



Governance News

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

15 November 2023

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Boards and Directors

National survey (again) flags cyber as the chief concern keeping directors up at night

Key takeaways from the latest Australian Institute of Company Directors (AICD) bi-annual Director Sentiment Index

The Australian Institute of Company Directors (AICD) has released its [second bi-annual Director Sentiment Index for 2023](#). The report is based on the results of a survey of 1300+ directors on a range of issues including the economy, government policy and regulation.

A high level overview of some of the key findings is below.

Directors sentiment has fallen further into negative territory

Overall director sentiment has fallen from -6.1 in H1 2023 to -19.7 in H2 2023.

The AICD attributes this to 'decreases in index scores for all DSI categories' including increased pessimism about the economic outlook in Australia (and in China) as well as to 'worsening perceptions of economic, business, and directorship conditions, both domestically and internationally'.

Economic outlook

- As flagged, directors have a less positive view of the global economic outlook than



was the case in the last survey with director sentiment declining from +7 in H1 2023 to -6 in H2 2023.

- Notably, directors' views on the strength of China's economy have worsened significantly since the last survey with perceptions dipping to -59 (down from +21 in H1 2023)
- Directors were also less positive about Australia's economic outlook than was the case in the last survey - directors' views on the strength of the Australian economy fell by 22 points to +14.
- Although still negative at -37, the European economy recorded the greatest increase in economic health perception, up by 21 points.

Key challenges facing Australian businesses

- Directors are less optimistic about business conditions than previously.
- Directors nominated labour shortages (43%) as the top economic challenges currently facing their businesses. 88% of directors agree that there is a skills shortage in the Australian workforce. Interestingly, 33% of directors surveyed consider that the implementation of AI systems and workforce automation 'can resolve current skills shortages'.
- Other top economic challenges for business after labour shortages were: cost of living (second behind labour shortages); inflation and rising interest rates, productivity growth and climate change.

Climate change among the top priorities directors would like to the government address in the short term

- Addressing the housing affordability/housing supply shortage ranked as the top issue directors would like to see the government address in the short term (3 years).
- This was followed by Productivity Growth and Energy Policy (tied as the second top ranked issues), and Climate change (ranked third).
- Interestingly, despite the high level of concern over the skills shortage, directors ranked it behind these other issues - 26% of directors ranked this as a top priority (down from 34% in the previous survey).

Climate change ranked as the top priority for government to address (in the longer term)

- Directors nominated tackling climate risk as the key priority that they consider the government should address in the longer term (10-20 years) with 41% of directors nominating it as the top issue.
- In terms of other longer-term priorities, directors nominated the ageing population, productivity growth, energy policy and taxation reform as the next most important issues (after climate change).

Climate governance and reporting

- Despite of the relatively strong level of support for government prioritising action on the issue over the longer-term, less than half of directors (47%) consider climate change to be a material risk for their organisation (unchanged from the previous survey).
- From a reporting standpoint:
 - more directors were satisfied than dissatisfied with their board's climate reporting – 30% were satisfied vs 18% dissatisfied.
 - less than half of directors (44%) are satisfied that their existing board structures are 'sufficient to address climate and sustainability reporting and broader ESG issues' (vs 22% dissatisfied).
 - less than half of directors (42%) of directors consider the shift to mandatory climate reporting will impact their organisation. Almost 40% (38%) consider this will have no impact, while 21% 'don't know'.

[Note: The Australian government [plans to](#) phase in new, internationally aligned, mandatory climate disclosure reporting requirements from July 2024 for certain entities. For more on the government's proposed approach see: [Introduction of mandatory climate reporting in Australia: Second round of consultation launched](#)

The content of these new requirements will be set out in new Australian Sustainability Reporting Standards (ASRS) which are being developed by the Australian Accounting Standards Board (AASB). The AASB has released a package of three initial draft standards for consultation based on the ISSB standards: IFRS S1 and IFRS S2. The due date for submissions is 1 March 2024. Subject to the passage of the necessary legislation, it's envisioned that the new AASB standards (once finalised) will apply for certain entities from 1 July 2024. For more see: [Another step closer towards implementing mandatory climate disclosure in Australia - Post - MinterEllison](#)

Ahead of the introduction of the new requirements, the AICD, in conjunction with Deloitte and MinterEllison, have produced a new guide outlining what is known about the forthcoming requirements and the steps boards can take now in preparation.]

Cybercrime/data security is a key concern for directors

- Perhaps unsurprisingly given the recent spate of cyber incidents, asked what issues 'keep them awake at night' directors nominated cybercrime and data security as their top concern, consistent with the H1 2023 survey.
- Cyber attacks also ranked as the second 'top factor impacting board risk appetite' after 'compliance and regulation'
- The survey also highlights that over half of directors surveyed (51%) consider that flexible working arrangements are negatively impacting cyber-security (despite the benefits of flexible working arrangements from a staff retention, attraction and wellbeing perspective).

Data collection and retention

The report found that:

- the vast majority of directors surveyed (84%) consider that their board is aware of their Privacy Act obligations related to the collection, storage and management of personal information
- most directors (72%) consider that their board understands what personal data is being collected, who has access to it and where it is stored, and most (63%) indicated their organisation has a data governance framework in place to guide how data is collected, stored, protected and destroyed; though just 41% of organisations conduct 'a regular spring clean of all data stored' and delete data when no longer needed.
- From an oversight perspective, most directors (62%) also consider their board has 'sufficient' oversight of cybersecurity threats to their organisation (22% disagreeing)

[Note: ASIC's report – [Report 776 Spotlight on cyber: Findings and insights from the cyber pulse survey 2023 \(REP 766\)](#) – summarising the findings of the recent Cyber Pulse survey identified a number of 'significant gaps' in the way in which organisations are approaching cyber security/cyber resilience. We cover the key improvement areas identified in REP 766 separately in this issue]

Understanding and oversight of AI

- Less than half (45%) of directors are confident their board has an 'adequate understanding' of Artificial Intelligence (AI).
- Just 38% of directors consider their boards are 'aware of the possible risks that may be incurred through organisational and supply chain implementation of AI systems'

Advancing reconciliation with First Nations people

The survey highlights that a majority of directors (58%) see national reconciliation with First Nations people as a national governance priority (down from 62% in H1 2023).

