

A woman with curly hair is looking down at a tablet computer in a dimly lit office. The background is blurred, showing office equipment and lights. A red square is in the top left corner.

Governance News

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

11 October 2023

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Shareholder Activism

Nike shareholders reject shareholder ESG proposals on gender/racial pay gap reporting and supply chain transparency

Nike Inc held its shareholder meeting on 12 September 2023.

Two shareholder ESG proposals went to a vote, both of which were opposed by the board.

Neither proposal was carried, though Proposal 5 – which called for disclosure of the company's gender/racial pay gap – looks to have secured 30% support. This is potentially significant because 30% is the level of support likely (based on a study from BlackRock) to provoke action by the company - according to BlackRock, 75% of proposals that secured at least 30% of votes resulted in companies taking action.

According to Reuters, the proposal had the backing of Institutional Shareholder Services (ISS).

Support was much lower for the other shareholder supply chain management proposal at (approx) 12% support.

To provide some context for this result, according to BlackRock, the median level of support for shareholder ESG proposals was 15% for the 2023 proxy season. Separate analysis from ISS puts median support for shareholder proposals at 20.23% and median support for shareholder environmental and social proposals at below 20%.

The table below provides a snapshot of each of the proposals, together with the (approx) vote result and an indication of how some investors voted in each case.

SHAREHOLDER PROPOSALS	VOTE RESULT	HOW (SOME) INVESTORS VOTED
<p>Report on median gender/racial pay gap: Proposal 5 in the Notice, coordinated by Arjuna Capital, calls on the company to:</p> <p>'report on median pay gaps across race and gender, including associated policy, reputational, competitive, and operational risks, and risks related to recruiting and retaining diverse talent'.</p> <p>The board gave the following two reasons for its 'against' recommendation:</p> <ul style="list-style-type: none">– 'We remain committed to the principle of equal pay for equal work and to enhancing the representation of diverse individuals at all levels of the Company; and– Our current initiatives and public disclosures, including the pay equity data published in our annual Impact Report, already address the underlying rationale for the proposal and provide our shareholders with more relevant information about NIKE's commitment to pay equity and increasing diversity, equity, and inclusion ("DE&I") at all levels of the Company than the requested measure'.	Approx. 30% support	<p>The proposal looks to have secured the support of a number of investors.</p> <ul style="list-style-type: none">▪ Norges Bank Investment Management (NBIM) voted in support. The rationale given is as follows: 'The board should account for material sustainability risks facing the company, and the broader environmental and social consequences of its operations and products. Sustainability disclosures should be aligned with applicable global reporting standards and frameworks to support investors in their analysis of risks and opportunities. Where a company's disclosure does not meet our needs as a financial investor, we will consider supporting a well-founded shareholder proposal calling for reasonable disclosure.'▪ Legal and General Investment Management (LGIM) also voted in support. The rationale given is that: 'A vote in favour is applied as LGIM expects companies to disclose meaningful information on its gender pay gap and the initiatives it is applying to close any stated gap'.▪ Engine No 1 voted in support

SHAREHOLDER PROPOSALS	VOTE RESULT	HOW (SOME) INVESTORS VOTED
		<ul style="list-style-type: none"> California Public Employees Retirement System (CalPERS) voted in support California State Teachers' Retirement System (CalSTRS) voted in support New York City Board of Education Retirement System, New York City Employees' Retirement System, New York City Police Pension Fund, Teachers' Retirement System of the City of New York (NYC pension funds) voted in support
<p>Supply chain management disclosure: Proposal 6 in the Notice, filed by Tulipshare Ltd calls on the board to</p> <p>'oversee and issue a report to shareholders...assessing the effectiveness of its existing supply chain management infrastructure in ensuring alignment with Nike's equity goals and human rights commitments'.</p> <p>The board gave the following five reasons for its 'against' recommendation to shareholders:</p> <ul style="list-style-type: none"> – 'NIKE strongly believes in, and is committed to respecting, human and labour rights throughout our operations and supply chain; – NIKE's commitment to ethical practices in our own operations and our supply chain begins at the highest level; – NIKE expects, and supports the creation of, world-class, safe, and healthy workplaces for the people making our products; – NIKE continues to evolve and strengthen our expectations and practices; and – NIKE's policies effectively articulate our long-standing commitment to human rights and sustainable sourcing, rendering the proposal unnecessary'. 	Approx. 12% support	<p>Unsurprisingly given this result, fewer investors looks to have supported the proposal.</p> <ul style="list-style-type: none"> NBIM voted against. The rationale given is as follows: <ul style="list-style-type: none"> 'We will not support a shareholder proposal where the company does not appear to have significant gaps in their management or reporting of the relevant sustainability risk. We assess companies against our public expectations on environmental and social issues. We may consider direction of travel and pace of change as part of our assessments'. CalSTRS voted against LGIM voted in support. The rationale given is that: <ul style="list-style-type: none"> 'A vote in favour is applied as LGIM supports such risk assessments as we consider human rights issues to be a material risk to companies.' NYC pension funds voted in support Engine No 1 voted in support CalPERS voted in support

[Sources: Nike Notice of Meeting; Results of Meeting]

Meetings and Proxy Advisers

Report finds investors globally are increasingly willing to oppose director elections/re-elections as a means of communicating concern over a range of ESG (and other) issues

- According to [analysis from](#) Diligent Market Intelligence (DMI) of voting outcomes for H1 2023, the level of dissent against director elections/re-elections has increased (if only slightly). According to DMI H1 2023 saw support for global director elections/re-elections decline to 95.6%, (down from 96.4% and 96.1% throughout 2021 and 2022, respectively).
- DMI attributes this uptick to the increased popularity among investors, of using votes against director elections/re-elections as a means of clearly telegraphing concern/dissatisfaction over a range of issues – eg (perceived) ESG shortcomings, concern about the broader strategic direction of the company etc – to companies.

