Governance News

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

13 September 2023

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Boards and Directors

New report offers insights into ASX 300 board composition, remuneration, tenure and independence

Ownership Matters has released a report tracking trends in the composition of ASX100, ASX200 and ASX300 company boards, including gender diversity, remuneration, tenure, age and directors' shareholdings.

Our key takeaways are below.

Board gender diversity

The report found that while representation of women on boards continues to increase, progress is not even across the ASX 300 and it remains relatively rare for women to hold CEO and/or Chair positions. According to the report:

- Across the ASX300, female directors now hold a record 34.2% of positions
- There are zero all-male ASX 200 boards, but all-male boards are not extinct - there are still five ASX 300 companies with no female board representation
- While female representation on boards continues to increase, this has not been mirrored in similar increases in the number of women holding Chair or CEO roles. According to the report women hold:
  - 10.1% of ASX 100 Chair roles and 12.5% of ASX 100 CEO roles
  - 9.7% of ASX 200 Chair roles and 3.8% of ASX 200 CEO roles
  - 13.3% of ASX 300 Chair roles and 5.8% of ASX 200 CEO roles
  - In only four of the 290 ASX 300 companies sampled, did women hold the Chair and CEO roles.

  [Note: A separate report – CEW Executive Census 2023 – also highlights the lack of female representation in leadership roles. The report projects that at the current rate of change it could take up to 50 years to reach gender parity in CEO roles. The chief driver identified in the report, behind the lack of women CEOs is lack of women in the 'leadership pipeline'.]
- This also has financial implications for women on boards. Ownership Matters Director Dean Paatsch comments:

  'Whilst more than one in three non-executive directors are now female, it is surprising that this cohort has still only produced 33 chairs across the largest 290 companies that we surveyed…And of the 15 highest paid professional directors in 2022 who received more than $1 million in fees, only one female features. The men are allowing record numbers of female directors into the tent, but are yet to meaningfully hand over the best paid chairing roles.'
- Of the 329 'new entrants to the director pool' in 2022 (ie directors who have not held a directorship in an ASX 300 listed company previously) 143 were women.
- The report also found that women directors are more likely than their male colleagues to sit on multiple boards. On average, professional NED men hold 2.2 board seats vs 2.5 board seats for women.

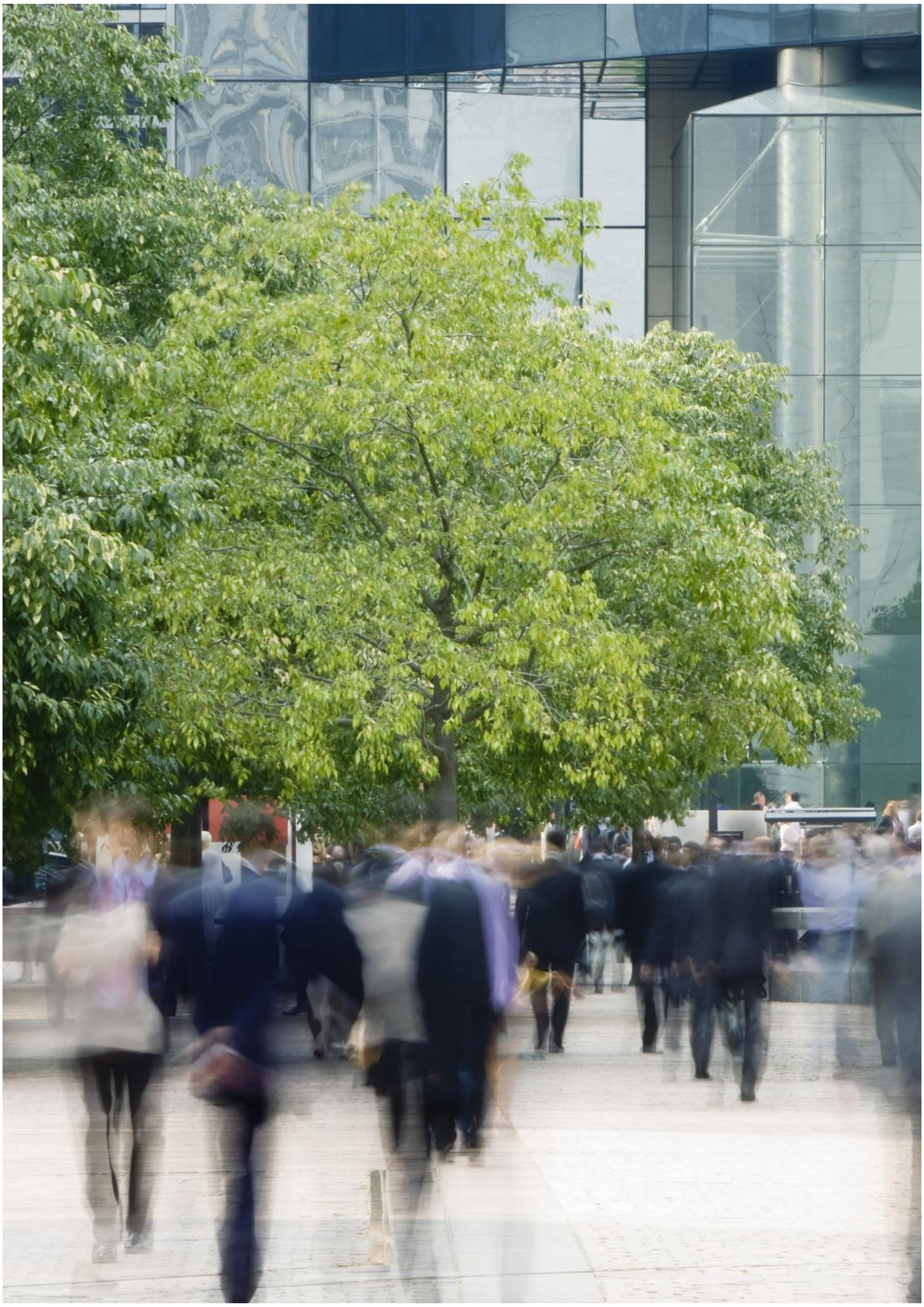
(Lack) of age diversity

Noting that information about directors' ages is not always disclosed, the report found that:

- There is lack of age diversity across the Non-executive Director (NED) cohort with ages tending to concentrate in the 60 to 69 age bracket for male NEDs and the 40 to 49 and 50 to 59 brackets for female NEDs.
- NEDs tend to be older than executive directors and directors of smaller companies tend to be younger overall than the directors of larger companies. The report found that:
  - In ASX 100 companies the average age for executive directors is 56.9 years vs 62.6 years for NEDs.
  - In ASX 300 companies average age for directors is 52.4 years for executive directors vs 60.2 years for NEDs
- Women tend to be younger than their male counterparts. The report found that:
  - In ASX 100 companies, the average age of male executive directors is 57 years vs 56.5 years for women and the average age of male NEDs is 64.7 years vs 62.6 years for women.
  - The gender age gap is greater in smaller companies vs larger companies – in the ASX 300, the gap between the average age of women NEDs and their male peers is just over eight years (55.1 years for women, vs 63.2 years for men).

CEOs tend to be internal appointments (at least in larger companies)

- 10 of the 12 new ASX100 CEO appointments in 2022 were sourced internally
- In smaller organisations, one in six ASX200 CEO appointments and three in 14 ASX 300 appointments were sourced internally.



Director independence

- The report highlights a 'trend toward an increasing proportion of non-executive directorships held by independent directors', particularly among smaller companies. According to the report, the proportion of NED directors held by independent directors has climbed to 77.1% (62.6% of all directorships) which was up from 74.3% (59.5% of all directorships) in 2021 and from 73.3% (58.7% of all directorships) in 2020.
- In terms of Chair independence, the report concludes that larger companies are more likely than smaller entities to have an independent Chair. According to the report, there were:
  - In the ASX 100 – 89 Chairs were assessed by Ownership Matters as independent
  - In the ASX 200 group – the proportion was less, with 68 Chairs assessed as independent
  - In the ASX 300 group – the proportion was even less, with 66 Chairs assessed as independent

Board tenure

- According to the report:
  - there were 18 companies across the companies assessed where average board tenure was more than ten years (in most cases, this was because founders were still in leadership roles).
  - on average, tenure for NEDs in the companies assessed was 5.6 years
  - men tend to sit on boards longer than their female colleagues - male NEDs have an average tenure of 6.5 years and average female NED tenure was 4.2 years.