[Sources: AICD media release 19/04/2023; Director Sentiment Index H1 2023]

Shareholder Activism

Companies seeking SEC's OK to block shareholder proposals now required to use standard form

The US Securities and Exchange Commission (SEC) [has announced](#) that issuers requesting 'informal, non-binding staff views regarding...[their] intentions to exclude shareholder proposals from their proxy statements under Exchange Act Rule 14a-8' are now required to apply submit their request using [a standard form](#) – emailed materials will no longer be accepted.

Among other things, the new form requires issuers to:

'acknowledge that submitting this form will not transmit my correspondence to the counterparty and confirm that I have sent this correspondence to the counterparty by email and/or mail'

The form also limits the number of 'supporting files' to a maximum of five.

[Source: SEC media release November 2023]

Meetings and Proxy Advisers

2023 AGM season: Shareholders continue to 'strike' on pay

Magellan shareholders deliver first strike

Magellan Financial Group (Magellan) shareholders delivered a first 'strike' on the company's remuneration report at the 8 November 2023 AGM with 58% of shareholders voting 'against'.

[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 \(aph.gov.au\)](#).]

All directors standing for election/re-election were duly elected with 99% or more support with two exceptions:

- Over 37% of shareholders voted 'against' the proposal to re-elect Chair of the Remuneration Committee John Eales to the board.
- Over 16% of shareholders voted 'against' Board Chair and Audit and Risk Committee and Remuneration and Nominations Committee member Andrew Formica.

[Reuters](#) suggests this may be in response to the company's financial performance – including the decline in the company's share price over the past two years.

Broader context

This is the latest in a string of recent 'strikes' against ASX companies over the last few weeks including:

- Tabcorp Holdings Ltd: [34.25%](#) against (25 October 2023).
- APA Group: [25.79%](#) against (26 October 2023)
- Whitehaven Coal Ltd: [40.61%](#) against (26 October 2023).
- Woolworths Group Ltd: [28.04%](#) against (26 October 2023).
- Qantas Airways Limited: 82.93% [against](#) (3 November 2023)

[Sources: Magellan Group: Notice of meeting; Results of meeting]

ESG

'Falepili Union': Australia's pledge to Tuvalu for climate adaptation and migration support amid rising sea levels

- Australian Prime Minister Anthony Albanese has [announced](#) a new bilateral Treaty with Tuvalu – the Falepili Union – 'to safeguard the future of Tuvalu's people, identity and culture' through formalising Australia's commitment to support Tuvalu's efforts to adapt and respond to the physical impacts of climate change (eg sea level rise)..
- Notably, Australia has committed to:
 - support the expansion of the Tuvalu Coastal Adaptation Project to reclaim land in Tuvalu capital, Funafuti to enable people to 'continue to live and thrive in their territory and retain Tuvalu's deep, ancestral connections to land and sea'. According to the government's announcement the project is planned to expand Funafuti's land by approximately 6% creating space for new housing and essential services.
 - 'provide a special pathway for citizens of Tuvalu to come to Australia, with access to Australian services that will enable human mobility with dignity'
 - provide assistance to Tuvalu in response to major natural disasters, pandemics or 'traditional security threats'.
- The agreement was signed at the request of the Tuvalu government.

Calls for the Australian government to go further

- In a [statement](#) Greenpeace suggested that the agreement is at odds with Australia's continued expansion and subsidisation of fossil fuels, an issue that Pacific leaders have been urging Australia to address for some time. Pacific Climate Action Network's Regional Coordinator, Lagi Seru [commented](#):

'Australia must understand that the only real solution to stop the destruction of Pacific homes is to stop the expansion of its fossil fuel industry, end all fossil fuel subsidies, and support the climate frontline countries and communities to adapt to the impacts of climate change'.
- Separately, the [Climate Council](#), though welcoming Australia's commitment to support climate adaption measures/offer a pathway to Australia for Tuvaluans impacted by rising sea levels, called on the government to

'build on these positive announcements with a solid plan to phase out fossil fuels to tackle the risks threatening Pacific Islands communities at their source'.

[Source: Prime Minister Anthony Albanese media release 10/11/2023]

Sectoral decarbonisation plans: Consultation opens on Agricultural and Land Net Zero plan

- The Australian government has released a [discussion paper](#) for consultation, seeking views on one of six planned sectoral decarbonisation plans - the Agriculture and Land Plan - being developed under the government's broader Net Zero 2050 plan.
- Among other things, views are sought on:
 - Potential opportunities to reduce emissions and build carbon stores in agriculture/the land and existing barriers to action
 - What practical measures could be implemented to support adoption of established and emerging technologies, practices and other measures to reduce emissions and increase carbon stores
 - Whether there is a role for the government to address concerns about the lack of 'a consistent and trusted approach for assessing and reporting emissions'
 - What skills, knowledge and capabilities producers and land managers need to implement change and what data would help them make decisions about emissions reductions and sustainable land management in the short and longer-term
- It's envisaged that the discussion paper will be the first step in 'a longer-term, ongoing discussion with the sector on lower emissions pathways'.

- Minister for Agriculture, Fisheries and Forestry, Murray Watt will lead the plan's development in collaboration with the Minister for Climate Change and Energy, Chris Bowen, and the Minister for the Environment and Water, Tanya Plibersek.
- The due date for submissions is 13 December 2023.

[Sources: Joint media release Minister for Climate Change and Energy Chris Bowen, Minister for Environment and Water Tanya Plibersek and Minister for Agriculture, Fisheries and Forestry Murray Watt 07/11/2023; Consultation home page]

Progress of Treasury Laws Amendment (2023 Measures No. 1) Bill 2023 (Cth): A step towards mandatory climate disclosure in Australia

Treasury Laws Amendment (2023 Measures No. 1) Bill 2023 (Cth) has progressed to second reading stage in the Senate.