Regional variations in the level of support

- UK vs US: Generally, DMI found that support for FTSE 350 directors (directors of UK companies) was higher at 97.5% than for S&P 500 directors (directors of US companies) at 95.9%.
- Across Europe, investor support for director re-elections has averaged 96.7% in the first half of 2023
- Across Asia, average investor support has declined to 96.6% (down from 97.4% throughout 2022)

Failure rate

- 2023 marks the first time in five years where FTSE 350 directors have failed to receive majority support, with five (0.3%) director proposals failing. In contrast, only three S&P 500 directors failed to secure majority support.
- Looking at the role of proxy advisers in this context, both ISS and Glass Lewis were found to be more critical S&P 500 directors, with Glass Lewis and ISS endorsing 93.4% and 97.1% of director re-election proposals, respectively, compared to 98.7% and 99% of FTSE 350 director re-election proposals in the same period. DMI attributes this to concern (on the part of proxy advisers) over the level of compensation paid to S&P 500 CEOs.

Proxy advisers

- Interestingly, DMI found that proxy advisers Glass Lewis and Institutional Shareholder Services (ISS) have different approaches when it comes to issuing voting recommendations on director elections with ISS far more likely than Glass Lewis to support directors.
- To illustrate, according to DMI while Glass Lewis endorsed 77.9% of director election/re-election proposals in H1 2023 (down from 79% in 2022), ISS endorsed a far higher proportion - 95.1% of proposals (up from 86.3% in 2022).
- DMI suggests that advisors are becoming increasingly conscious of various ESG issues including, for example the need for technology knowledge and ESG knowledge on boards as well as other issues such as gender diversity. In support, DMI points to changes in Glass Lewis' voting policies including the following.
 - Glass Lewis has updated its policy to note that it would 'closely evaluate' US - and Canada-listed company disclosure in instances where cyber-attacks have caused 'significant harm to shareholders' and may recommend against appropriate directors, should it find such disclosure to be insufficient.
 - Glass Lewis has also flagged it would recommend votes against Russell 3000 nominating committee chairs for boards featuring less than 30% gender diversity.

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 02/10/2023]

Insights from the US meeting season: (More) confirmation that support for E&S proposals has dipped

Semler Brossy's latest [report](#) provides insights into proxy voting results and trends for 2023, based on analysis of vote results from Russell 3000 and S&P 500 companies. Our key takeaways are below.

'Say on Pay'

- Approval rate remained high:
 - The average approval rate for 'say on pay' resolutions remained high at 90% for Russell 3000 companies (for context, according to the report, average level of support has hovered around 90% since 2018)
 - The percentage of Russell 3000 companies receiving greater than 90% is down very slightly at 71% on the same time last year (72%)
- Failure rate fell:
 - The failure rate for say on pay resolutions (2.1%) is down on the same time last year (3.7%).
 - Looking at it by sector, the failure rate was highest in the Communication Services and Healthcare sectors (5% and 4% respectively) and lowest in the Utilities sector (0%)
- Leading causes of failure to approve 'say on pay' resolutions: The report identifies a number of drivers behind 'say on pay' failures at individual companies. The most common contributing factors are identified as: 'pay and performance relation' and 'problematic pay practices'.

Director Elections

- Average support for director nominees standing for election/reelection remains high at 94.7%
- The report flags that the average level of support for the directors of companies where the 'say on pay' resolution in the previous year failed, is (somewhat) lower at only 91%

E&S resolutions

Consistent with analysis from a number of other sources (see for example: [Institutional Shareholder Services Insight July 2023](#)) Semler Brossy found that support for E&S proposals is down on prior years.

Environmental resolutions

- The median level of support for environment-focussed proposals was found to have fallen from a high of 46% in 2021 to 27% in 2022 to 18% so far this year.
- Two (of 93) shareholder environmental proposals have received majority support so far this year.

Social resolutions

Similarly, the support for social resolutions (eg disclosure of board diversity, disclosure of EEO1 data) also looks to be decreasing:

- The median level of support for social proposals has fallen from a high of 32% support in 2021 to 22% in 2022 to 15% so far this year
- Five social proposals this year have received greater than 50% support

[Source: Semler Brossy 2023 Say on Pay Report Vol 7 28/092023]

Major proxy firms walk back support for shareholder E&S proposals

[Morningstar's analysis](#) of the volume and level of support for shareholder environmental and social (E&S) proposals over the 2023 US proxy season highlights that:

The volume of shareholder environmental and social (E&S) resolutions continues to increase

- The number of shareholder resolutions proposed at US companies increased to 616 (up from 522 in 2022).
- Morningstar highlights that for the second consecutive year, the majority of these resolutions focused on E&S topics (as opposed to governance-related topics) – 337 E&S resolutions were proposed in total (up 23% on 2022)

Support for shareholder E&S proposals dropped 10% on last year

- According to Morningstar, average support for E&S resolutions was 20% in the 2023 proxy year (down from 30% in 2022).
- Morningstar attributes this drop in support to the increase in the volume of resolutions that are perceived by investors to be overly 'prescriptive' proceeding to a vote.

Key shareholder resolutions

Of the 53 shareholder resolutions that secured 40% or more support from independent shareholders – 'key resolutions' – the majority (37) fell into the 'social' category, 12 fell into the 'environmental' category and four addressed board diversity.

Most 'key' environmental proposals concerned climate change/GHG emissions

According to Morningstar, of the 12 environmental proposals that secured 40% or more support:

- Ten concerned climate change and/or greenhouse gas emissions (down from 15 in 2022).
- Just two, addressed other environment-related topics eg plastic use and water management risks (down from seven in 2022)
- Morningstar attributes the drop volume to the fact that 'incoming regulation' is 'set to fill many of the reporting and governance gaps on climate that were previously filled by shareholder resolutions'.

Political influence/activity and workplace equity were the most prevalent subtopics in the 'social' resolutions category

26 of the 37 'social' proposals that secured 40% or more support concerned either:

- **political influence/activity** – 13 proposals called for disclosure on political spending/lobbying activity. Morningstar highlights that within this group, two proposals in this subcategory called for disclosure of alignment between political spending and company's publicly stated corporate values – a new issue in 2023.
- **workplace equity** – 13 proposals focused on a range of issues connected with workplace equity (beyond diversity, equity and inclusion) eg freedom of association, gender/racial pay gap reporting. Morningstar highlights that just three proposals within this group requested civil rights/racial equity audits (down from 16 in 2022).