Non-executive directors (NEDS) hold the majority of board seats

- According to the report, in 2022 NEDs held 86.6% of ASX100 board seats (the number has ranged between 86.4% and 86.8% over the past five years), just over 83% of ASX 200 board seats, and almost 82% of ASX 300 board seats.
- 93.1% of all NEDs in the ASX 100 are independent.
- 23 companies across the ASX 300 include zero NEDs, including two ASX 100 companies, 12 ASX 200 companies and eight ASX 300 companies (though the report notes that there has been some movement on this since these figures were recorded).

NED Pay

- The report highlights that NED remuneration tends to increase as market cap increases - fees payable to chairs and NEDs of ASX100 companies are generally higher than those in the ASX200 or ASX300 groups:
  - Average remuneration for ASX 100 NEDs is $274,936 (up from $267,933 in 2021) and $511,746 for Chairs (up from $510,444).
  - Average remuneration for ASX 300 NEDs is $172,625 (up from $162,001 in 2021) and $207,192 for Chairs (up from $190,278 in 2021)

NED 'skin in the game'

The report also assessed each NEDs 'skin in the game' ie 'their personal ownership in each of the companies they govern'.

According to the report:

- In the ASX100 group just under 44% of directorships were held by directors with holders worth less than one years' fees.
- The ASX300 group had the highest number of directorships held by NEDs with 'skin in the game' of more than 2 years' fees at 36.3%.

Commenting on these findings, Mr Paatsch queried whether the relative lack of 'skin in the game' compromises directors' focus on shareholder interests. Mr Paatsch commented:

> '…the lack of alignment between the interests of directors and shareholders remains an issue. Investors broadly support the concept of NEDs having some "skin in the game" through personal investments in ordinary shares which provide alignment with shareholders. Disappointingly, at sample date there was still 50 ASX100, 72 ASX200 and 86 ASX300 NEDs with no skin in the game, meaning they are receiving fees without having bought a single share. It was notable that almost 50% of ASX 100 directors had purchased less than one year's worth of board fees'.
>
> [Sources: Ownership Matters media release 11/09/2023; Full text report: Australian Directors – The More Things Change, The More They Remain The Same - Ownership Matters]

Diversity

DEI is a growing area of investor focus: Survey finds 66% of investors plan to increase their engagement on diversity over the next 12 months

- 40:40 Vision is an investor initiative aimed at increasing gender diversity in ASX 300 leadership by encouraging companies to set medium and long-term gender targets for their leadership teams with the aim of achieving gender parity (40% men, 40% women and 20% any gender) by 2030.

- A survey of investors conducted by the initiative identified diversity as a growing area of focus. For example:
  - most (90%+) respondents are engaging with the boards of companies they invest in on gender diversity issues as part of their ongoing/standard engagement with companies. While board representation, target setting/reporting, and managing their leadership pipeline is a focus, discussions with companies also encompass a broader range of gender-related issues eg gender pay gaps, domestic violence policies, parental leave policies and workplace sexual harassment
  - 75% are 'using their voting power to drive diversity' at board level
  - 66% plan to increase their engagement on diversity in the next 12 months.
- The survey also found that investors consider the lack of information on company gender diversity a 'barrier to taking further action' on the issue.
- 40:40 Vision Steering Committee Chair and HESTA CEO Debby Blakey considers the survey results underline the value investors place on diversity and the growing support among investors for companies to be more ambitious in their diversity efforts. Ms Blakey commented:

  > 'send a clear message to listed companies: institutional investors want to see clear targets for gender diversity, strategies for achieving workplace gender equality, and transparent reporting of progress…Corporate cultures that are not inclusive and do not encourage diversity represent a clear financial risk to investors – this can negatively impact a company's reputation, its productivity, and ability to attract and retain talent. There is clear evidence that better gender balance in leadership is not only fairer but also smart business – leading to better performance, better profits, and better corporate governance – and this creates long-term value for shareholders.'

  [Source: (accessed through Capital Monitor) HESTA media release 04/09/2023]

Remuneration

APRA has released its initial assessment of CPS 511

- The Australian Prudential Regulation Authority (APRA) has released a letter to industry, outlining the findings of its review into entities' preparations for the introduction of cross-industry prudential standard CPS 511 Remuneration (CPS 511).
- APRA states that while the review predominantly involved significant financial institutions (SFIs), 'the findings are relevant to all APRA-regulated entities' and are 'intended to support wider industry implementation, promote consistent application and clarify expectations in key areas'.
- Importantly, because the review was conducted between September 2021 and December 2022, entity compliance was not assessed (as CPS 511 was not in force at the time) – rather APRA's focus was chiefly on the design of remuneration frameworks.

Key findings

- **The positives:** APRA states that it found 'early signs of a step change in remuneration practices' including:
  - 'efforts to strengthen alignment of remuneration and risk management in remuneration frameworks' – for example, APRA observed entities were including risk measures in variable remuneration design and downward-adjustment processes.
  - Improvement in board engagement including through the remuneration committee (RemCo) of CPS 511 implementation
- **Three 'common gaps':** The letter makes clear that despite being 'broadly comfortable' with entities' progress towards implementation of the new standard, entities 'should consider' the following three 'common gaps':
  - 'limited progress implementing controls to manage potential conflicts arising from compensation arrangements of third-party service providers'
  - 'inadequate understanding of how selected non-financial measures (NFMs) will drive desired behaviour, risk outcomes and performance'
  - 'insufficient rigour in the proposed processes to ensure remuneration consequences result from poor risk management outcomes'.
- More detail around APRA's observations, as well as the hypothetical scenarios used in the review, are outlined in an Annex to the letter.
- Looking ahead, APRA writes that:
  - Learnings from the review will be considered for inclusion in CPG 511 'in due course, subject to consultation with industry'.
  - Once remuneration outcomes start to be determined under CPS 511, it will be 'better able to assess' whether the objectives of the new standard have been 'fully satisfied'. APRA flags that its approach to assessing this will be risk based including through 'prudential reviews and engagements'.

    [Source: APRA letter to industry 06/09/2023]

Shareholder Activism

As You Sow releases 2023 Shareholder impact review

As You Sow has released a report on the outcomes of its activity over the course of the 2023 proxy season.

Key points

- Engagement activity: As You Sow conducted 210 engagements with 169 companies across the following 11 issue areas: climate change (81); diversity, equity, and inclusion (43); racial justice (28); governance (13); ocean plastics, single use plastics, and recyclability (11); retirement plan climate risk (10); sexual and reproductive health (7); petrochemicals (6); water use (5); environmental health, including antibiotics in factory farming, pesticides, and PFAs(4); and political spending (2).
- In proxy year 2023, 111 of these engagements were escalated, with shareholder resolutions filed on behalf of 73 shareholders.
- Of these resolutions:
  - The Securities and Exchange Commission approved requests from companies to block two resolutions from proceeding to a vote (companies requested approval to omit a total of eight As You Sow resolutions)
  - Almost half (51 resolutions) were withdrawn in exchange for concessions from the companies targeted. You can find a full list of these (and a summary of what was agreed) at page 12 of As You Sow's report.
  - 48 proceeded to a vote (you can find the full list at page 5 of As You Sow's report)
- Average support for As You Sow coordinated shareholder resolutions was 23%. For context, separate analysis from a number of sources suggests that support for shareholder resolutions is generally down on previous years. For example: BlackRock puts the median level of support for shareholder ESG proposals at 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%.
- In 2023, total shareholder proposals slipped and the percentage landing on the ballot also fell, while median vote support fell by almost one-third compared with last year.
- Proposals that secured the highest levels of shareholder support:
  - 15 As You Sow resolutions secured 30% or more shareholder support – the level of support likely (based on a study from BlackRock) to provoke action by the company – BlackRock found that 75% of proposals that secured at least 30% of votes resulted in companies taking action.
  - Of these, 12 were climate-related (with the majority concerning plastic reduction or transition planning).
  - The proposals that secured the highest level of support were:
    - As You Sow's transition planning resolution at Raytheon Technologies (calling on the company to disclose how is plans to reduce its full value chain greenhouse gas emissions in alignment with the Paris Agreement's 1.5°C goal requiring Net Zero emissions by 2050) secured 37.8% support.
    - As You Sow's mandatory arbitration resolution at Tesla calling on the board to oversee the preparation of a publicly disclosed report on the impact of the use of mandatory arbitration on Tesla's employees, workplace culture and brand' also secured 37.8% support.
    - Plastic packaging resolutions filed at Yum! Brands and Restaurant Brands International secured the next highest level of support at 36.9% and 36.8% respectively.

