Governance News

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

20 September 2023

Contents

Diversity

Gender parity on Russell 3000 boards not projected to be reached until 2040

The latest 50/50 Women on Boards Gender Diversity Index tracks progress towards gender parity and increased racial diversity on Russell 3000 company boards.

Headline findings

- Overall progress towards increased gender diversity continues to slow, with gender parity now not projected to be achieved until 2044 – ten years later than was predicted last year.
- According to the report at 30 June 2023, women held 29% of Russell 3000 board seats, and women of colour held just 7% of seats.
- The report found that representation of women on boards increases where women hold board leadership roles. For example:
  - Women hold the CEO role at 203 Russell 3000 companies. In these companies, women hold 41% of seats (vs 29% across Russell 3000 boards), and 35% of these companies have a gender balanced board (vs 12% of companies across Russell 3000 boards)
  - When hold the CEO, Board Chair and Nominating Chair roles in a company – 27 Russell 3000 companies fall into this category - representation of women on the board is even higher at 48%. 63% of these companies are gender balanced.
  - When women hold none of the CEO, Board Chair and Nominating Chair roles (which is the case in 62% of Russell 3000 companies) representation of women on the board drops to 26%. Only 6% of companies in this category are gender balanced (vs 12% for Russell 3000 boards overall).
- The report also found that boards are more racially diverse where women hold leadership roles. For example:
  - When women hold one of the CEO, Board Chair or Nominating Chair roles the percentage of directors of colour is nearly 20%
  - When women hold all three positions this increases to 27% (vs 17% people of colour where there are no women in these leadership roles).

[Source: 50/50 Women on Boards Gender Diversity Index]

Institutional Investors and Stewardship

NYC Pension Funds sue Fox News board over alleged failure to manage (what the funds consider) was the foreseeable risk of defamation litigation

- The five New York City pension funds have filed a shareholder derivative lawsuit against the board of directors and certain officers of Fox Corporation (which is the parent company of Fox News Network) over their alleged failure to appropriately manage the risk of defamation litigation, in (alleged) breach of their fiduciary duty.
- Broadly, the funds' case is that:
  - The board knew that Fox News' promotion of political narratives 'without regard for whether the underlying factual assertions were true created defamation risk'
  - In light of this, Fox's board needed to be 'particularly attuned to the risk of defamation litigation', but instead 'consciously disregarded that risk'
  - The company 'undertook no good-faith efforts to monitor for or mitigate defamation risk'
- The funds also allege that

  > 'the Defendants took no meaningful steps to protect the Company and are liable for the harm to Fox that has resulted from their breaches of fiduciary duty, including Fox's $787.5 million settlement with Dominion. The Board's failures have also brought increased scrutiny on Fox's adequacy to hold an FCC broadcast license'.

- The lawsuit seeks to recover from Fox's officers and directors damages that the funds allege their misconduct has caused to the company, including amounts paid in settlement and legal fees arising out of lawsuits brought by Dominion and Smartmatic.
- Commenting on the case, NYC Comptroller Brad Lander underlined that the motivating factor for the funds in bringing the action, is the financial 'threat' to the company's bottom line, flowing from the boards' alleged failure of oversight. Mr Lander commented:

  > 'Fox's board of directors has blatantly disregarded the need for journalistic standards and failed to put safeguards in place despite having a business model that invites defamation litigation…A lack of journalistic standards and a proper strategy to mitigate defamation has clearly harmed Fox's reputation and threatens their bottom line and long-term profitability. Clear governance systems are absolutely necessary for the long-term health of a company. As Fox's board continues to ignore these red flags, we are holding them accountable as long-term shareholders.'

  [Source: NYC Comptroller Brad Lander media release 13/09/2023]

In Brief | NBIM outlines new climate expectations of companies, makes clear that it expects companies not to 'count carbon credits towards science-based interim emission reduction targets'

[Source: NBIM climate expectations September 2023]

Disclosure and Reporting

Independent review of the recent changes to continuous disclosure regime to report by early 2024, government appoints reviewer

- The government has announced that Kevin Lewis (former Chief Compliance Officer at ASX) has been appointed as a part-time independent reviewer of recent amendments to continuous disclosure laws under the Corporations Act 2001 (Cth) introduced by Schedule 2 to the Treasury Laws Amendment (2021 Measures No.1) Act 2021 (Cth).
- For context, the changes introduced mean that all civil penalty proceedings commenced under the continuous disclosure and misleading and deceptive conduct provisions must prove that an entity or officer acted with 'knowledge, recklessness or negligence' in respect of the alleged contravention. For more on the changes see: Changes to continuous disclosure laws are now permanent - Technical update - MinterEllison
- The review is being undertaken because it is a requirement under Treasury Laws Amendment (2021 Measures No.1) Act 2021 (Cth). Schedule 2 was amended in the Senate to include requirements for the review to be commissioned within six months of the second anniversary of the commencement of the changes, and for the report and government's response to be tabled within a specific timeframe.