Notably, the amendments in Schedule 2 to the Bill confirm the Australian Accounting Standards Board (AASB), Auditing and Assurance Standards Board (AUASB) and Financial Reporting Council (FRC) as the entities responsible for:

- formulating sustainability standards (AASB)
- developing auditing and assurance standards for sustainability purposes (AUASB)
- providing strategic oversight and governance functions in relation to the AASB's and the AUASB's sustainability standards functions (FRC)

The [explanatory memorandum](#) states that this changes are necessary because:

'The ASIC Act currently does not explicitly grant the AASB and the AUASB the function to develop and formulate sustainability standards and associated auditing and assurance standards. This is necessary to support the Government's commitment to ensure entities provide Australians and investors with greater transparency and accountability in relation to their climate-related plans, financial risks, and opportunities. The proposed sustainability standards would provide general guidance, assisting relevant industry to prepare systems and processes for eventual transition to mandatory climate-related financial disclosures. They would also be flexible enough to accommodate future global developments in other sustainability reporting'.

The amendments are proposed to commence the day after the Bill receives Assent.

Context

- The Australian government plans to phase in new, internationally aligned, mandatory climate disclosure reporting requirements from July 2024 for certain entities. For more on the government's proposed approach see: [Introduction of mandatory climate reporting in Australia: Second round of consultation launched](#)
- The content of these new requirements will be set out in new Australian Sustainability Reporting Standards (ASRS) which are being developed by the Australian Accounting Standards Board (AASB).
- The AASB has released a package of three initial draft standards for consultation based on the ISSB standards: IFRS S1 and IFRS S2. The due date for submissions is **1 March 2024**. For more on the proposed AASB standards read: [Another step closer towards implementing mandatory climate disclosure in Australia - Post - MinterEllison](#)

[Source: Treasury Laws Amendment (2023 Measures No. 1) Bill 2023]

Carbon Leakage Review: Phase one of the consultation seeks feedback on the proposed approach to the review including the desirability of an Australian CBAM

- The Australian government has [appointed](#) Professor Frank Jotzo to lead a Review into potential additional policy options to address the issue of 'carbon leakage'.
- For context, the Review defines 'carbon leakage' as follows.

'Carbon leakage refers to production of emissions intensive trade exposed goods and commodities shifting from countries with more ambitious emissions reduction policies to those with weaker (or no) emissions reduction policies solely because of different policy settings' [ie to take advantage of looser/non-existent emissions reduction policies and avoid having to comply with tighter requirements]

- The Review is tasked with:
 - Conducting an assessment of the carbon leakage risks
 - Developing of policy options to address carbon leakage
 - Assessing the feasibility of an Australian Carbon Border Adjustment Mechanism (CBAM) particularly in relation to steel and cement.

[Note: For context the [Review defines a CBAM](#) as:

'A carbon border adjustment mechanism (CBAM) is a pricing mechanism that seeks to equalise the carbon costs facing domestic and overseas production by imposing a carbon cost or rebate adjustment at the border (Clausing and Wolfram 2023). The adjustment is calculated based on the carbon emissions embedded in the product and the difference between the domestic carbon compliance price and the relevant international carbon price (or potentially an equivalent price from other climate policies). A CBAM can include adjustments affecting imports, exports, or both.']

You can find full details in the [Terms of Reference](#).

Consultation paper released

On 13 November 2023, a [consultation paper](#) was released seeking stakeholder views on the proposed approach to the review. Specific questions on which feedback is sought include:

- Whether the description of carbon leakage (quoted above) is 'appropriate for the purpose of this Review'
- Whether there are goods or commodities beyond the 68 goods identified as trade exposed (and therefore potentially at risk of carbon leakage under the current the Safeguard Mechanism) that should be included in the overall assessment of carbon leakage risk
- Views on the effectiveness of existing measures under the Safeguard Mechanism
- Whether an Australian CBAM is desirable and 'what design features should be considered' if so
- Views on both:
 - the 'appropriate role for emissions product standards to mitigate carbon leakage'
 - the 'appropriate role for public investment measures to mitigate carbon leakage'
- Whether there are additional policy options that should be considered to address carbon leakage

Next steps

- Two phase consultation is planned:
 - The due date for submissions on the first round of consultation is 12 December 2023.
 - A second round of consultation will be undertaken in mid-2024.
- The Review is due to report to the government by 30 September 2024.
- The review recommendations 'could' inform the government's 2050 Net Zero plan.

[Sources: Department of Climate Change, Energy, the Environment and Water: Australia's Carbon Leakage Review 1 July 2023 – 30 September 2024; Public consultation on the proposed approach to assess and address carbon leakage risk, as part of the Carbon Leakage Review]

Indirect nature-related dependencies: Shareholder proposals target Chemours and Sherwin-Williams over Ecosystem concerns

Green Century Capital Management, together with the Felician Sisters of North America, [have filed](#) separate shareholder proposals at chemical company, The Chemours Company and carrier or titanium-dioxide based paint Sherwin-Williams over their failure to rule out sourcing titanium for their products from a planned new mining project which is feared with threaten the fragile wetland ecosystems in the Okefenokee Swamp (one of the world's largest intact freshwater wetlands).

The groups consider filing the proposals to be necessary because:

'While both companies have conveyed a lack of immediate plans to source titanium near the Okefenokee, each has stopped short of a permanent commitment. Sourcing titanium from the edge of the Okefenokee could expose Chemours and Sherwin-Williams to unnecessary climate, regulatory, legal and reputational risks...It's frankly hard to see a strong business case for supporting mining at the Okefenokee — which should dissuade any company from even thinking about it.'