[Source: As You Sow 2023 Shareholder impact review]

Meetings and Proxy Advisers

ISS reports on 2023 proxy season trends

Institutional Shareholder Services (ISS) has released its 2023 Proxy Season Digest highlighting key trends over the 2023 proxy season, based on analysis of Russell 3000 company filings.

Director elections, board composition

- According to ISS' analysis, though support for Russell 3000 directors remains high (above 97% support) it continues to (very) gradually decrease – in in 2019, median support was over 98%.
- Though also following the same downward trend, support for women and minority directors is slightly higher than their male peers.
- Looking at board composition – women account for 29.26% of Russell 3000 board seats (up from 28.7% in 2022) while ethnic minority directors account for 20.6% of seats (up from 20.24% in 2022).
- Women remain underrepresented in CEO roles – according to the report, women account for just 7% of S&P 500 CEO roles (up slightly on 6.47% last year).
- Women CEOs earn more than their male counterparts – median pay for women S&P 500 CEOs is $14.44m vs $13.19m for men.

Executive compensation

Say on Pay

For context 'Say on Pay' resolutions are management-proposed advisory resolutions, on the compensation of the most highly compensated executives in the company. According to ISS' analysis:

- Say on Pay support remains high, but continues to trend down (slightly) – median support for Say on Pay proposals at Russell 3000 companies has dropped from 95.41% in 2019 to 94.34% in 2023
- Just 2% of Say on Pay proposals failed, which

according to ISS, is more or less in line with the historic average. This is a significant drop on last year's historic failure rate of 3.43%.

- Though the Say on Pay failure rate dropped, the number of companies facing 'significant opposition' (defined in the report as 50=80% support) is 'largely unchanged from 2022'.
- ISS suggests that offering shareholder a yearly opportunity to vote on a Say on Pay resolution - which is 'widely practiced among larger companies' – is 'increasingly becoming the norm among smaller ones as well'. According to the report, just over 83% Russell 3000 (excluding S&P 1500 companies) are now adopting this course.
- ISS supported approximately 88% of say-on-pay proposals this year, up from around 86% in 2022 and in line with 2021.

The prevalence of ESG metrics is increasing

- ISS found that CEO pay is increasingly tied to ESG metrics, especially among larger companies – according to the report, 26.25% of S&P1500 companies do so (up from 21.24% last year), while 16.38% of the rest of the Russell 3000 do so (up from 12.72% in FY21).

  [Note: This is a trend that has been highlighted in a number of reports. For example, separate analysis from Semler Brossy highlights that 72% of S&P 500 companies now include some form of ESG metric in executive compensation (up from 70% last year). Analysis from Meridian Compensation Partners found that In 2023, 73% of S&P 500 companies linked a portion of incentive compensation to the achievement of ESG metrics.]

Shareholder proposals

According to the report,

- fewer shareholder proposals overall were submitted in 2023 than in previous years – 831 shareholder proposals were submitted in 2023 vs 914 in 2022 and 879 in 2021.
- more proposals proceeded to a vote than in previous years – 66.06% were included on ballots in 2023 vs 60.07% last year.
- median vote support has fallen significantly on last year from 30.03% in 2022 to 20.23% in 2023.

Shareholder E&S proposals

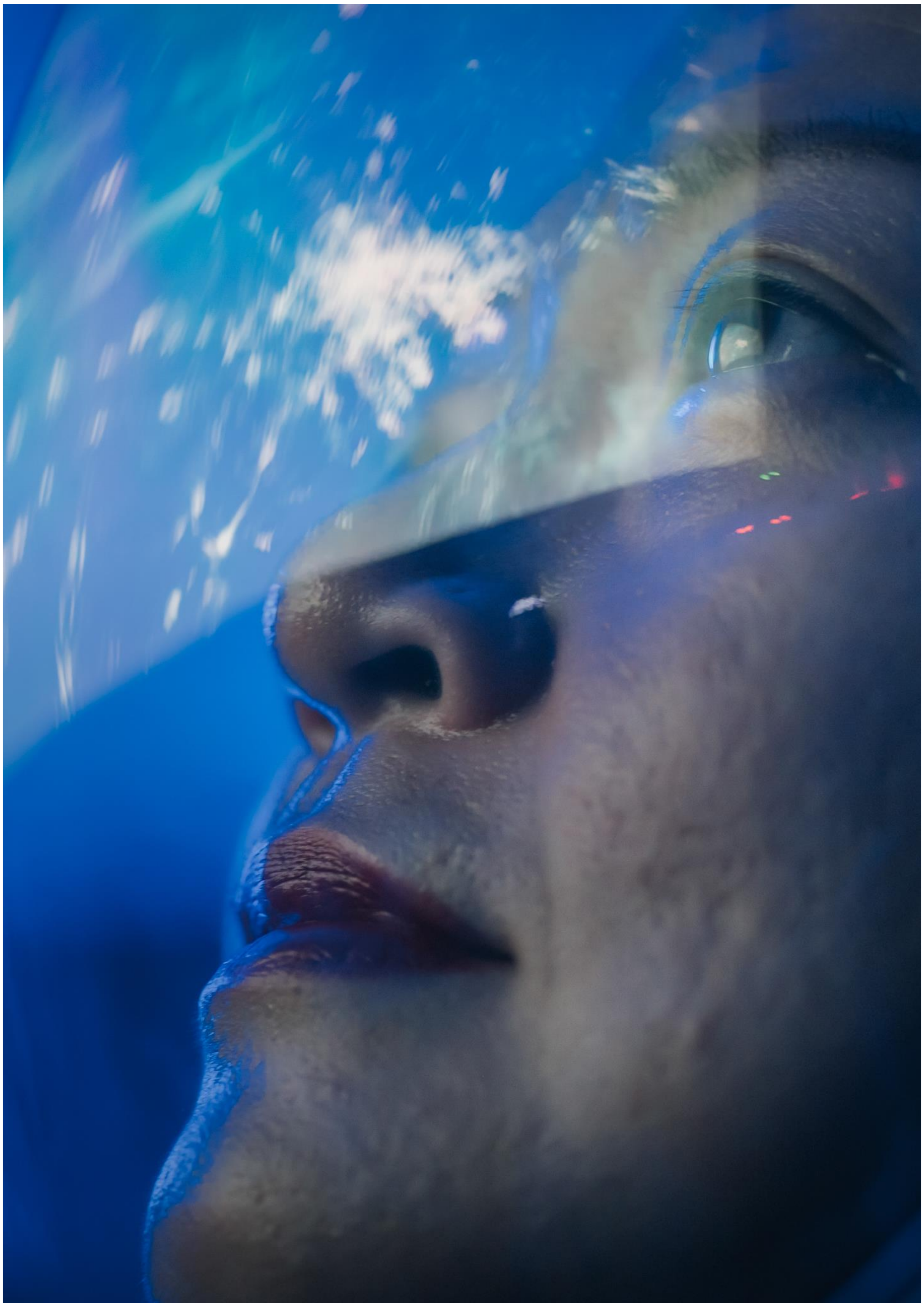
Looking specifically at shareholder environmental and social (E&S) proposals filed at Russell 300 companies, ISS found that:

- Just over 67% of all shareholder proposals were E&S proposals making it by far the largest category of shareholder proposal. In contrast, shareholder governance and compensation proposals made up a relatively small proportion of the overall total at 24.47% and 8.35% respectively.
- Social proposals are the largest subcategory (within the broader category of E&S shareholder proposals) accounting for 39.18% of proposals (down from 39.61% in 2022)
- Both the environmental and 'blended E&S' sub-categories of proposal are on the rise – the proportion of environmental proposals has increased from 19.6% in 2022 to 20.12% in 2023, while the proportion of E&S blended proposals has increased from 5.91% to 7.88%.
- The level of support for shareholder environmental proposals has dropped significantly from (median) 27.05% support in 2022 to 18.72% in 2023. Looking specifically at support for climate-related shareholder proposals, support dropped from (median) 26.44% support in 2022 to 18.42% in 2023.
- The level of support for shareholder social proposals has also dropped from (median) 23.88% support in 2022 to 17.6% in 2023. Looking specifically at human-rights related shareholder proposals, support increased from (median) 24.64% support for this subcategory of proposal in 2022 to 31.44% in 20232.
- Though the number of anti-ESG proposals filed continues to increase (8 anti-ESG proposals were included on ballots in 2020 vs 67 in 2023) the level of support has dropped from an already low base to (median) 1.9% support in 2023.