Asset manager voting trends

- Morningstar also analysed the voting decisions of the 'big three index firms' – BlackRock, State Street and Vanguard – which together control around a fifth of the independent share vote at the largest US public companies.
- Morningstar found that:
 - Voting decisions by the two largest firms, Vanguard and BlackRock, reflected the broader trend in support for shareholder resolutions with both walking back their support for shareholder E&S proposals significantly compared with 2022. According to Morningstar, BlackRock supported less than 7% of E&S shareholder resolutions in the 2023 proxy year, while Vanguard supported just 2%.
 - In contrast, State Street *increased* its support for 'key' shareholder resolutions, supporting 66% of these proposals in 2023 (up from 59% in 2022).
 - Morningstar notes that investors often withheld support for E&S proposals on the basis that the proposals were too 'prescriptive' or 'redundant'.

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 04/10/2023]

Institutional Investors and Stewardship

Swiss Stewardship Code launched

- The Asset Management Association Switzerland (AMAS) and Swiss Sustainable Finance (SSF) have together released the new (voluntary) [Swiss Stewardship Code](#) with a view to encouraging 'the active exercising of shareholder rights by investors in Switzerland'. The integration of stewardship into the investment process is viewed as key to enabling the country to meet its sustainability targets.
- The Code is structured around nine principles which are broadly aligned with the Global Stewardship Principles of the International Corporate Governance Network (ICGN), the Principles for Responsible Investment (PRI) and the UK Stewardship Code.
- Broadly, the nine principles enjoin Code signatories to:
 - 'establish good governance as a basis for stewardship activities with the objective of creating long-term financial, societal and environmental value and reaching positive and long-term sustainable outcomes for clients and beneficiaries and address sustainability-related risks'
 - have in place (and publicly disclose) 'effective stewardship policies' in line with the nine Code principles
 - integrate 'effective voting mechanisms into their investment process'
 - actively engage both with: a) investee entities 'with the aim of generating long term financial and societal value and of reaching positive and long-term sustainable outcomes'; and b) 'relevant public stakeholders and policymakers on issues that affect sustainable investment'
 - escalate stewardship activities 'where necessary'
 - regularly monitor investee entities to track and review the effectiveness of their stewardship activities
 - (where stewardship activities are delegated), 'ensure consistency of the delegated activities with their own investment beliefs, stewardship policy and strategy'
 - manage conflicts of interests in the best interests of their clients
 - disclose their stewardship policies and activities to clients and beneficiaries
- [Announcing](#) the release of the Code, SSF CEO Sabine Dobeli commented:

'There is increasing pressure on companies and investors to play their part in making a sustainable impact. With the new Stewardship Code, SSF and AMAS are helping Swiss financial players communicate their goals to companies and encourage them to adopt more sustainable business models and create long-term value. The Stewardship Code has been developed in collaboration with asset owners, asset managers and service providers, and describes how financial players can be as effective as possible in their shareholder activities. The Code also improves comparability and creates more transparency, which in turn boosts confidence in sustainable investments'.

[Source: Swiss Assessment Management media release 04/10/2023]

Disclosure and Reporting



ASIC secured over \$700,000 in penalties for financial reporting failures in H1 2023

- The Australian Securities and Investments Commission (ASIC) has announced that over the first six months of 2023, it prosecuted 36 companies and secured over \$700,000 in penalties over failure by the companies to:
 - lodge financial reports
 - hold annual general meetings (AGMs)
 - maintain the required number of directors and resident directors.
- Three of ASIC's prosecutions resulted in fines of more than \$100,000.
- ASIC reminds companies that

'Financial reports provide shareholders, creditors and the public with important information, enabling them to make informed decisions when dealing with these companies. It is crucial that disclosing entities lodge their financial reports in a timely manner'.

Company fined \$100K over failure to lodge annual financial reports

ASIC has since announced that a mining exploration company (which was delisted from the ASX on 28 August 2018) has been fined \$100,000 over failure to lodge five annual financial reports with ASIC for the 2018-2022 financial years.

ASIC said the fine 'reflects the seriousness of the offences' and again underlined its continuing focus on ensuring companies comply with their reporting obligations. ASIC stated:

'It is important that accurate and timely reports are lodged to assist shareholders, creditors and the public in making informed decisions when dealing with entities.

ASIC will continue to prosecute companies that fail to comply with their statutory obligations'.

[Sources: [ASIC media release 28/09/2023](#); ASIC media release 10/10/2023]

ASIC extends electronic precontractual disclosure legislative instrument pending law reform

- [Treasury Laws Amendment \(2023 Law Improvement Package No. 1\) Bill 2023](#) (Cth) received Assent on 20 September 2023. Among other things, changes included in the legislation will move modifications/exemptions to the law currently included in [ASIC Credit \(Electronic Precontractual Disclosure\) Instrument 2020/835](#) (the Principal Instrument) which was set to expire on 1 October 2023, directly into new regulations.
- For context, the Principal Instrument operates to allow credit licensees and representatives to give pre-contractual disclosure to consumers in the same electronic manner that applies to other credit disclosure documents.
- As the new regulations have not yet been made/to allow time for the regulations to be made, the Australian Securities and Investments Commission (ASIC) has made [ASIC Credit \(Amendment\) Instrument 2023/675](#), extending the operation of the Principal Instrument for 12 months (until 1 October 2024)

[Source: ASIC Credit (Amendment) Instrument 2023/675]

Financial reporting relief for stapled entities: ASIC remakes financial reporting legislative instrument

- [ASIC Class Order \[CO 13/1050\] Financial reporting by stapled entities](#) (Class Order) expired on 1 October 2023.
- A new instrument - [ASIC Corporations \(Financial Reporting by Stapled Entities\) Instrument 2023/673](#) – extends the relief previously provided under the Class Order to both:
 - allow stapled entities which are disclosing entities to present combined financial statements or consolidated financial statements of the stapled group
 - allows the stapled entities in a stapled group to present their respective financial statements together in a single financial report.
- The Australian Securities and Investments Commission (ASIC) [states](#) that it made the new instrument because it considers that the Class Order was continuing to operate effectively and 'continues to form a necessary and useful part of the legislative framework'.