GRI, IFRS set to launch a new initiative to help companies build sustainability reporting capability

- The Global Reporting Initiative (GRI), together with the IFRS Foundation, have announced the launch of a new initiative – the Sustainability Innovation Lab (SIL) – aimed at assisting companies to meet their 'evolving sustainability disclosure requirements'.
- The focus of the initiative is on supporting organisations to report using the GRI standards and the IFRS Sustainability Disclosure Standards.
- Ultimately, the goal of the initiative is to:

 'support stakeholders and all market participants on their disclosure journeys, guiding them to address disparities in sustainability reporting requirements while supporting the further harmonisation of the reporting landscape at the global level. It will seek to streamline the process for companies that report on a multi-stakeholder basis'.
- The SIL (which will officially be launched on 20 November 2023) will officially be based in Singapore.
- SIL will initially be operated by and managed by a steering committee led by senior representatives from GRI and the IFRS Foundation.
- Multi-stakeholder working groups are being established to focus on four priority areas: digital taxonomies, audit and assurance, smaller companies, and public sector reporting.

[Source: GRI media release 09/11/2023]

Anti-ESG backlash continues in the US: Texas Comptroller publishes updated Texas fossil fuel divestment list

Texas Comptroller Glenn Hegar has [announced that](#):

- five firms have been added to the list of financial services institutions/providers subject to the divestment provisions outlined in Texas Government Code Chapter 809, over their (perceived) boycott the oil and gas industry.
- one company has been removed the list – this is a result of the merger of Credit Suisse into UBS Group AG. As Credit Suisse is no longer publicly available, it is no longer listed.

Additionally, the Comptroller's office identified 'about 350 investment funds' that qualify for divestment following its review of investment funds.

This means that government entities including the Employees Retirement System of Texas, Teacher Retirement System of Texas, Texas Municipal Retirement System, Texas County and District Retirement System, Texas Emergency Services Retirement System and the Texas Permanent School Fund have 30 days after receiving the updated list to notify the Comptroller of the listed financial companies in which they own direct/indirect holdings. These entities are also required to report on all securities sold, redeemed, divested or withdrawn in compliance with the Texas Government Code.

The announcement makes clear that the Office of the Comptroller will continue to review information on an ongoing basis, 'and the list may be subject to change as often as quarterly'.

[Source: Texas Comptroller Glenn Hegar media release 01/11/2023]

Nature-related risk: Major bank faces legal action brought by shareholder over its (alleged) lack of transparency around its management of climate and nature-related risk

In what is thought to be a first-of-a kind case, [a shareholder in a major Australian bank](#) has filed an application in the Federal Court seeking copies of the bank's internal risk management framework because the shareholder considers the bank has not sufficiently disclosed how it is managing emerging, material climate and nature-related risks as required under existing disclosure laws.



Basis for the claim

Broadly, it's alleged that though the bank's 2022 Annual Report acknowledged both climate risk and biodiversity loss as 'emerging' material risks it did not explain how the bank is addressing them under its risk management strategy.

It's alleged that this disclosure is required under APRA's Prudential Standard CPS 220 Risk Management

Remedy being sought

The shareholder is seeking more information about the bank's risk management systems, by way of preliminary discovery, both:

- 'enable her to determine whether the bank's governance systems adequately deal with climate change and biodiversity risks'; and
- enable her to assess whether 'she has a right to obtain relief from the Court in relation to the question of whether...[the bank] has breached its obligations under APRA Prudential Standards or misleading conduct laws'.

A [statement](#) from Equity Generation Lawyers (who are representing the shareholder) quotes her as stating:

'I'm worried that ANZ is not playing the part a financial institution should be playing in the 21st century, in managing climate change and biodiversity risk...I think it's important for shareholders and the community at large to understand if a major bank is taking these risks seriously. That's why I've filed an application in the Federal Court of Australia seeking more information about ANZ's risk management systems.'

[Sources: Equity Generation Lawyers media releases: 09/11/2023; 09/11/2023]

In Brief | Fidelity International has pledged to begin voting against companies that fail to meet its expectations on deforestation-related practices and disclosure from 2024

[Source: Fidelity Nature Roadmap October 2023]



Financial Services

Top Story | Quality of Advice Review: Consultation opens on draft Bill to implement the 'first tranche' of planned reforms

The draft Bill proposes to implement the government's response to 11 QAR recommendations with the aim of 'cut[ting] onerous red tape that adds to the cost of advice with no benefit to consumers'. We've summarised the key points.

Key Takeouts

- In June 2023, the Australian government [confirmed its acceptance](#) (in full or in principle) of 14 of the 22 Quality of Advice Review (QAR) recommendations for the overhaul of financial advice regulation. Read: [Government response to the Quality of Advice Review - Insight - MinterEllison](#)
- **Consultation on 'first tranche' of reforms:** On 14 November 2023, the government released the first tranche of its planned Delivering Better Financial Outcomes package of reforms for consultation. The proposed reforms are focused on 'increasing accessibility and affordability of personal financial advice by improving the experience for consumers and removing unnecessary regulatory red tape. The proposed reforms include:
 - The proposed introduction of a new standard consent requirement for ongoing fee arrangements
 - Giving providers of personal advice a choice in how they comply with financial service guide (FSG) requirements – they would have the option to continue provide the information to their clients in accordance with existing requirements or to make this information publicly available on their website
 - The proposed simplification, replacement or removal of certain exemptions to the ban on conflicted remuneration
 - The proposed preservation of certain exemptions to the ban on life, general and consumer credit insurance commissions and standardisation of consumer consent requirements relating to the payment of these commissions
 - The due date for submissions on the draft Bill is **6 December 2023**.
- **Outstanding reforms:** The draft Bill does not address (among other matters): a) the removal of the 'safe harbour steps' from the Best Interests Duty/potential replacement of the Best Interests Duty (Recommendation 5); b) the replacement of 'Statements of Advice' (Recommendation 9); or c) the introduction of standardised consumer consent requirements to classify a consumer as a wholesale or sophisticated client (Recommendation 11). The government has [flagged its intention](#) to 'announce its final position on these and other "outstanding recommendations" before the end of the year, with further legislation to be released in 2024'.

Treasury has released a draft Bill – [\[exposure draft\] Treasury Laws Amendment \(2024 Measures No. 1\) Bill 2024: Quality of Advice Tranche 1](#) – which is planned to implement the 'first tranche' of a broader legislative package of reforms – the Delivering Better Financial Advice Outcomes package – in response to the following 11 [Quality of Advice Review recommendations](#): 7, 8, 10, 13.1, 13.2, 13.3, 13.4, 13.5, 13.7, 13.8 and 13.9.