  [Source: ISS 2023 Proxy Season Digest 06/09/2023]

Institutional Investors and Stewardship

Responsible use of AI: NBIM's public statement



On 15 August 2023, Norway's sovereign wealth fund, Norges Bank Investment Management (NBIM), released a public statement outlining its views on artificial intelligence.

Our key takeaways are below.

NBIM's interest in AI

NBIM considers that AI has 'potential to affect the financial return on our investments over time'. NBIM explains:

> 'As AI becomes ubiquitous across the economy, it is likely to bring great opportunities but also severe and uncharted risks – both for the companies we invest in and for the stakeholders affected by their activities. AI can be a powerful tool to augment business models and human processes, and can result in significant gains for companies. However, AI continues to develop at a pace where it can be challenging to predict and manage risks. Beyond regulatory, operational and reputational risks to companies, development and use of AI systems can impact society at large and human rights such as privacy, security, personal freedom and non-discrimination. It can increase the risk of large-scale misinformation, deception or manipulation'.

Supportive of global 'comprehensive and cohesive regulation of AI'

NBIM considers that global, 'comprehensive and cohesive' regulation of AI will benefit the companies it invests in, and by extension the fund, by supporting and enabling, 'safe innovation and market predictability'.

The statement observes that a number of companies/experts have suggested an international oversight body as a 'suitable solution' in this context, but offers no opinion beyond this though NBIM does encourage companies to 'engage constructively and transparently with standard setters and regulators'.

All companies expected to have appropriate AI governance systems in place

The statement underlines NBIM's expectation that all companies who engage with AI, do so responsibly. NBIM states:

> 'As an investor, we view responsible development and use of AI as a core element of responsible business conduct – and a necessary complement to the emerging regulatory landscape. AI governance systems should be at the basis of company innovation and adoption of AI and consider potential impacts across the AI value chain. Company approaches should build on internationally acknowledged standards such as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct'.

In NBIM's view, companies that develop their own AI systems have a 'particular responsibility' in this context.

What does responsible development and use of AI look like? NBIM's three 'key elements'

The statement offers insights into what NBIM considers are the three 'key elements of responsible AI'. The table below provides a brief snapshot.

<table>
<tr><th colspan="2">NBIM'S THREE 'KEY ELEMENTS' OF RESPONSIBLE AI</th></tr>
<tr><td>Board accountability</td><td>

The statement makes clear that NBIM considers the board bears overall responsibility for companies' 'responsible development and use of AI' including responsibility for ensuring appropriately 'robust' AI governance and oversight is in place.
Further to this, the statement suggests that a good starting point is for AI policies and governance to be:

'aligned with internationally acknowledged standards for human rights and responsible business conduct, as well as relevant AI guidelines such as the OECD AI Principles and UNESCO's Recommendation on the Ethics of AI, can ensure minimum safeguards are in place. AI governance structures that integrate sector-specific tools and best practices, are tailored to the company's business model and specific use cases for AI, and are regularly updated, are necessary to manage evolving risks and seize opportunities'.
NBIM adds that it considers boards have a key role in 'overseeing a company culture of responsible AI stewardship to ensure implementation of AI policies and guidance across the business'.
</td></tr>
<tr><td>'Transparency and explainability'</td><td>

NBIM considers 'transparency and explainability' to be key to ensuring accountability and building trust.
NBIM's expectation is that companies are able to:

'explain how the AI systems they develop or use have been designed, trained and tested – and how they align with human values and intent. Stakeholders should be enabled to assess the potential impacts of AI systems and understand their accuracy, efficiency and reliability. Companies should also provide information to relevant and trusted third parties, such as auditors or regulators, to allow them to verify the AI system and assess its risks'.
More broadly, NBIM considers 'transparency' to be critical to gaining informed consent from AI users and 'ensuring legitimacy among broader stakeholders'. NBIM writes:

'It should be clear when a person is interacting with or affected by AI systems, including synthetic content. Informing people of how AI is used in outcomes that affect them, and providing appropriate access to remedy, are also core components of responsible business conduct and key to mitigating adverse impacts'.
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<tr><td>Robust risk management</td><td>

NBIM's expectation is that companies are 'proactive' in their management of AI-related risk and 'transparent about their objectives for developing and deploying AI'. NBIM writes that:
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NBIM'S THREE 'KEY ELEMENTS' OF RESPONSIBLE AI	
	'Risk management processes should be robust and proportionate to the company's risk exposure, and seek to identify, assess and mitigate risks to business, people and society. In addition to ensuring business resilience, AI risk management processes should address broader impacts and safeguard privacy, security and non-discrimination, and ensure effective human oversight and control. Risk measures should include evaluations of system limitations and the potential consequences of system failure. Development or deployment of AI systems that can pose particularly severe risks to people, society or business outcomes should be subject to additional controls. Risk management processes should also have appropriate safeguards to manage the risks of misinformation, deception or other adverse impacts. Importantly, we believe AI systems, guidelines and risk management processes should be independently verified and regularly audited over time'. ▪ Importantly, NBIM also considers that: 'Companies that develop and use AI have a responsibility to prevent and ***mitigate risks across the AI value chain*** in situations where they cause or contribute to adverse impacts, including impacts on people in vulnerable situations. Diverse teams, datasets and stakeholder engagement, and appropriate oversight structures, are important for effectively preventing and mitigating unintended impacts or the perpetuation of harmful biases. We believe companies should take particular care and give due consideration to impacts on people in vulnerable and marginalised situations, such as children'. [emphasis added]

Looking ahead

- NBIM states that looking ahead, it will be paying 'close attention' to the following five issues: a) development of international standards and regulation for companies; b) companies' implementation of responsible AI policies, guidelines, risk management and related. Reporting; c) risks related to privacy and security, and misinformation, deception and manipulation; d) effects on inequality and discrimination; and e) long-term effects on the workplace and companies' human capital management.
- Companies should expect to engage on 'responsible development of AI' as NBIM looks to integrate AI-related risks/opportunities into its approach to managing its portfolio.

[Source: NBIM media release 15/08/2023]

ESG

Mandatory climate disclosure in Australia | Investors tell Treasurer 'further steps' are needed to support entities to produce 'credible transition plans'

- Ahead of the expected introduction of mandatory climate reporting requirements in Australia (see: Introduction of mandatory climate reporting in Australia: Second round of consultation launched - Technical update - MinterEllison), a group of investors (Investor Group on Climate Change, CDP and Principles for Responsible Investment) have written to the Treasurer calling for the government to go further than is currently proposed, as the UK and EU have done, by establishing:

  > 'a clear framework for developing and disclosing transition plans which supports a whole of economy just transition aligned with limiting global temperatures to 1.5°C. This would include introducing best practice regulatory guidance and minimum requirements for transition plan disclosure in Australia. This should build on the ISSB Climate Standard, draw on international examples, and involve close consultation with finance sector representatives, industry experts and the wider community'.

- Investors identify the following five points as key to ensuring transition plans meet investor information needs (and by extension, support investment):
  - 'Describe the ambition of the entity's transition plan by disclosing its short, medium and long-term targets, objectives, priorities, and milestones for responding and contributing to an orderly and just whole-of-economy transition.
  - Describe the business strategies and actions to deliver those targets, including identifying implications for resourcing, products and services, capital and operational expenditure, engagement with stakeholders across the entity value chain, use of offsets as well as internal policies and financial planning.
  - Demonstrate how targets, business strategies and actions align with a 1.5°C decarbonisation pathway, including with reference to the latest international agreement on climate change (i.e., the Paris Agreement), domestic regulatory commitments, and comprehensive and credible 1.5oC aligned sector pathways10, including underlying methodologies and assumptions.
  - Demonstrate how investment commitments and financial planning (capital and operational expenditures, revenue etc) align with targets, including alignment of the overarching capital allocation strategy, acquisitions and disposals, disclosing a forward oriented CapEx budget and details of the operating plan, commitments to a just transition, any closure provisions and rundown plans.
  - Set out the timing for disclosing, monitoring and tracking progress, updating and verifying the transition plan including independent verification of targets'.

- Announcing this, IGCC CEO Rebecca Mikula-Wright commented:

  > 'To help put capital to work in the right parts of the economy, investors need comparable, reliable and standards-based transition plans to be part of companies' mandatory annual reporting.'

