generated content and authenticating official content (in a bid to strengthen protections against AI-enabled fraud/deception)

[Source: White House Fact Sheet: President Biden Issues Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence 30/11/2023]

In Brief | The AICD has released a guidance for directors on how to meet their positive duty obligations in preventing workplace sexual harassment and other harmful conduct including suggested steps to elevate workplace sexual harassment at the board level and suggested questions to put to management

[Source: AICD report: A director's guide to the positive duty to prevent workplace sexual harassment October 2023]

Has this newsletter been forwarded to you? You can subscribe to our weekly wrap up of key governance, risk, regulatory and ESG developments here.

Contacts

Mark Standen
Consultant

—

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

Siobhan Doherty
Partner

—

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

Kate Hilder
Consultant

—

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