Broadly, the proposed changes in the draft Bill [are aimed at](#) increasing the 'accessibility and affordability of personal financial advice by removing regulatory red tape for financial advisers'.

What's in the draft Bill?

Clarification of when fees for individual advice can be deducted from a members' superannuation account

Recommendation 7 recommended that:

'Superannuation trustees should be able to pay a fee from a member's superannuation account to an adviser for personal advice provided to the member about the member's interest in the fund on the direction of the member.

The objective of this recommendation is to provide superannuation fund trustees with more certainty about paying advice fees agreed between a member and their financial adviser from the member's superannuation account and ensure that adviser fees are not paid in breach of the SIS Act and are not taxable benefits for members'.

The changes included in Part 1 of Schedule 1 would implement the government's response to this recommendation by:

- amending section 99FA of the Superannuation Industry (Supervision) Act 1993 (Cth) (SIS Act) to 'clarify the legal basis of existing practices in which superannuation trustees pay advice fees from a member's superannuation account at the request of the member'; and
- amending the Income Tax Assessment Act 1997 (Cth) (ITAA 1997) to 'provide legal certainty that payments of certain personal advice fees by a superannuation trustee from the member's interest in the fund are deductible from the superannuation fund's assessable income (to the extent they are not incurred in gaining or producing the fund's exempt or non-assessable non-exempt income), and are not a superannuation benefit for the relevant members'.

Proposed timing: It's proposed that:

- The changes to the SIS Act would apply to costs charged six months after 'the day after Royal Assent', the 'start day'. However, an arrangement entered into before the 'start date', in accordance with the consent requirements of old section 99FA, could continue to rely on that consent 'until the end of the period 12 months after the start day' (unless the arrangement is varied or renewed within the 12 month transition period at which point, the replacement arrangement would need to comply with the requirements of the new s99FA).
- The amendments to the ITAA 1997 would commence from the first 1 January, 1 April, 1 July or 1 October to occur after Assent is given. The changes would apply, and the deduction created by them would be available, in relation to the 2019 20 income year and later income years.

Proposed introduction of a new standard consent requirement for ongoing fee arrangements

Recommendation 8 recommended that:

'The current provisions which require a provider of advice to give a fee disclosure statement to the client, to obtain the client's agreement to renew an ongoing fee arrangement and the client's consent to deduct advice fees should be replaced. Providers should still be required to obtain their client's consent on an annual basis to renew an ongoing fee arrangement, but they should be able to do so using a single "consent form".'

The proposed changes in Schedule 1, Part 2 of the draft Bill would implement the government's response to this recommendation by amending the Corporations Act 2001 (Cth) (Corporations Act) to introduce 'a consolidated and streamlined consent process for when a client enters or renews an ongoing fee arrangement and authorises ongoing advice fees to be deducted from a financial product'. This would entail consolidating ongoing fee consent requirements into a single 'standard form' and repealing the existing requirement for advisers to provide a fee disclosure statement to their clients as part of an ongoing fee arrangement.

Proposed timing: It's proposed there would be a six month transition period. That is, the changes are proposed to apply to new ongoing fee arrangements entered into on or after six months after the Bill receives royal Assent.

For ongoing fee arrangements in force immediately before the amendments made by Part 2 of Schedule 1 apply, the amendments will apply to the arrangement on and after the anniversary of the day on which the ongoing fee arrangement was entered into.

Example 1.1 in the draft explanatory memorandum is a table outlining the proposed operation of the application and transitional provisions on the basis the Bill receives royal assent on 1 July 2024.

Introduce 'flexibility' in how financial service guide (FSG) requirements can be met:

Recommendation 10 recommended that:

'Providers of personal advice should either continue to give their clients a FSG or make information publicly available on their website about the remuneration and any other benefits the provider receives (if any) in connection with the financial services they provide and their internal and external dispute resolution procedures (and how to access them)'.

The changes in Schedule 1, Part 3 of the draft Bill would implement the government's response to this recommendation by amending the Corporations Act to give providers of personal advice the option to either continue providing FSG information to their clients in accordance with existing requirements, or to make this information publicly available on their website.

Proposed timing: It's proposed that these changes would commence the day after the Bill receives Assent

Simplify, replace or remove certain exemptions to the ban on conflicted remuneration

Recommendation 13.1 recommended that:

'the conflicted remuneration provisions in the Corporations Act [should be amended] to explicitly provide that both monetary and non-monetary benefits given by a client to an AFS licensee or a representative of a licensee are not conflicted remuneration'.

Recommendation 13.3 recommended that (assuming Recommendation 13.1 is accepted/implemented) the repeal of the following exceptions to the conflicted remuneration provisions:

- 'section 963B(1)(d)(i) of the Corporations Act – monetary benefits given by the client for the issue or sale of a financial product;
- section 963C(1)(e)(i) of the Corporations Act – non-monetary benefits given by the client for the issue or sale of a financial product; and
- regulation 7.7A.12E of the Corporations Regulations – monetary benefits given to the provider by a retail client in relation to the provider dealing in a financial product on behalf of the client'.

The changes included in Schedule 1 Part 4 of the draft Bill would implement the government's response to recommendations 13.1 and 13.3 by amending the Corporations Act to clarify that monetary and non-monetary benefits given by a retail client are not conflicted remuneration and removing the associated exceptions to the ban on conflicted remuneration.

Recommendation 13.2 recommended:

'the exception in section 963B(1)(d)(ii) and 963C(1)(e)(ii) of the Corporations Act [should be removed and replaced] with a specific exception that permits a superannuation fund trustee to pay an AFS licensee or its representative a fee for personal advice where the client directs the trustee to pay the advice fee from their superannuation account'.

The changes included in Schedule 1 Part 4 of the draft Bill would implement the government's response to recommendation 13.2 by amending the Corporations Act to provide that it is not conflicted remuneration for a superannuation trustee to pay an Australian Financial Services (AFS) licensee or its representative a fee for personal product advice that relates to a member's interest in the fund.