  [Sources: IGCC media release 08/09/2023; Joint investor statement: Corporate climate transition plans are an essential building block on global reporting baseline]

Mitigating the risk of carbon leakage: Professor Frank Jotzo to lead review, review set to report by 30 September 2024

- The Australian government has announced that Professor Frank Jotzo (Professor at the Australian National University's Crawford School of Public Policy, Head of Energy, ANU Institute for Climate, Energy and Disaster Solutions) is set to advise the Department of Climate Change, Energy, the Environment and Water's review of potential policy options to address the risk of 'carbon leakage'. For clarity, the risk of 'carbon leakage' refers to the risk of businesses moving their operations overseas in order to take advantage of looser restrictions on/policies on carbon emissions.

- Broadly, the Review will have three areas of focus:
  - It will assess carbon leakage risks
  - Develop policy options to address these risks
  - (Importantly) conduct an 'assessment of the feasibility of an Australian Carbon Border Adjustment Mechanism, particularly in relation to steel and cement'.

The full terms of reference are here.

- Announcing this, Minister for Climate Change and Energy Chris Bowen commented:

  'We need to ensure our ambitious climate policies have a positive global effect and won't be diluted by the supply of carbon-intensive products moving to countries with weaker climate policies…The review will look closely at the risk of carbon leakage and develop policy options to address any such risks. We need to consider how new policy options, like the CBAM being implemented in the European Union, could work for Australia's national circumstances.'

Timing and next steps

- It's envisaged that the review will undertake two rounds of stakeholder consultation, and present advice to the government by 30 September 2024.
- Policy options implemented in response to the review 'could be part of the Australian government's net zero 2050 plan'.

  [Source: Minister for Climate Change and Energy Chris Bowen media release 06/09/2023; Department of Climate Change, Energy, the Environment and Water consultation: Australia's Carbon Leakage Review]

Survey finds that the majority of Australians believe that the impacts of climate change are exacerbating the current cost of living crisis and support the introduction of new taxes on fossil fuel producers

The Australia Institute's 2023 Climate of the Nation survey tracks public attitudes toward climate change.

Some Key Points

Concern about climate change is high

According to the survey:

- 77% of Australians believe climate change is occurring (vs 12% who do not believe it). However, there is a marked generational divide on the issue – 92% of those aged 18-24 believe it (5% do not), in contrast those in the 65+ age bracket are less likely to believe it (67% believe it is occurring and 16% do not). Australians who are culturally and linguistically diverse (CALD) are also more likely to believe climate change is occurring (83%) compared to those who are not (74%).
- 71% of Australians report being concerned about climate change. The top three issues of concern are:
  - more droughts and flooding impacting crop production/food supply the top concern (80%)
  - more bushfires (79%)
  - the extinction of plant/animals (79%)
- Again, looking more closely younger people are more concerned than older people. Of those aged 18-24, 83% are concerned about climate change, compared to 58% of those aged over 65.

The majority of people believe that climate change is contributing to/exacerbating cost of living pressures.

For example, the survey found that:

- 75% of people are concerned about climate-related disruptions to supply chains making it hard to buy necessities
- 75% of people are concerned that climate change will result in more expensive insurance premiums, while 21% are not concerned.

The majority of survey respondents support the introduction of new taxes on the fossil fuel industry

According to the Australia Institute, the cost of natural disasters for Australia's economy is $38 bn annually and this is projected to increase to $73bn by 2060. The report found that 45% of people consider fossil fuel producers should pay for the costs of responding to climate change. For context, only 12% consider the cost should be borne by taxpayers or the people impacted (15%).

The survey also found that:

- 74% of those surveyed would support 'a polluter-pays tax'

- 66% of those surveyed would support a windfall profits tax on the oil and gas industry
- 59% of those surveyed would support a levy on fossil fuel exports to fund climate adaptation

[Sources: Australia Institute media release 13/09/2023; Australia Institute 2023 Climate of the Nation Survey]

ShareAction calls on the UK government to mandate ethnicity pay gap reporting, flags engagement plans on the issue

- As a step towards lessening racial inequality, ShareAction and Runnymede Trust are calling on the UK government to adhere to its initial 2018 commitment to mandate Ethnicity Pay Gap reporting for workplaces with 250+ employees. This would work in much the same way as gender pay gap reporting requirements.
- In addition, the groups have called for the introduction of 'new laws' to require these employers to publish an 'action plan' to address any issues identified and for the government to carry out a two-year review to track the progress made by these organisations.
- The call follows the government's decision to walk back from its commitment to mandate ethnicity pay gap reporting and the very low levels of voluntary reporting by companies to date – according to ShareAction, at present, only 18 FTSE 100 companies disclose this information.
- Separately, ShareAction has flagged it will be 'working with a coalition of investors to ensure that the companies they hold shares in have procedures in place for robust Ethnicity Pay Gap Reporting'.

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

In Brief | In Brief | Mandatory climate disclosure in California is another step closer after the first of two Bills - Climate Bill SB 253 which will require companies that do business in California and earn at least $1 billion report annually on emissions across their supply and value chains (Scope 3 emissions) - passed the Senate. The Bill is now set to go to the Governor for final approval

[Sources: Senator Scott Weiner media release 13/09/2023; Ceres media release 11/09/2023]

In Brief | How to drive down Scope 3 (supply chain) emissions: The We Mean Business Coalition has launched a suggested framework/approach – the supplier cascade - to assist businesses to accelerate supply chain decarbonisation

[Source: We Mean Business Coalition media release 05/09/2023]

In Brief | Climate Action 100+ has released a new tool for investors – the Net Zero Standard for Diversified Mining – which aims to provide both the metrics needed to enable effective assessment diversified minters' transition plans and a basis for engagement discussions

[Source: Climate Action 100+ media release 06/09/2023]

Financial Services

Top Story | A welcome development (but room for refinement): Submission on the draft FFSP Bill

The Australian Government has released Exposure Draft legislation (**FFSP Bill**), which seeks to codify licensing exemptions for foreign financial service providers (**FFSPs**). The explanatory memorandum (**EM**) to the FFSP Bill states that it will 'facilitate cross-border financial services while balancing the need to ensure regulatory oversight of foreign financial services provider activity in Australia'. The FFSP Bill aims to achieve this objective by replacing the existing licensing relief for FFSPs with the following four exemptions for FFSPs:

- professional investor exemption
- comparable regulator exemption
- market maker exemption, and
- fit and proper person test exemption.

You can find our detailed overview of the proposed changes here: The New World for FFSPs - INSIGHT - MinterEllison

MinterEllison's submission

MinterEllison has also made a submission on the draft FFSP Bill. Though generally supportive of the proposed approach, the submission raises concerns about some aspects of the draft legislation and puts forward suggested improvements to address these. You can download the full text of our submission here: A welcome development (but room for refinement): Submission on the draft FFSP Bill - INSIGHT - MinterEllison

APRA consults on proposed changes to Reporting Standard ARS 180 Capital Adequacy: Counterparty Credit Risk

- The Australian Prudential Regulation Authority (APRA) is consulting on proposed amendments to Reporting Standard ARS 180 Capital Adequacy: Counterparty Credit Risk.
- Proposed changes include:
  - Amending ARS 180.0 'align the regulatory burden on non-significant financial institutions (non-SFIs) with APRA's previous prudential guidance, as part of the new capital framework's reduction of reporting burden on smaller ADIs and to improve entities' understanding of regulatory obligations'.
  - Moving reporting form ARF 226.0 Margining and risk mitigation for non-centrally cleared derivatives (ARF 226.0) from ARS 180.0 to a new reporting standard to be called ARS 227 Margining and risk mitigation for non-centrally cleared derivatives (ARS 226.0). No changes to reporting obligations are proposed. Moving the form is intended to make it easier for industry to locate it.
- The due date for submissions is 22 September 2023.

[Source: APRA letter to industry 11/09/2023; Consultation on changes to Reporting Standard ARS 180 Capital Adequacy: Counterparty Credit Risk]

APRA finalises 'minor administrative updates' to Financial Claims Scheme standard APS 910 Financial Claims Scheme (APS 910)

- On 26 July 2023, the Australian Prudential Regulation Authority (APRA) opened a consultation on a proposal to remake Prudential Standard APS 910 Financial Claims Scheme (APS 910), with what APRA describes as 'minor administrative updates'. For context, the standard requires

  'locally-incorporated authorised deposit-taking institutions to be operationally ready for the activation of the Financial Claims Scheme (FCS), Australia's deposit insurance scheme. This scheme provides insurance protection for deposits if needed in a crisis'.