Terms of Reference

The Terms of Reference provide that the reviewer will have regard to the following when carrying out the review:

- 'whether the changes made to the continuous disclosure regime are working in support of an efficient, effective and well informed market
- the effect of the amendments on the quality and nature of disclosures made by listed companies
- continuous disclosure regimes that operate overseas and the extent to which the Australian regime is consistent with those regimes
- whether the amendments have given rise to barriers that may prevent compliance with or enforcement of the continuous disclosure obligations'.

Timing

The review will consult publicly, with a final report to be provided to the Treasurer by the 14 February 2024.

[Sources: Assistant Treasurer and Minister for Financial Services Stephen Jones media release 19/09/2023; Continuous Disclosure: Review of liabilities for failure to meet obligations]

ESG

Greenwashing | Key takeaways from the Law Council of Australia's submission to the Senate greenwashing inquiry

On 29 March 2023, the Senate referred an inquiry into greenwashing to the Senate Environment and Communications References Committee for inquiry and report by 5 December 2023.

For context, 'greenwashing' is when an organisation misrepresents the extent to which a product, service, investment or initiative is sustainable, ethical or 'green'.

Among other things, the Terms of Reference for the inquiry provide that the Committee consider 'legislative options to protect consumers from green washing in Australia; and any other related matters'.

This issue is the primary focus of the Law Council of Australia's submission.

Broadly, the Law Council submits that:

- Additional greenwashing-specific regulation is not required as 'current legislative frameworks prohibit false and misleading claims, representations and conduct in financial services and marketing and promotion'. Expanding on this, the submission states:

  > 'the Law Council considers that the existing legislative frameworks and enforcement activities—working collectively and with the initiatives presently under development, such as climate-related financial disclosures, the Taxonomy Project, and the ACCC's draft guidance on environmental and sustainability claims—provide a solid foundation for the regulation of greenwashing'.

- 'The most significant "missing piece" in Australia's regulation of greenwashing is uniformity of language, meaning and purpose' as 'clearer and more consistent classification of key definitions, terms and standards would enable better overall regulation'. The Law Council considers that the Australian sustainable finance taxonomy (currently under development) appears likely to address this gap (though the submission queries whether the taxonomy 'could be applied to the environmental claims made to consumers about a business's products, services and operations, as regulated by the ACCC').

Where government/regulators focus their efforts

- Rather than enacting additional greenwashing-specific regulation, the Law Council suggests that government and regulators focus instead on 'strengthening the "bright lines" that promote and support compliance with existing legal obligations' through both:
  - 'maintaining the ACCC and ASIC focus on greenwashing under existing legal frameworks, and monitoring the success of these enforcement actions (including how existing legal frameworks are being interpreted and applied by the courts in relation to greenwashing)'; and ;
  - 'providing enhanced guidance on greenwashing to business, which is clear and consistent, and specific in relation to the expectations of regulators'.
- In particular, the submission calls for additional guidance around:
  - 'the parameters of acceptable use of commonly used terms such as "sustainable", "green", "carbon neutral", "bio-degradable", "ethical" or "ethically sourced"'
  - 'clearer standards for and scrutiny of the use of offsets in Australia, particularly as a tool for achieving business aims such as "net zero"'
  - 'increased transparency and accountability around certification and accreditation of products, services and investments, including by reference to a centralised and uniform nomenclature such as a taxonomy or other classification system of accreditations, symbols, logos and trust marks'
  - 'regulators' expectations about the process for verification or substantiation of claims, particularly forward-looking claims and principles-based claims (such as alignment with the Paris Principles or other targets)'
  - '"sustainability" in a broad sense as including sustainable development factors, such as social, economic and governance factors, along with environmental factors'.