Recommendation 13.4 recommended the removal of:

'the exception in paragraph 963B(1)(c) of the Corporations Act, which provides for monetary benefits given for the issue or sale of a financial product where the AFS licensee or representative has not given financial product advice about the product (or class of product) for at least 12 months prior to the date the benefit is given'.

The changes included in Schedule 1 Part 4 of the draft Bill would implement the government's response to recommendation 13.4 by amending the Corporations Act to remove the conflicted remuneration exception for monetary benefits given for the issue or sale of a financial product where financial product advice about the product has not been provided in the previous 12 months.

Recommendation 13.5 recommended the removal of:

'the exceptions in section 963D of the Corporations Act and regulation 7.7A.12H of the Corporations Regulations for benefits given to an agent or employee of an Australian authorised deposit-taking institution for financial product advice about basic banking products, general insurance products or consumer credit insurance'.

The changes included in Schedule 1 Part 4 of the draft Bill would implement the government's response to recommendation 13.5 by amending the Corporations Act to remove the exceptions to conflicted remuneration for agents or employees of Australian Authorised Deposit-Taking Institutions (ADIs).

Proposed timing: It's proposed that these changes would commence 'immediately after the day after Royal Assent' ie immediately after the commencement of the proposed changes included in Part 3, Schedule 1 to the Bill.

Preserve certain exemptions to the ban on life, general and consumer credit insurance commissions and standardise consumer consent requirements

Recommendation 13.7, 13.8 and 13.9 recommended that the exceptions to the ban on conflicted remuneration for 'benefits given in connection with the issue or sale' of a life risk insurance product (13.7), general insurance product (13.8) and consumer credit product (13.9) should be retained, provided that the client gives their informed consent before the commission is accepted.



The changes in Part 5 of Schedule 1 to the Bill would implement the government's response to recommendations 13.7, 13.8 and 13.9 by amending the Corporations Act to require that a person who provides personal advice to a retail client about a life risk insurance product, general insurance product or consumer credit insurance and receives a commission in connection with the issue or sale of that product must obtain the client's informed consent before accepting the commission.

Proposed timing: It's proposed that these changes would apply to benefits given for the issue or sale of general insurance products, life risk insurance products or consumer credit insurance three months after Assent is given.

It's proposed that the amendments would [not apply to](#):

'benefits given in connection with the issue or sale of a general insurance product if the product is a renewal of a general insurance product, and that general insurance product was sold before the period of 3 months beginning on the day this Act receives the Royal Assent'.

The [reason given](#) for this is that

'it is common for providers to renew a client's cover on a yearly basis without necessarily meeting with the client before doing so. This reduces the risk that a client could be left uninsured if the provider was in fact required to wait for that consent from the client prior upon the application of the amendments'.

Draft Bill does not address 'Safe Harbour' or SOAs

The [government's response](#) to the Quality of Advice Review flagged that 'Stream one' or 'tranche one' of legislative reforms would include:

- The removal of the 'safe harbour steps' from the Best Interest Duty 'with consultation [undertaken] to determine implementation details and the implications of adopting the remaining parts of Recommendation 5' (ie the replacement of the 'best interests duty' with a new statutory best interests duty which would only apply to financial advisers)
- The replacement of 'Statements of Advice' (SOAs) with 'an advice record that is more fit-for-purpose, with consultation to determine the final design of the replacement' (in line with the government's response to Recommendation 9).
- The introduction of standardised consumer consent requirements will be introduced to classify a consumer as a wholesale or sophisticated client (Recommendation 11).

However, the draft Bill does not address these issues.

The government has [flagged its intention](#) to 'announce its final position on the "outstanding recommendations" of the Quality of Advice Review (which presumably includes the recommendations flagged above) 'before the end of the year, with further legislation to be released in 2024'.

In a statement, the Financial Advice Association of Australia (FAAA) expressed concern that these changes have not been included in the draft Bill commenting that:

'These are important elements in cutting unnecessary red tape and have the potential to meaningfully reduce the cost of providing advice. We will be seeking further clarification from the Government on the timeframe for these measures'.

Next steps

The due date for submissions on the draft Bill is **6 December 2023**.

[Source: Treasury Consultation: Delivering Better Financial Outcomes – reducing red tape and other measures 14 November 2023 - 06 December 2023]

Time to reinstate CAMAC?

The Australian Law Reform Commission (ALRC) Review of the Legislative Framework for Corporations and Financial Services Legislation is due to deliver its final report to the Attorney General on [30 November 2023](#).

Ahead of this, the Australian Institute of Company Directors (AICD) and the Law Council of Australia's Business Law Section have [urged](#) the ALRC to recommend the reinstatement of a 'CAMAC-like body' – ie an independent advisory body on corporate law – in its final report.

[Note: For context, the Corporations and Markets Advisory Committee (CAMAC) [was an expert advisory body](#) established in 1989 under the Australian Securities and Investments Commission Act 2001 (Cth). Broadly, its purpose was to 'provide advice and recommendations to the Minister about matters relating to corporations and financial services law, administration, and practice'. CAMAC was abolished in 2018.]

The rationale given is that in light of

'the increasing complexity of corporate law and corporate governance in Australia, the AICD considers there is a need for expert and independent capacity to support the Government's policy-making in this area'.

To be clear, it is not submitted that this body would in any way supersede Treasury's role as the principle body responsible for providing policy advice to government. Rather, it's suggested that the new body would complement Treasury's role, by focusing on 'longer term inquiries that are not tied to the political issues of the day' and providing independent, expert advice.

[Source: AICD letter: Reinstatement of the Corporations and Markets Advisory Committee (CAMAC) 01/11/2023]

2020 General Insurance Code under review

The Insurance Council of Australia has announced that a three person expert panel - former APRA Deputy Chair Helen Rowell (panel chair), consumer expert Gerard Brody, and industry expert Paul Muir - will undertake an independent review of the 2020 General Insurance Code of Practice (Code).