- APRA flags that the four submissions received in response to the consultation were supportive of APRA's proposed approach, and confirms that it will remake the standard as proposed. Clean and marked up versions of the updated standard are available on the APRA website here.
- What APRA describes as 'broader feedback' on the standard in some submissions is planned to be taken into consideration when a comprehensive review of APS 910 is undertaken 'in due course'.
- The updated standard will come into effect on 1 October 2023.

[Sources: APRA letter to industry 12/09/2023; APRA Remake of Prudential Standard APS 910 Financial Claims Scheme]

DDO interim measures extension: ASIC Corporations (Amendment) Instrument 2023/706 registered

- The Australian Securities and Investments Commission (ASIC) has registered an instrument - ASIC Corporations (Amendment) Instrument 2023/706 – that both: a) extends the operation of Corporations (Design and Distribution Obligations Interim Measures) 2021/784 instrument (the principal instrument) until 5 October 2028; and b) removes an exemption for cashless welfare arrangements that is no longer necessary (following the making of the Corporations Amendment (Design and Distribution Obligations - Income Management Regimes) Regulations 2023).
- For context, the explanatory statement notes that the principal instrument was initially made for a period of two years, to 'provide certainty on the application of the DDO regime in the period prior to the government making the necessary legislative amendments' to ensure the regime operates as intended.
- As the government has not yet made the legislative amendments 'required to achieve the intended operation of the reforms,' ASIC has extended the operation of ASIC Corporations (Amendment) Instrument 2023/706 to allow the government more time to do so.

[Source: ASIC Corporations (Amendment) Instrument 2023/706]

Simplifying and improving the navigability of Treasury portfolio laws: Treasury Laws Amendment (2023 Law Improvement Package No. 1) Bill 2023 has passed both Houses

On 7 September 2023 Treasury Laws Amendment (2023 Law Improvement Package No 1) Bill 2023 (Cth) (Bill) passed both Houses without amendment in line with the Senate Economics Legislation Committee's report.

Broadly, the changes will:

- implement a number of amendments aimed at simplifying and improving the navigability of existing Treasury portfolio laws in line with recommendations in interim reports A and B of the Australian Law Reform Commission (ALRC) Review of the Legislative Frameworks for Corporations and Financial Services Regulation.
- amend the enabling acts of certain legislative instruments regulating the insurance industry, to ensure sunsetting insurance instruments that are being remade are up to date (in line with the findings of a thematic review of Insurance Instruments that are due to sunset on 1 October 2023).
- transfer what the explanatory memorandum describes as 'longstanding and accepted matters' currently contained in three ASIC made legislative instruments to the Corporations Act 2001 (Cth) and the National Consumer Credit Protection Act 2009 (Cth)
- make 'minor and technical' changes to various Treasury portfolio laws to 'correct drafting errors, repeal inoperative provisions, address unintended outcomes, and make other technical changes'.

[Source: Treasury Laws Amendment (2023 Law Improvement Package No 1) Bill 2023 (Cth)]

UK financial regulator to review treatment of 'politically exposed persons'

- The UK Financial Conduct Authority (FCA) will review regulated firms' treatment of 'politically exposed persons' (PEPs) based in the UK, to ensure 'political figures' are not being refused services unfairly as a result of financial institutions taking an unduly strict approach to compliance with anti-money laundering legislation.
- In undertaking the review, the regulator will consider how financial institutions are:
  - 'applying the definition of PEPs to individuals

- conducting proportionate risk assessments of UK PEPs, their family members and known close associates
- applying enhanced due diligence and ongoing monitoring proportionately and in line with risk
- deciding to reject or close accounts for PEPs, their family members and known close associates
- effectively communicating with their PEP customers
- keeping their PEP controls under review to ensure they remain appropriate'

- The regulator states that it is undertaking the review because:

  'of concerns that firms may not be treating customers individually as directed by both the legislation and FCA guidance. This matters as individuals may find themselves excluded from products or services through no fault of their own. As well as potential unfairness, this also potentially harms the reputation of the UK's financial services sector'.

- The full terms of reference for the review are here.

- The review will is due to report by the end of June 2024. The regulator has said it stands ready to 'take prompt action if any significant deficiencies are identified in the arrangements of any firm assessed'.

- Though not directly referenced in the regulator's announcement, the review follows a private banks' decision to close Brexit party leader Nigel Farage's bank account.

  [Source: FCA media release 05/09/2023]

ASIC sues BNPL provider over alleged unfair contract term in contract with small business account holders

- The Australian Securities and Investments Commission (ASIC) has commenced court proceedings against a Buy Now Pay Later (BNPL) provider over the inclusion of an (allegedly) unfair contract term in its User Agreement (which forms part of its standard form contract with Australian small business account holders).

- According to ASIC's statement, the term operates to enable the BNPL provider to retain the financial benefit of any errors/discrepancies in fees charged to these customers if they do not notify it of the issue within a 60 day timeframe. ASIC Deputy Chair Sarah Court summed up ASIC's concerns as follows:

  'ASIC has commenced this action to protect the interests of small businesses. We allege this term is unfair because it allows…[the BNPL provider] to escape the consequences of its own errors in overcharging small businesses, and places additional burdens on small businesses to detect and correct charging errors.'

- In addition, ASIC alleges the term is unfair because it:
  - 'causes a significant imbalance in the parties' rights and obligations under the contract
  - is not reasonably necessary to protect…[the company's] legitimate interests, and
  - would cause detriment to…[the company's] business account holders if the term were relied on'.

- ASIC is seeking declarations that the term is void. ASIC is also seeking injunctions and corrective orders.

  [Source: ASIC media release 07/09/2023]

Risk Management

Top Story | Cost of living, privacy and AI top the list of ethical challenges facing Australia

Our key takeaways from the Governance Institute of Australia's 2023 Ethics Index are below.

Key Takeouts

- Australians are placing a higher value on ethics than ever - the report found that importance placed on ethics in society has risen to an all-time high of 84, driven in large part by Millennials (and Gen X).
- Rising cost of living pressures and impacts of inflation top the list of ethical challenges facing Australia. Cybersecurity breaches and privacy protection ranks second (37%) and the increasing use of AI ranked third (31%)
- Acting on climate change also ranks in the top five ethical challenges facing the country.
- The corporate and financial services sectors (banking, finance and insurance) ranked in the bottom three sectors in terms of perceived ethical behaviour – though there was some improvement on last year.
- Perhaps unsurprisingly, most respondents consider that senior roles within organisations have the most impact on influencing ethics within an organisation – consistent with last year.

Overview

The Governance Institute's eighth annual Ethics Index tracks changes in public attitudes to the importance of ethics generally, and also changes in public perceptions around the extent to which certain groups can be trusted to behave ethically.

The findings are based on a survey of 1000 people conducted during June-July 2023. Our key takeaways are below.

More ethical than last year (but further away from living up to expectations)

- Overall, the 2023 Index found that public perceptions of the ethics of Australian society has recovered from last year's dip, with the overall Ethics Index Score now at 45 (up from 42 in 2022, in line with the score in 2021).
- The report attributes this in chief to the increase in trust/ethical perceptions of the public service – the ethics score for the public service returned to a score of 46, in line with 2021 (up from 38 in 2022).
- Despite the lift in the overall ethics score, the survey highlights a widening gap between public expectations of how ethical something should be and how ethical the public think it actually is – the ethics expectation deficit. The expectation deficit sits at -39 this year (up from -37 last year and -28 in 2021). Commenting on this Governance Institute of Australia CEO Megan Motto said it
- 'indicates that there's still plenty of work to do by organisations and individuals, both in the public and private spheres to ensure good, ethical conduct and a positive culture remain top of the agenda.'
- According to the report, the widening gap is being driven chiefly by Millennials – Millennials were found to be placing more importance on ethical behaviour than previously (expectations increased 15 points on 2022).

Top five ethical challenges

Respondents nominated the following issues as the top five greatest ethical challenges facing Australia in the next 12 months.