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



Top Story | Climate litigation development: Australia leading the pack

Three recent reports (LSE's '2023 snapshot, UNEP's 'Global Climate Litigation Report' and NFGS Climate-related litigation: recent trend and developments) tracking the status of and analysing recent climate-related litigation trends highlight that, second only to the US, Australia has the highest number of climate-related cases (and first on a per capita basis). While the overall number of proceedings filed decreased year on year in 2022/2023, the number of cases against companies and financial institutions has rapidly escalated, driven largely by the significant number of recent greenwashing cases filed.

Investors are starting to see climate-related litigation as a risk informing investment decisions and a risk that could have a broader market impact on a corporation's value.

MinterEllison has released an article highlighting the key developments and current strategic levers being implemented, for Australian corporates to look out for. You can access the full text here: [Climate litigation development: Australia leading the pack - Insight - MinterEllison](#)

Top Story | Mandatory Climate Reporting in Australia: New guide outlines the steps directors can (and should) take now to prepare

How directors can prepare now for 'the biggest change to corporate reporting in a generation'

It's currently proposed that mandatory climate reporting obligations, based on global standards, will be phased in for large Australian corporations and financial institutions, from July 2024.

For more on the proposed requirements see: [Introduction of mandatory climate reporting in Australia: Second round of consultation launched - Technical update - MinterEllison](#)

Ahead of this, through the Australian Chapter of the Climate Governance Initiative (CGI), the Australian Institute of Company Directors, MinterEllison and Deloitte have jointly released a new guide - [A director's guide to mandatory climate reporting](#) - to assist directors to prepare for these landmark reforms.

In his foreword to the guide Australian Securities and Investments Commission (ASIC) Chair Joe Longo underlined the significance of the shift to mandatory reporting and the key role boards are expected to play in overseeing it. Mr Longo [comments](#):

'This shift to mandatory climate-related disclosure presents the biggest change to corporate reporting in a generation....Getting started early is critical, as is a recognition that the quality and depth of reporting will mature over time. As stewards of long-term value, boards have a critical role to play in overseeing this shift to high-quality climate reporting, and building organisational resilience in the face of the escalating physical and transitional risks posed by climate change. I am therefore pleased to see that the Australian Institute of Company Directors, Deloitte and MinterEllison have partnered via the Climate Governance Initiative (CGI) Australia, to publish a Climate Reporting Guide aimed at preparing directors for this major reform. At its heart, good quality reporting must be underpinned by strong and effective governance. Boards must think about both the risks and opportunities facing their organisation, now and into the future. I encourage Australian directors and executives to show leadership at this critical juncture for our nation and economy'.

What's in the guide?

The guide aims to help directors understand the changes, why they are being introduced, how to assess their existing level of preparedness and identify what they (and their organisations) need to do to prepare.

Broadly, the guide includes:

- An overview of the current reporting landscape
- Discussion of how climate change fits into directors' duties under existing Australian laws
- The practical steps directors can take now to help ensure their organisation and their boards are prepared for the introduction of mandatory climate reporting. Appendix A to the guide is a list of questions for directors to consider, as well as a list of practical steps.

You can access the full text here: [directors-guide-to-mandatory-climate-reporting-web \(aicd.com.au\)](#)



Mandatory climate reporting | Californian Governor has signed landmark climate disclosure Bills

- Mandatory climate disclosure in California is another step closer after two Bills [were signed into law](#) by the Governor:
 - Climate Bill SB 253 will require both public and private companies that do business in California with annual revenue of at least \$1 billion to report annually on emissions across their supply and value chains (Scope 3 emissions)
 - SB 261 will require both public and private companies with revenue of over \$500 million to report on their climate-related risks.
- However, in separate statements announcing this [see: [SB 253](#), [SB 261](#)], Governor Gavin Newsom signalled that the timelines for implementation of the new requirements is likely to be pushed back and that the impact of implementation costs for business would be closely monitored.

[Source: California Governor Gavin Newsom media release 07/10/2023]

Climate Action 100+ | Latest Net Zero Company Benchmark results show Australian focus companies continue to make (slow) progress, but more focus is needed on putting credible decarbonisation strategies in place

- Ahead of the Australian AGM season, global investor initiative Climate Action 100+ has released its latest assessment of [14 heavy-emitting Australian companies](#) against the Net Zero Company Benchmark (Benchmark) – a framework for assessing companies' progress on their net zero transition.
- Progress is assessed against the initiative's [three goals](#):
 - 'Implement a strong governance framework which clearly articulates the board's accountability and oversight of climate change risk;
 - Take action to reduce greenhouse gas emissions across the value chain, including engagement with stakeholders such as policymakers and other actors to address the sectoral barriers to transition. This should be consistent with the Paris Agreement's goal of limiting global average temperature increase to well below 2°C above pre-industrial levels, aiming for 1.5°C. Notably, this implies the need to move towards net-zero emissions by 2050 or sooner; and
 - Provide enhanced corporate disclosure and implement transition plans to deliver on robust targets. This should be in line with the final recommendations of the Task Force on Climate-related Financial Disclosures (TCFD) and other relevant sector and regional guidance, to enable investors to assess the robustness of companies' business plans and improve investment decision-making'.

Overall results

- Overall, Climate Action 100+ considers that 'steady progress is continuing to be made' by Australian focus companies. For example, many companies are now fully disclosing net zero commitments (57%).
- However, companies are considered to be lagging (if the goals of the Paris Agreement are to be kept in sight) when it comes to translating their net zero commitments into credible transition plans, including when it comes to funding. Climate Action 100+ found that:
 - Few companies are setting short-term targets to 'kick start the transition' (only 7% of the 14 Australian companies assessed currently score on Disclosure Indicator 4)
 - Investors also consider transition strategies 'lack quantification or capital allocation to feasibly align them with 1.5°C pathways (Disclosure Indicators 5 and 6)'.
- You can find Climate Action 100+ initiative's individual company assessments [here](#)

Assessments of companies outside Australia

- Climate Action 100+ will publish a further 136 assessments covering the rest of the initiative's focus companies, in mid-October 2023.