Review to be conducted in two phases

The review will be conducted in two phases to align with any recommendations from the [Federal Parliamentary Inquiry into insurers' responses to 2022 floods](#).

- Phase 1:
 - The first phase will focus on general topics that are not directly related to the floods including support for vulnerable customers and the interaction between the Code and existing laws.
 - Initial findings and recommendations to be delivered by 30 June 2024.
- Phase 2:
 - The second phase will focus on flood related topics, such as the responses required when a catastrophe occurs
 - It's planned that Phase 2 will also consider 'reworking' the definition of 'Extraordinary Catastrophe' in the Code (as recommended in [Deloitte's report \(commissioned by the ICA\)](#) into the insurance industry's response to the 2022 floods, released last month).
 - Findings will be delivered by 30 June 2025
- It's planned that the Review panel will consult key stakeholders, including the general insurance industry, ASIC, APRA AFCA, the Code Governance Committee, and consumer representatives.

[Source: Insurance Council of Australia media release 14/11/2023]

UCT reforms have commenced: ASIC has released updated guidance

The Australian Securities and Investments Commission [has updated](#) its guidance material on unfair contract terms (UCTs) - [INFO 210](#), [INFO 211](#) and [INFO 105](#) – following the commencement of significant changes to the UCT regime.

You can find a detailed explanation of the reforms here: [Beefed up unfair contract terms regime to commence next year - Insight - MinterEllison](#)

The regulator has also urged businesses to

'take the opportunity to review their standard form contracts to ensure they do not include any unfair terms'.

Compliance with the UCT regime (including by insurers) is among [ASIC's 2023 enforcement priorities](#).

[Source: ASIC media release 09/11/2023]

Money-management skills: ASIC launches consumer awareness campaign targeted at Gen Zs

The Australian Securities and Investments Commission (ASIC) has [announced](#) the launch of a new consumer awareness campaign targeted at Gen Zs – people aged between 18 and 26 years old – encouraging them to use the information on the MoneySmart website to learn how to better manage their finances.

The campaign was launched following a survey into the financial attitudes and behaviours of Gen Zs as compared with other generations which [revealed that](#):

- Gen Zs are also more concerned about their finances than any other age group - finances are 'a major cause of concern' for 68% of Gen Zs surveys vs 57% for non-Gen Zs
- on average, Gen Zs have higher levels of personal debt, greater reliance on credit products, and higher usage of buy now, pay later (BNPL) products than other generation.
- Gen Zs have a strong level of interest in boosting their money skills and financial confidence
- In terms of Gen Z learning preferences, Gen Z want to learn 'learn things in the shortest time possible' and are twice as likely as other generations to turn to social media for guidance on managing their finances.

[Source: ASIC media release 14/11/2023]

In Brief | 'ASIC has been in court somewhere in Australia almost every business day this year': ASIC's latest enforcement update covering the period July to September 2023 underlines the regulator's continued commitment to taking court action, flags ASIC 'will look to take strong, targeted enforcement action in the coming months and into 2024, as part of its focus on member outcomes in the superannuation sector'

[Sources: ASIC media release 15/11/2023; ASIC Report 777 ASIC enforcement and regulatory update: July to September 2023]

In Brief | AFCA has announced the appointment of two new industry directors - Raylene Bellottie and Yien Hong - to its board. The new two directors will take up their positions from 1 January 2024 replacing current AFCA board members Claire Mackay and Andrew Fairley

[Source: AFCA media release 14/11/2023]



Insolvency and Reconstruction

Insolvency Safe Harbour: Key takeaways from the AICD's submission on proposed changes to RG 217

- Between 14 September 2023 and 26 October 2023, the Australian Securities and Investments Commission (ASIC) [consulted](#) on proposals to update guidance for directors in Regulatory Guide 217, Duty to prevent insolvency trading: Guide for directors (RG 217) to support directors in understanding and complying with their duty to prevent insolvent trading, including guidance on the operation of the safe harbour provisions.
- Broadly, ASIC proposed to update RG 217 to [include](#):
 - 'information about when a holding company may be liable for debts incurred by a subsidiary when the subsidiary has continued to trade while insolvent'
 - 'information and general guidance about the operation of the safe harbour provisions and the factors ASIC will consider when assessing whether safe harbour protection is available to a director'
 - 'guidance for directors about the key principles they should consider in carrying out their duty to prevent insolvent trading'.
- On 27 October 2023 the Australian Institute of Company Directors (AICD) [made a submission](#) to the ASIC consultation ([CP 372](#)).
- Though broadly supportive of the proposed Insolvency Safe Harbour (Safe Harbour) focused amendments to RG 217, the submission suggests that ASIC:
 - include 'guidance [in RG 217] focused on the obligations and expectations on directors and responsible persons of charities and not-for-profits as it relates to insolvency'
 - employ 'visual aids, diagrams and additional examples to improve accessibility and understanding, particularly for directors of family-owned SMEs'
 - 'targeted additions to the proposed Safe Harbour guidance, including expanding the guidance on "reasonably likely" consistent with the Explanatory Memorandum'.
- The AICD also suggests that ASIC:
 - 'assess how it can provide more guidance on its website on the restructuring options that are available to directors. An elevation of messaging on restructuring options would be consistent with government policy to encourage directors to consider how to turnaround financial struggling businesses rather than prematurely placing them into voluntary administration or liquidation'.



[Source: AICD submission to the ASIC consultation on changes to Regulatory Guide 217: 27/10/2023]

Risk Management

Top Story Privacy Commissioner cracks down on late notification of data breaches

Two recent decisions of the Privacy Commissioner highlight the OAIC is taking an increasingly robust approach to investigating data breaches. MinterEllison has released an article discussing the implications of this for organisations. You can access the full text here: [Privacy commissioner cracks down on late notification of data breaches - Insight - MinterEllison](#)

ASIC's cyber pulse survey identifies 'alarming' gaps in the 'cyber capabilities of corporate Australia'

Key takeaways from ASIC Report 776 Spotlight on cyber: Findings and insights from the cyber pulse survey 2023

The Australian Securities and Investments Commission (ASIC) has called on organisations to redouble their focus on cybersecurity and cyber resilience after the recent 'cyber pulse' survey [identified](#) 'significant gaps' in the 'cyber capability of corporate Australia'.