- The standout concern is the rising cost of living and impacts of inflation (eg housing, healthcare) which was nominated by 54%.of respondents.
- Cybersecurity breaches and privacy protection ranks second (37%).
- Increasing use of AI ranked third (31%).
- Major reform and overhaul of the aged care sector (23%) which ranked as the top concern in 2022's Ethics Index

- Ensuring climate change and environmental issues continue to receive attention and action (21%), which ranked third in the list of top concerns in 2022 Ethics Index

Other key challenges

The following were nominated as the next most pressing ethical issues facing the country:

- Executive remuneration (21%). The report suggests that this is linked to the overall high level of concern over cost-of-living pressures.
- Referendum on the Voice to Parliament (20%)

Communication about data breaches is considered to be an 'urgent ethical obligation'

The survey found that the majority of survey respondents (73%) consider companies have an urgent ethical obligation to notify customers of all data breaches (ie not just serious data breaches).

Responsible use of AI

- The survey found that the majority of survey respondents (71%) consider companies have an urgent ethical obligation to ensure that their technologies are not being used by others to mislead or deceive.
- 60% of respondents considered that users of generative AI (eg ChatGPT) have an urgent ethical obligation to acknowledge that their material has been created using generative AI.

Acting on climate is considered to be an urgent ethical imperative for the public and private sectors

- When asked to nominate who has an ethical obligation to tackle climate change the majority respondents indicated that the Federal government, multi-nationals, international bodies (eg the UN), State governments, Australian businesses and local councils have an urgent ethical obligation to act. The Federal government was thought to bear the greatest responsibility of all groups with 67% of respondents indicating it has an 'urgent ethical obligation' to act.
- Interestingly, (especially in light of the high level of concern around cost of living pressures) the report also found that the public considers that that organisations have an ethical obligation to act on climate change even if this results job losses, fewer jobs or a reduction of profits.
- Though most respondents (78%) consider individuals to have an obligation to act on the issue, less than half of this group (43%) consider it to be an 'urgent ethical obligation'.

  [Note: A separate survey of public attitudes to climate change released by the Australia Institute found that concern about the impacts of climate change is high (71% of respondents reported being concerned about climate change). The survey also highlights there is acceptance of a link between climate change and cost of living pressures and moreover, that climate change is exacerbating cost of living pressures – for example 75% of survey respondents reported being concerned about climate-related disruptions to supply chains making it harder to buy necessities. In terms of government action on the issue, the survey found (among other things) strong support for the introduction of new taxes on fossil fuel producers - 74% of those surveyed would support 'a polluter-pays tax', 66% of those surveyed would support a windfall profits tax on the oil and gas industry and 59% of those surveyed would support a levy on fossil fuel exports to fund climate adaptation.]

Large corporations and the financial sector still have work to do…

- The corporate and financial services sectors (banking, finance and insurance) ranked in the bottom three sectors in terms of perceived ethical behaviour. Only the media sector is perceived as less ethical.
- Having said this, there was some improvement on last year -
  - At an organisational level, public companies are seen to more ethical than in 2022, increasing from 21 to 24. They are still seen as more ethical than Australian unlisted and private companies (13, down from 14 in 2022) and foreign companies operating in Australia (-6 up from -9).
  - Company Secretary (consistent with last year) is perceived to be the most ethical occupation within the corporate sector with a net score of 26.
  - Directors of foreign companies operating in Australia, Senior executives and Chairs of companies ranked as the three (perceived) least ethical occupations within the sector.
  - Turning to perceptions ethical behaviour within the finance sector, Accountant is perceived to be the most ethical occupation with a net score of 35, while funds managers and mortgage brokers are perceived to be the least ethical with a score of 11 respectively.

- At organisational level, industry superannuation funds were perceived as the most ethical organisations with a score of 35, while payday lenders ranked as the least ethical with a net score of -30.
- The public considers leaders have the greatest ability to set the tone from the top
- Perhaps unsurprisingly, most respondents consider that senior roles within organisations have the most impact on influencing ethics within an organisation – consistent with last year.
- CEOs were ranked top in terms of having the greatest influence with a net score of 69 (up from 64 in 2022), followed closely by the board of directors (66 up from 62), and senior management (at 64), and people holding Chair roles (59). This is potentially concerning given the negative public perceptions of Senior executives and Chairs in particular (flagged above).
- Interestingly, given the discourse around 'licence to operate' and the potential (financial and other) risks associated with falling foul of public expectations, survey respondents ranked customers and the general public in the bottom five groups in terms of the level of influence they are perceived to have over company ethics, together with 'the general workforce' and suppliers.
- Consistent with last year, activists are perceived to have the least influence over companies' ethical behaviour.

Top five ethical issues in business

- Corruption remains the top issue facing corporate Australia, followed by company tax avoidance, misleading and deceptive advertising, discrimination and bullying in the workplace.
- Environmental responsibility ranks ninth on the list.
- Treatment of suppliers ranked as the lowest priority.

[Sources: Governance Institute media release 12/09/2023; Governance Institute Ethics Index 2023]

The rush is on: Australian business is embracing AI, but a new survey suggests governance/oversight is lagging

Datacom has released the findings of a survey into Australian business leaders' attitudes towards AI usage and governance.

The findings are based on the responses of a nationally representative survey of 318 business decision markers for IT services undertaken in July 2023. Here are our key takeaways.

Business leaders' view of AI is positive

- The majority (65%) of business leaders see AI as a positive development and support its use within their organisation
- 74% consider 'Australia is ready to embrace AI'
- When it comes to employee use of AI tools in the workplace, the vast majority of leaders are even more supportive (86%)
- Only 3% of leaders report they are uninterested in AI/do not support its use within their organisation

Quick to embrace the technology

This strong support/positive outlook is reflected in the strong uptake of AI among Australian businesses

- 72% of businesses report using AI in some form – only 21% report their business does not do so
- Of the businesses not already using AI, only 12% have no plans to do so in future

Sectors expected to benefit most from the new technology

- The sectors business leaders believe will benefit most from AI are: Advertising and Marketing; Financial Services; Healthcare; and Administrative Services.
- Professional and Scientific Services, Retail and Transport are also expected to be among the top sectors to benefit.

Top three concerns around use of AI

- The three top concerns around use of AI are identified in the report as:

- – Security – ie 60% of respondents are unsure what security implications AI may have. Interestingly, the report also flags that 80% of business leaders feel 'well educated' and aware of the security risks of AI vs just 20% of the opposite view.
  - – Safety – ie 60% of respondents are also concerns about control or loss of control of AI.
  - – Ethical concerns about use of the technology is ranked next (45%).
- Despite the rapid uptake of AI, 58% of business leaders believe 'they will struggle to adapt to the AI revolution' and most (63%) consider internal AI specialists will be needed to incorporate AI into the business'.
- Applying a sector-specific lens, leaders believe the sectors that carry the most risk/concern to society when it comes to AI usage are: Financial Services, Healthcare and the Legal Sectors.

AI governance is lagging AI adoption?

The report found that 'across the board, the foundation for effective and safe use of AI hasn't been laid'. In support of this, the report points to the following findings:

- 52% of businesses have a staff policy around AI use in place
- 51% have conducted staff awareness training
- 42% have commercial and financial targets for the use of AI
- 39% have audit, assurance and governance frameworks in place.

Strong support for regulation of the use of AI within government/in the public sector

According to the report, there is strong support (89%) for the government to implement legislation or other 'controls' around the US of AI within the government and/or public sector.

[Source: Datacom media release 27/08/2023; Full text report: 2023 AI Attitudes in Australia]

OAIC H1 2023 Notifiable Data Breach report: Human error still a major cause of breaches

Ongoing vigilance in data protection measures essential | OAIC

On 5 September 2023, the Office of the Australian Information Commission (OAIC) released its latest Notifiable Data Breach report covering the period January to June 2023. The report highlights the leading sources of data breaches as well as 'emerging issues and areas for regulated entities' ongoing attention'.

Our key takeaways are below.

Number of reported breaches fell 16%

- 409 breaches were notified during the period vs 486 in July to December 2022 – a 16% decrease – though OAIC observes that:

  'Since the start of the NDB scheme in February 2018, the OAIC has observed a trend where more notifications are received in the second half of the calendar year'.

Top five sectors

- The five sectors with the highest number of reportable breaches were:
  - – Health (63 or 15% of all notifications)
  - – Finance (54 or 13% of all notifications)
  - – Recruitment agencies (33 or 8%)
  - – Legal, accounting and management services (26 or 6%)
  - – Insurance (25 or 6%).

Most common source/cause of breaches

- The majority (70%) of breaches were the result of 'malicious or criminal attack'.
- Human error was the next most common cause – accounting for 26% of breaches.
- 4% of breaches were attributed to 'system fault'.