IGCC calls on investors leverage the findings in their engagements

- The Investor Group on Climate Change (IGCC) has [suggested](#) investors 'leverage' the findings to inform their engagements with the companies assessed and hold them 'accountable for their climate commitments and decarbonisation strategies'.
- The IGCC has flagged its intention to continue to advocate for 'enhanced transparency and granularity' in disclosures and national sector decarbonisation pathways aligned with the 1.5C Paris goal. The IGCC considers that the government's work on developing sector-specific pathways is particularly important because they will 'give companies the necessary confidence for capital expenditure in line with their net zero goals'.

[Source: Climate Action 100+ media release 27/09/2023]

Say on Climate | £1.8tn investor coalition calls on heavy emitters to adopt 'Say on Climate' votes ahead of next year's AGM season

- Ahead of the 2024 AGM season, an 18 strong, £1.8tn investor coalition [has written](#) to the chairs of 35 FTSE 350 companies reiterating their previous calls for companies to provide shareholders with an opportunity to vote on their climate transition plans (ie to give shareholders a 'Say on Climate' vote).
- The companies targeted were chosen because investors consider they:
 - 'face heightened climate risks, whose actions are essential to the accelerated action required to meet the Paris goals and where the risks we face as investors are substantial.'
- Investors suggest that adopting a 'Say on Climate' vote is in company's own interests because doing so avoids (potential) protest votes against board members – investors observe that 'having such a vote will enable shareholders in the first instance to express their view on transition plans through a specific resolution rather than immediately voting against the chair or another board member'.
- Investors also observe that there is increased regulatory focus on climate transition planning. For example:
 - the UK government is considering a recommendation for companies to be required to product



- transition plans every three years
- in France, a proposed new law would require listed companies to put their transition plans to an advisory vote every three years with an annual vote on the implementation of the strategy.

[Source: LAPFF media release 03/10/2023]

NGOs publish list of companies 'blacklisted' by investors/financial institutions on sustainability grounds

- An NGO coalition has [launched a new website](#) – the [financial exclusions tracker](#) - naming the companies that have been 'blacklisted' (ie excluded) by investors/financial institutions on sustainability grounds.
- Currently the 'tracker' lists 4532 companies across 16 countries together with the 'original motivation for excluding each company by the financial institution' (where this is provided by investors/financial institutions).
- The top five reasons for exclusion are concerns about companies' approach to/links to:
 - climate/fossil fuels (40%)
 - controversial weapons (17%)
 - tobacco (12%)
 - human rights (7%)
 - business practices
- It's hoped that the tracker will:

'put additional pressure on those identified companies to change their practices. Local communities, civil society, investors and governments can use the list to identify the companies with the largest Environmental, Social, and Governance (ESG) risks, as flagged by investors themselves'.

[Source: BankTrack media release 04/10/2023]

UK regulator issues first climate change reporting fine against a pension scheme

- The Pensions Regulator (TPR) [has fined](#) ExxonMobil Pension Plan £5000 over its failure to publish a report on trustees' management and governance of climate-related risks and opportunities within the required timeframe – the first such fine the regulator has issued.
- The TPR notes that though the report had been 'produced' within the required timeframe, it was not published on a publicly available website due to an administrative error. This issue was not picked up by the trustees who expected their scheme administrator to publish the report.
- The TPR comments:

'In this case, the trustees had expected their scheme administrator to publish the report. It highlights the fact that, while administrators support schemes with their duties, trustees are ultimately responsible for ensuring climate reporting requirements are met.

The case also demonstrates we are closely monitoring compliance with this climate reporting duty. It warns we will take enforcement action, where appropriate, to ensure schemes meet their obligations'.

[Sources: TPR media release 28/09/2023; ExxonMobil Pension Plan - Regulatory intervention report]

Investors consider Nestle is 'falling short' of expectations when it comes to shifting away from sales of unhealthy foods

- Following earlier [calls](#) from investors for Nestle to set targets to increase sales of nutritious foods (and shift away from sales of less healthy products), the company has announced a new [nutrition target](#) to grow the sales of its more nutritious products by CHF 20-25 billion by 2030 (a 50% increase over 2022 sales).
- In a [statement](#) responding to this, investors (coordinated by ShareAction) have raised concerns that the new target 'falls short' of both the role they expect Nestle to play in improving public health and the company's previously stated goal of driving healthier outcomes for society.
- Investors have raised two main concerns about the design of Nestle's target. Namely:
 - Investors consider the target is not sufficiently ambitious in that it 'is broadly in line with its current overall growth guidance of 4-6 per cent per year' for sales of more nutritious foods. Investors observe that:

'If its sales of unhealthier products also increase at a similar rate, there will be no improvement in the impact of the food it sells on consumer diets and public health'.

- Investors have also raised concerns about Nestle's definition of 'nutritious'. Investors write:

'Nestlé has chosen to count as "nutritious" some products to which government-endorsed nutrient profile models do not apply, such as coffee and commercial baby foods. This means that Nestlé could meet its target by selling more of these foods with no positive impact on public health'.

- ESG analyst at NEST Tom Sanders summed up investors' concerns as follows:

'Unhealthy food options, and the heavy reliance of companies on the sales of products high in fat, sugar and salt, generates financial risks, compromises the wellbeing of communities and creates risks for the economy. Setting a proportional target to increase healthy food sales is a crucial step to addressing the systemic risks of a less healthy product portfolio. Nestlé's target has fallen short of adequately addressing its over-reliance on the sales of unhealthy products.'

[Source: ShareAction media release 03/10/2023]

65% of large Japanese companies have developed human rights policies after the government released non-binding guidelines in 2022

- In September 2022, Japan's Ministry of Economy, Trade and Industry (METI) released new (voluntary and non-binding) human rights guidelines - [Guidelines on Respecting Human Rights in Responsible Supply Chains](#) – for all companies or independent contractors conducting business in Japan.
- One year on, research shows companies have been quick to embrace them. According to the Business and Human Rights Centre:
 - 64.8% of large Japanese companies have already implemented a human rights policy with over 70% of this group requiring their global suppliers to comply with it
 - 28.8% of these companies are already conducting human right due diligence (with this expected to increase to 71.9% 'in a few years').