What is the 'cyber pulse survey'?

The survey was a voluntary self-assessment exercise aimed at gauging the strength of regulated entities' cyber capabilities/cyber resilience by gathering information about their approach to:

- governing and managing organisational-wide cyber risks
- identifying and protecting information assets that support critical business services
- detecting, responding to, and recovering from cyber security incidents.

The 697 organisations that opted to participate had the option to receive an individual report from ASIC providing insights on how their cyber resilience compared to their peers – an option that was taken up by 95% of participating organisations.

What did the survey find?

Overall, ASIC considers that the survey

'exposed deficiencies in cyber security risk management of critical cyber capabilities, indicating that organisations are reactive rather than proactive when it comes to managing their cyber security'.

[REP 776](#) highlights the following four areas as 'the top four areas for improvement':

Supply chain risk management

The report found that:

- 69% of survey participants indicated reported having 'minimal or no capabilities in supply chain and third-party risk management'.
- 44% of participating organisations reported they 'do not manage third-party or supply chain risk'
- 58% of survey participants indicated they do not test cyber security incident responses with critical suppliers.

Commenting on this, ASIC Chair Joe Longo emphasised that:

'ASIC expects this to include oversight of cyber security risk throughout the organisation's supply chain – it was alarming that 44% of participants are not managing third-party or supply chain risks. Third-party relationships provide threat actors with easy access to an organisation's systems and networks.'

Data Security

Some of the deficiencies in this area flagged in the report include:

- 58% of survey participants indicated they had limited or no capability to protect their confidential information

- 29% of participants do not encrypt confidential information
- 31% of participants do not have controls to prevent unauthorised transmission of confidential information
- 40% of participants do not manage their data destruction

The report comments:

'Ransomware threat actors target confidential information. To limit the impact of cyber breaches, organisations should identify, classify and secure confidential information – and limit what is stored'.

Consequence Management

The report found that 33% of participating organisations also do not have a cyber incident response plan which means they are likely to be less able to quickly and effectively respond to or recover from an incident.

Commenting on this, Mr Longo [observed that](#):

'There is a need to go beyond security alone and build up resilience – meaning the ability to respond to and recover from an incident. It's not enough to have plans in place. They must be tested regularly – alongside ongoing reassessment of cyber security risks'.

Adoption of Cybersecurity Standards

For context, ASIC considers that:

'Cyber security standards and frameworks help organisations to improve their cyber security and resilience by taking a comprehensive approach to:

- identifying and managing cyber risk
- protecting confidential information
- mitigating and managing cyber threats, and
- guiding appropriate investment in cyber security'.

The report found that

- 20% of organisations have not adopted a cyber security standard
- 34% of small organisations do not follow or benchmark against any cyber security standard

ASIC's expectation is that all organisations should 'adopt and implement a cyber security standard that is proportionate to the nature, size and complexity of the organisation'.

Small organisations

The report highlights that smaller organisations 'lagged behind' larger and more well-resourced organisations on a number of fronts including: a) third-party risk management, b) data security, c) consequence management, and d) adoption of industry standards.

Call to action

The report highlights includes examples of what ASIC considers to be 'better practices'.

The National Cyber Security Coordinator, Air Marshal Darren Goldie joined ASIC is calling on organisations to sharpen their focus to address the 'gaps' in cyber resilience identified.

Air Marshall Goldie commented:

'Cyber security must be a priority for us all, including individuals and businesses large and small. Support is available – the National Office of Cyber Security works closely with industry, to promote awareness and best practice, and support decision-making in response to cyber incidents. The 2023-2030 Australian Cyber Security Strategy will enable Australia to build and strengthen its cyber shields and develop our resilience to bounce back quickly'.

[Sources: ASIC media release 13/11/2023; Report 776 Spotlight on cyber: Findings and insights from the cyber pulse survey 2023 (REP 766)]

Other News

Allowing electronic and digitally verified execution of statutory declarations: Statutory Declarations Amendment Bill 2023 (Cth) has passed both Houses

The [Statutory Declarations Amendment Bill 2023 \(Cth\)](#) passed both Houses on 9 November 2023.

Broadly, the changes permanently enable statutory declarations to be validly made in one of three ways:

- electronically (application of an electronic signature and witnessing via an audio-visual communication link)
- 'digitally verified' ie through the use of a prescribed online platform eg myGov
- 'traditional' method (wet ink signatures and in person witnessing)

This follows what the government considers was essentially a successful trial of moving away from the traditional method as a result of COVID-19 restrictions.

The changes apply from 1 January 2024 or the day after Assent is given (whichever is the later).

In a [statement](#) announcing the passage of the legislation, the government underlined the financial benefits of the reforms. According to the government:

'Digital statutory declarations could save more than \$156 million and hundreds of thousands of hours each year and deliver a productivity bonus to the national economy'.

[Source: Statutory Declarations Amendment Bill 2023 (Cth)]

Australia signs joint statement in support of the OECD's Crypto-Asset Reporting Framework for tax evasion prevention

In a [joint statement](#) published on the Treasury website, Australia together with 40 other nations (including the UK, the US, Japan and Singapore) have:

- welcomed the release of the new international standard on automatic exchange of information between tax authorities developed by the OECD – the Crypto-Asset Reporting Framework (CARF)
- flagged their intention to 'work towards swiftly transposing the CARF into domestic law and activating exchange agreements in time for exchanges to commence by 2027, subject to national legislative procedures as applicable'
- issued an invite to other jurisdictions to 'join' in 'enhancing the global system of automatic information exchange which leaves no hiding places for tax evasion'

Countries that are also signatory jurisdictions to the Common Reporting Standard also flagged their intention to

'also implement, in line with the above timeline and subject to national legislative procedures as applicable, amendments to this standard as agreed by the OECD earlier this year'.

[Source: Treasury media release 10/11/2023]

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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