'Cyber incident' breakdown

- 42% of all reported breaches were the result of a 'cyber security incident'.
- Within this category of breaches, the largest subcategory was ransomware attacks (31%), followed by 'compromised or stolen credentials' (method unknown), and Phishing (compromised credentials).
- Looking at large-scale breaches – 21 of the 23 breaches that affected over 5000 during the period were caused by cyber incidents. While ransomware and use of stolen credentials were the leading causes of breaches within this group, two breaches affecting over 5000 people were caused by 'a rogue employee or insider threat and theft of paperwork or a data storage device'.

Human error breakdown

- The report identifies the following as the top three causes of human error breaches: 1) personal information sent to the wrong email (46%); 2) unauthorised/unintended disclosure or publication of information (18%); and 3) loss of data storage device/paperwork (9%).

Kinds of information exposed

- Most breaches (87%) involved contact information (eg individual's name, home address, phone number or email address), followed by identity information (eg individuals date of birth, passport details and driver licence details) (64%) and financial details (eg bank account, credit card numbers) (40%).

People impacted

- Breaches affecting 100 or fewer individuals comprised 63% of notifications and breaches affecting between 1 and 10 individuals accounted for 43% of notifications, similar to previous reporting periods.
- There were 23 breaches reported that affected over 5,000 Australians (down from 42 in the previous period). OAIC attributes this to overall (16%) decrease in the number of notifications received during H1 2023.
- One breach reported during the period is thought to have impacted ten million+ people – the first time a breach of this scale has been reported.
- The report records seven instances where the number of people impacted is unknown.

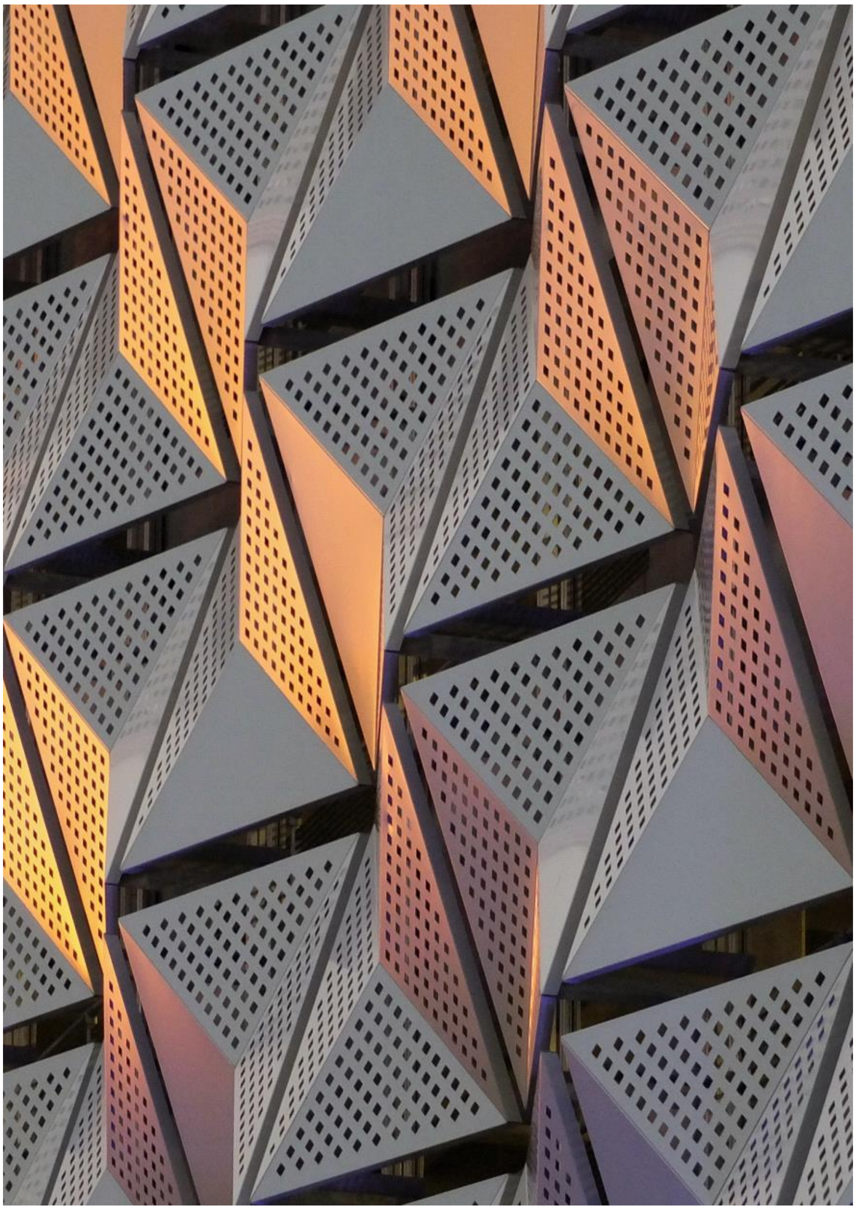
Time taken to identify breaches

- 78% of breaches were identified by the entity within 30 days of it occurring, consistent with the previous period.
- In 1% of cases, the reporting entity was unable to determine when the breach occurred.
- Human error breaches (81% identified within 30 days) were the fastest to be identified, followed by malicious or criminal attacks (77%).
- 74% of entities notified the OAIC within 30 days of becoming aware of an incident, similar to 72% in the previous period.

[Source: OAIC Notifiable Data Breach report January to June 2023]

UCT reforms: ACCC urges business to review their standard form contracts ahead of November changes

- The Australian Consumer Law's unfair contract terms (UCT) regime will significantly change in November 2023, following the passing of the Treasury Laws Amendment (More Competition, Better Prices) Act 2022 (Cth) (Amending Act). You can find an expert overview of the changes here: Beefed up unfair contract terms regime to commence next year - Insight - MinterEllison
- Ahead of the reforms taking effect, the ACCC has urged businesses to review their standard form contracts to ensure they comply and offers the following six 'tips' for business to consider when doing so:
  - 'Consider both points of view: if you think a term is necessary to protect your business's legitimate interest, consider the term from the other party's point of view.
  - Include counter-balancing terms: check that your contract has appropriate counter-balancing terms. For example, if you consider that your business reasonably needs the ability to unilaterally change the product or service being provided under the contract, does the contract also allow your customers to exit the contract without penalty when this occurs?



- Avoid broad terms: don't have terms that are as broad as possible. Make sure terms are only as broad as reasonably necessary to protect your business's legitimate interests.
- Meet your obligations under the Australian Consumer Law: don't have terms that seek to avoid your business's obligations under the Australian Consumer Law. For example, don't include terms that seek to limit your customers' consumer guarantees rights, or terms that seek to disclaim any representations your business may have made outside of the contract.
- Be clear: Use clear and simple language in your contracts.
- Be transparent: ensure key terms are clearly drawn to the attention of your customers during the sign-up process, and any renewal process'.

- As flagged, the ACCC has underlined its expectation that businesses are proactive in their preparations for these reforms. Deputy Chair Mick Keogh commented:

> 'The changes to the unfair contract terms laws should motivate businesses to take steps to ensure their standard form contracts are fair, including by removing or amending concerning terms…There was previously little motivation for businesses to comply with the law, despite the ACCC's compliance and enforcement actions. We strongly urge businesses to review their contracts now to ensure they comply…While some of the changes won't apply to contracts until they are renewed, or a new contract is entered into, businesses should be proactive in reviewing their standard form contracts now.'

[Source: ACCC media release 11/11/2023]

In Brief | Whistleblower reforms: More than 70 organisations and individuals have signed an open letter to the government calling for an end to the prosecution of whistleblowers and for whistleblower protections to be strengthened

[Source: Open letter to the Prime Minister, Attorney General, Minister for Defence, and Minister for the Public Service]

In Brief | Undertaking human rights due diligence: New report offers practical guidance for businesses on how to undertake effective human rights due diligence in line with the UN Guiding Principles on Business and Human Rights

[Source: Human Rights Due Diligence in Australia: Modern Slavery and Beyond August 2023]

Other News

Statutory Declarations Amendment Bill 2023 (Cth) introduced

The Statutory Declarations Amendment Bill 2023 (Cth) was introduced into the House of Representatives on 7 September 2023 and referred to the Senate Legal and Constitutional Affairs Legislation Committee for report by 18 October 2023.

Broadly, if legislated, the proposed changes would 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.

Proposed timing

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

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

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