[Source: Business and Human Rights Centre 11/09/2023]

In Brief | Anti-ESG backlash in the US: InfluenceMap says it has uncovered 'evidence of a concerted campaign by fossil fuel, financial, and cross sector groups to apparently obstruct and dilute climate-related financial regulation in the US' through (successfully) influencing the policy priorities championed by House Republicans

[Source: InfluenceMap briefing October 2023]

In Brief | Timing of SEC's Climate Disclosure Rule still unclear: SEC Chair tells Committee the Commission is 'focussed on getting things right – based on the economics, the Commission's legal authorities, and promoting the SEC's mission – not the clock', flags potential changes in light of feedback received on the draft Rule

[Source: SEC Chair Gary Gensler, Testimony Before the United States House of Representatives Committee on Financial Services 27/09/2023]

In Brief | The UK government's Transition Plan Taskforce has released the final version of the TPT Disclosure Framework which is hoped to provide 'the gold standard' for private sector companies to develop and report on their climate transition plans

[Source: TPT Disclosure Framework 09/11/2023]



Regulators

ACCC seeks feedback on its compliance and enforcement priorities

The Australian Competition and Consumer Commission (ACCC) has released a survey seeking feedback on:

- The ACCC's 2023-24 [compliance and enforcement priority areas](#)
- It's [Product Safety Priorities](#)
- Any other issues that 'might be causing consumer harm or competitive detriment'
- How it can 'better target and deliver on our work in 2024-25, including what you would like to see more of from the ACCC'.

Feedback received will help inform the ACCC's priority areas, and 'help ensure' resources are allocated as effectively as possible in 2024/25.

The survey closes on [13 October 2023](#).

[Source: ACCC media release 25/09/2023]

In Brief | US competition regulator and 17 State Attorneys General are

[suing Amazon over \(allegedly\) anti-competitive conduct – it's alleged that 'Amazon violates the law not because it is big, but because it engages in a course of exclusionary conduct that prevents current competitors from growing and new competitors from emerging'](#)

[Source: FTC Media release 26/09/2023]



Financial Services

Top Story | ASIC and APRA have released an information package to support implementation of the FAR

ASIC and APRA have released an information package to support implementation of the FAR.

Key Takeouts

- Approach to joint administration of the FAR:
 - APRA and ASIC which together will jointly administer the FAR, plan to coordinate closely with each other to minimise duplication and alleviate the additional reporting burden on entities as far as possible. To this end, FAR reporting will take place through a single portal – APRA Connect – and entities will also have a single point of contact for communicating with the regulators on FAR-related matters.
 - Likewise, the regulators plan to collaborate closely when it comes to monitoring FAR compliance as well as undertaking investigation and/or enforcement activity and communicating their expectations to industry.
- The regulators have also released an information paper outlining the steps they expect ADIs to take in the lead up to the commencement of the FAR, including the information ADIs are expected to submit in the short term (ie from November 2023). As yet no specific dates/specific details around how the information is to be submitted have been provided – though the regulators have indicated the information will be made available soon (once the Regulator Rules and Transitional Rules for ADIs and the Key Functions Descriptions that were released for consultation on 20 July 2023 have been published in final form).
- ADIs must continue to comply with the BEAR in the period leading up to the FAR commencing.

What is the FAR and when will it apply?

The Financial Accountability Regime (FAR) will replace and expand on the existing Banking Executive Accountability Regime or BEAR.

Broadly, the FAR will extend strengthened, but BEAR-like accountability requirements to other APRA-regulated entities and to the directors/senior executives of those entities in accordance with the government's response to several [Hayne Commission recommendations](#) (Hayne Recommendations 3.9, 4.12, 6.6, 6.7 and 6.8).

The [aim of the FAR](#) is ultimately to strengthen and increase individual and entity level accountability across the financial services sector, including for non-financial conduct risk.

Unlike the BEAR which is administered by the Australian Prudential Regulation Authority (APRA), the FAR will be jointly administered by APRA and the Australian Securities and Investments Commission (ASIC) (the regulators).

The FAR will apply to authorised deposit-taking institutions (ADIs) and their authorised non-operating holding companies (NOHCs) from 15 March 2024 and to insurance entities, their licensed NOHCs, and superannuation trustees from 15 March 2025.

For more on the FAR see: [FAR status update: FAR Bills now law - POST - MinterEllison](#)

Information package released

Ahead of the commencement of the FAR, the regulators have released:

- the [Joint Administration Agreement](#) between APRA and ASIC setting out the framework within which the regulators will work together to administer the FAR
- a joint information paper - [RG 278 ADIs: Transitioning to the Financial Accountability Regime](#) – providing some initial guidance for ADIs on the steps the regulators expect them to take to transition from the BEAR to the FAR, including the information ADIs are expected to supply to the regulators ahead of the commencement of the new regime. The regulators have also released a separate [ADI accountability statement template and guidance](#).

We provide a brief overview of the key points below.

Joint administration of the FAR: How APRA and ASIC intend to administer the new regime

The starting point for the agreement between the regulators is that they aim to collaborate to ensure the FAR is administered as efficiently and consistently as possible, with minimal duplication of effort.

To this end, the agreement is underpinned by the following four principles for 'effective collaboration':

- 'support and harness each Regulator's mandate and strengths for effective joint administration of the FAR;
- leverage supervision and surveillance frameworks already established by the Regulators;
- focus on risks that impede strong and clear accountability; and
- be accountable and transparent in the joint administration of the FAR'.

Beyond this, the agreement covers:

- **The broad delineation of responsibility between the regulators:**
 - ASIC will (generally) focus on the 'impacts to market integrity and consumer protection in the financial system and payments system'.
 - APRA will 'focus on impacts to the prudential soundness of regulated entities as well as the financial stability of the overall system'.
- **Approach to monitoring and supervision under the FAR:**
 - The regulators intend to take a 'risk based and outcomes focussed approach' to monitoring of accountable entities and accountable persons including through: surveillance, engagements, reviews and resolving technical queries.
 - Monitoring/supervisory activities may be undertaken together or independently of each other – the agreement states that the regulators plan to 'collaborate and coordinate on these regulatory activities when there is joint interest on a FAR-related risk area', but may take an 'independent but coordinated approach' where this is more appropriate.
 - The agreement also commits the regulators to 'keeping each other informed and when resolving these issues with entities, will work together as appropriate'.
- **Arrangements to facilitate streamlined communication and reporting:**
 - FAR reporting: There will be no need for accountable entities to report separately to the regulators, rather FAR reporting – eg registration of accountable persons, lodgement of accountability maps/statements and other notifications including breach reporting - will be done through APRA Connect
 - The register of accountable persons will also be maintained through APRA Connect.
 - The agreement also flags plans to establish a single point-of-contact to enable accountable entities to contact the regulators about FAR reporting obligations or other matters.
 - The Regulators plan to put in place information sharing mechanisms, including establishing a dedicated single portal, to support timely exchange of FAR-related information with each other, with a view to avoiding duplicative information requests.
- **Investigations and enforcement of the FAR:**
 - The Regulators also plan to work together on FAR investigations and enforcement.
 - Prior to the commencement of an investigation, they will identify the objectives of the investigation and establish the role of each regulator, including the appropriate lead.
- **Communication with industry about FAR-related matters:**
 - Industry communication about FAR-related matters may be released jointly or individually by the regulators.
 - The regulators plan to inform industry about minimum expectations for compliance with FAR obligations and support compliance through publication of: better practice examples, the publication of thematic review findings and details of enforcement activity
 - The regulators also plan to disclose accountable person disqualifications made under the FAR, 'to facilitate industry governance of accountable persons'. However, the agreement states that 'no further information from the FAR register is intended to be published at this time'.

Pre-commencement arrangements for ADIs

The regulators have released a joint information paper for ADIs - RG 278 ADIs: Transitioning to the Financial Accountability Regime. Broadly, RG 278 covers:

- **Registration of accountable persons (APs):** Existing APs (ie APs already registered under the BEAR) will automatically transition to being registered APs under the FAR but additional information is likely to be required – the information paper offers guidance around this. The information paper also includes information on: the

process for new accountable person registrations; requirements for filling temporary and unforeseen vacancies; and how ADIs should assign key functions to APs.

- **Guidance for 'enhanced ADIs' around the preparation of accountability statements and maps** (which 'core' entities are not required to submit to the regulators)
- **Guidance on notification obligations** under the FAR for 'enhanced' and 'core' entities.
- **Guidance on the application of FAR to corporate groups** including how ADIs are expected to identify their Significant Related Entities (SREs) and the preparation of accountability statements and maps for individuals who are APs for multiple entities within the same corporate group
- **Deferred remuneration obligations** and other transitional matters.

Practical steps

The information paper also provides an overview of the steps ADIs (and their authorised NOHCs) are expected to take to transition from the BEAR to the FAR between now and 15 March 2024.

As a first step, all ADIs are expected to determine their entity profile - whether they are an 'enhanced' (larger/complex ADI) or 'core' entity (as this will determine which FAR obligations they are subject to). The thresholds for determining whether an ADI is an enhanced or core entity are set out in Part 3 of the [\(as yet still draft\) Minister's rules](#).

Having done this, the information paper highlights the following five other 'key activities', enhanced ADIs are expected to undertake:

- 'identifying which of its subsidiaries will become Significant Responsible Entities (SREs
- allocating additional prescribed responsibilities to existing or new accountable persons
- allocating all applicable key functions to the relevant accountable persons
- updating/preparing the accountability statements of existing or new accountable persons; and
- updating its accountability map'.

For smaller and more 'simple' or 'core' ADIs with no subsidiaries, preparation is expected to be less involved. The regulators expect this group of ADIs to:

- allocate 'additional prescribed responsibilities to existing or new accountable persons';
- allocate 'all applicable key functions to the relevant accountable persons'
- update its 'internal accountability documentation'.

Information to be provided to the regulators in the short term

The regulators have flagged that from November 2023, ADIs will be asked to provide the following information, via APRA Connect:

- entity profile information, including whether the ADI is classified as an enhanced or core entity, whether it is sole or dual-regulated, and its nominated significant responsible entities (SREs)
- drafts of the additional information to be included in the FAR register for existing APs under the BEAR who will transition to being APs under the FAR, as well as draft registration information for any new accountable persons to be registered under the FAR for initial feedback from the regulators (ahead of formally submitting the updated information)
- (for enhanced entities only) updated draft accountability maps and accountability statements for feedback (ahead of formally submitting the updated information)

At this stage, the regulators have released an [ADI accountability statement template \(and guidance\)](#) to assist in this.

Further detail to come

The regulators plan to provide further details, including hard timelines/more detailed instructions for submitting this information, once the [Regulator rules and Transitional rules as well as Key Functions Descriptions](#) on which the regulators recently consulted are published in final form. For more on the draft Rules/Key Functions see: [FAR status update: Regulators consult on FAR implementation - POST - MinterEllison](#)

The Regulators plan to host ADI and industry briefings from October 2023.

[Sources: Joint ASIC/APRA media release 03/10/2023; Financial Accountability Regime Information Package]

APRA registers new standard determining updated Prudential Standard CPS 511 Remuneration (CPS 511)

Context – updated CPS 511 to apply from 1 January 2025

- In August 2023, the Australian Prudential Regulation Authority (APRA) released an [updated version of CPS 511 Remuneration](#) incorporating new disclosure requirements for all APRA-regulated entities.
- For context, the changes will require APRA-regulated entities to disclose more detailed information about how:
 - remuneration is aligned with performance and risk and 'how remuneration is decided, beyond purely financial performance'
 - consequence management is applied
 - non-financial measures have been incorporated in remuneration outcomes (for variable remuneration).
- These changes are [intended to](#) 'establish and maintain': a) 'stronger incentives for individuals to manage the risks they are responsible for'; b) 'appropriate consequences for poor risk outcomes'; and c) 'increased oversight, transparency and accountability on remuneration'.
- The Explanatory Statement [states that](#):

'Aside from the new remuneration disclosure requirements, the updated CPS 511 does not, in any way, alter requirements in the existing prudential standard'.
- For a more detailed overview of the updated CPS 511 see: [APRA finalises remuneration disclosure requirements for APRA-regulated entities - POST - MinterEllison](#)

New instrument registered

- In preparation for the commencement of the updated standard, APRA has registered a new instrument - [Banking, Insurance, Life Insurance, Health Insurance and Superannuation \(prudential standard\) determination No. 3 of 2023](#) – which formally revokes existing Prudential Standard CPS 511 Remuneration made under Banking, Insurance, Life Insurance, Health Insurance and Superannuation (prudential standard) determination No. 1 of 2021 and determines an updated Prudential Standard CPS 511 Remuneration (CPS 511).
- The instrument commences on 1 January 2024 in line with the commencement of updated CPS 511.

[Source: Banking, Insurance, Life Insurance, Health Insurance and Superannuation (prudential standard) determination No. 3 of 2023]

FAAA seeks feedback on policy platform

- The Financial Advice Association Australia (FAAA) [is surveying](#) members, seeking feedback on its policy platform including the following 'key policy areas':
 - 'ease of providing advice
 - ease of servicing clients
 - improved technology and data
 - cost of providing advice
 - sustainability of financial advice
 - professional standards and education
 - licensing and registration, and
 - those who can provide financial advice, and to whom'.

Timing and next steps

- The survey will remain open until 19 October 2023.
- The member survey is the start of a longer policy development process, which is planned to extend over a number of months. It's envisioned that further consultation with members will be undertaken through the FAAA committee as part of this process.
- Feedback received will inform the FAAA's policy and advocacy priorities through to 2030.

[Source: FAAA media release 06/10/2023]

Responsibility for the Life Insurance Code of Practice transitions to the Council of Australian Life Insurers

- The Financial Services Council (FSC) has [announced](#) that responsibility for the Life Insurance Code of Practice (Life Code) will transition to the Council of Australian Life Insurers (CALI) effective, 29 September 2023.
- This means that CALI will become the primary point of contact for code-related matters for industry stakeholders, regulators and policy makers.
- The independent Life Code Compliance Committee (LCCC), administered by the Australian Financial Complaints Authority (AFCA), will continue to oversee Code compliance.

[Source: Financial Services Council media release 27/09/2023]

Crypto promotion: UK financial regulator issues multiple warnings about crypto ads within the first 24 hours of the commencement of the new cryptoasset financial promotions regime

New cryptoasset financial promotion regime is now in force

- The new regime: Following the passage of legislation bringing cryptoassets within the existing financial promotion regime, the UK Financial Conduct Authority (FCA) published a policy statement in June 2023 - [PS23/6](#) – setting out new, broad-based rules governing the financial promotion of crypto assets to UK consumers.
- The new rules stipulate four ways cryptoasset firms can take to lawfully promote investment in cryptoassets namely:
 - the promotion is made by an 'authorised person';
 - the promotion is approved by an 'authorised person';
 - a crypto firm registered under the Money Laundering Regulations (MLR) communicates the promotion; or
 - 'the promotion otherwise complies with the conditions of an exemption in the Financial Promotion Order'.
- Promotions not made using one of these four methods will be in breach of section 21 of the Financial Services and Markets Act 2000 (FSMA), which is a criminal offence punishable by up to two years imprisonment, and/or the imposition of a fine.
- The intention is that the rules apply to 'the vast majority, if not all, websites and apps that enable a UK consumer to invest in cryptoassets will be in scope of the financial promotions regime', bringing requirements around the promotion of cryptoassets – which are considered to be inherently high risk – into line with requirements for other high risk investments.
- The new rules are now in force – they commenced on 8 October 2023.

Multiple alerts issued within the first 24 hours

- Within the first 24 hours the FCA issued [146 'alerts'](#) (warnings) about cryptoasset promotions and the regulator has urged social media platforms, app stores, search engines, domain name registrars, payments firms and businesses to 'consider them'. The regulator has also urged consumers to check the Warning List – a list of firms which the regulator considers 'may be illegally communicating crypto asset promotions and that are not engaging with the regulator 'constructively' - before making any investment in crypto, noting that 'not all firms of potential concern will be added [to the list] straightaway'.

FCA's approach to enforcement

- The FCA states that

"Where firms are engaging with the FCA in good faith with a view toward achieving compliance we are taking a proportionate approach to implementation....[However] in the case of non-compliance, we will take robust action to remove illegal content to protect consumers'.

[Source: FCA media release 09/10/2023]

In Brief | Increasing transparency: APRA is consulting on proposals that 'would significantly increase visibility of how superannuation members' money is spent and invested' – for example, the regulator is proposing to publish (among other things) total expenses at individual fund level by category, including expenditure for marketing and sponsorships, industrial bodies, related parties, director and executive remuneration, and political donations by payee or service provider. The consultation, which is planned to include two roundtable discussions with trustees and other industry stakeholders, closes on 29 November 2023

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

In Brief | Tackling a 'harmful lending model...designed to avoid consumer protection laws': ASIC has commenced further court proceedings against two short term lenders and their directors over their alleged engagement in unlicensed credit activity between July 2022 and December 2022 and the (allegedly) excessive fees charged. Taking action to protect consumers from 'predatory lending' practices, is identified in ASIC's latest corporate plan as key focus for the regulator

[Source: ASIC media release 03/10/2023; ASIC Corporate Plan 2023]

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Accounting and Audit

In Brief | UK and New Zealand audit authorities have signed a first of its kind agreement to recognise audit qualifications in both the UK and NZ to enable auditors to more easily work between both countries

[Source: FRC media release 27/09/2023]

Risk Management

Top Story | The long road to Australian privacy reform

On 28 September 2023, the Federal Government published its response to the Privacy Act 1988 (Cth) (Privacy Act) Review Report (Report). Broadly, the report found that the Privacy Act has not kept pace with technological changes and that privacy protections need to be strengthened.

MinterEllison has released an article outlining the key areas for reform and exploring how key reforms may be implemented.

You can access the full text here: [The long road to Australian privacy reform - Insight - MinterEllison](#)

In Brief | The Governance Institute has reiterated its previous calls for the government to prioritise action on strengthening whistleblower protections and underlined its continuing commitment to pushing for reform – 'Governance Institute will continue to advocate for this important reform as proper and clear protections for whistleblowers is critical to help identify and stop corporate misconduct.'

[Source: Governance Institute of Australia media release 11/10/2023]

In Brief | 'What good governance looks like for directors and boards considering the application of AI within their organisations': The Governance Institute has released a new AI governance guide

[Sources: Governance Institute of Australia media release 11/10/2023; Full text guide: Good Governance Guide Generative Artificial Intelligence October 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