[Source: Australian Law Council submission to the Senate Environment and Communications References Committee Inquiry into Greenwashing]

Boosting credibility: SBTi flags plans to split out its validation function from its target setting function

- The Science Based Target Initiative (SBTi) has announced a range of governance and organisational changes to 'further boost credibility and integrity for businesses and financial institutions setting science-based targets'.
- A key change is the separation of its target setting and validation functions – the SBTi plans to set up separate validation and target setting entities. SBTi considers that splitting out the validation function in this way is in line with 'recognised best practice for assurance bodies'.
- The initiative has also flagged plans to publish its standard setting procedures/processes which have been revised 'in line with internationally recognised best practice'. .
- In addition, the SBTi has announced that:
  - It has incorporated in the UK as an independent legal entity, governed by its own Board of Trustees. For context up until now the initiative has operated as a partnership between the World Wide Fund for Nature, CDP, World Resources Institute, the UN Global Compact and the We Mean Business Coalition. The SBTi plans to become a charity regulated by the UK Charity Commission in due course – an application has been submitted to the Commission.

- A new Chair – Francesco Starace – and two new Trustees have been appointed to the Board

  [Source: SBTi media release 13/09/2023]

Another step towards mandatory climate disclosure in California: Governor commits to signing climate Bills into law

- Mandatory climate disclosure in California is another step closer after two Bills passed the Senate:
  - Climate Bill SB 253 will require both public and private 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)
  - SB 261 will require both public and private companies with revenue of over $500 million to report on their climate-related risks.
- The next (and final) step is for the Bills to go to the Governor for final approval. Speaking at NYC Climate Week, Governor Gavin Newsom confirmed his intention to sign both Bills.
- Ceres, a co-sponsor of the Bills, has welcomed the this as a win for investors. Ceres President and CEO Mindy Lubber commented:

  'This is exactly the kind of policy framework that investors have long sought to better understand how companies are working to manage and mitigate the immense financial impacts of the climate crisis'.

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

US Treasury releases new (voluntary) Principles for Net Zero Financing and Investment

- The US Department of Treasury has released new (voluntary) Principles for net Zero Financing and Investment for financial institutions with the aim of:
  - Reinforcing the importance of financial institutions' net zero commitments and supporting their implementation
  - Promoting 'consistency and credibility in financial institutions' approaches to these commitments'; and
  - Encouraging 'greater adoption of emerging best practices pertaining to these commitments'.
- The Principles focus on financial institutions' Scope 3 financed and facilitated greenhouse gas (GHG) emissions, are based on existing work developed by private sector and non-government organisations and initiatives.
- Importantly, the Principles 'do not impose legal requirements on any activities or institutions. They are not standards and are not intended to be exhaustive'. Nor are they intended to be applied prescriptively –

  'A financial institution's strategy, business model, size, client base, products and services, and fiduciary, regulatory, and legal obligations will affect its approach to the net-zero transition, including whether and to what extent it may choose to apply the Principles'.

Snapshot of the nine principles

NINE PRINCIPLES	
Principle 1: Credible Net Zero Commitments	Principle 1 states that: 'A financial institution's net-zero commitment (commitment) is a declaration of intent to work toward the reduction of greenhouse gas emissions. Treasury recommends that commitments be in line with limiting the increase in the global average temperature to 1.5°C. To be credible, this declaration should be accompanied or followed by the development and execution of a net-zero transition plan'.
Principle 2: Realising net zero commitments	Principles 2 states that: 'Financial institutions should consider transition finance, managed phaseout, and climate solutions practices when deciding how to realise their commitments'. Commentary under this principle offers insight into what Treasury considers to be better practice when implementing each of these approaches. Disclosure of how

NINE PRINCIPLES	
	each of these practices/approaches is being used – how each results in reductions of client's/portfolio company's emissions – is encouraged.
Principle 3: Credible metrics	Principle 3 states that: 'Financial institutions should establish credible metrics and targets and endeavour, over time, for all relevant financing, investment, and advisory services to have associated metrics and targets'. Commentary under this principle suggests that financial institutions set 'interim targets for 2030 or sooner and at no more than five-year intervals thereafter until the end-state target of 2050 or sooner' with the targets set covering 'all relevant financing, investment, and advisory services for clients and portfolio companies' over time.
Principle 4: Assessing client and portfolio company alignment with targets	Principle 4 states that: 'Financial institutions should assess client and portfolio company alignment to their (i.e., financial institutions') targets and to limiting the increase in the global average temperature to 1.5°C.' Commentary under this principle suggests that 'robust' approaches to assessing alignment may include use of: a) 'classification systems and lifecycle emissions calculation tools to evaluate whether or the extent to which an activity or company can be considered a climate solution'; b) . 'benchmarks like sectoral pathways, which are based on carbon budgets estimated to keep certain global warming temperature increases within reach'; and/or c) 'client and portfolio company net-zero transition plans'.
Principle 5: Supporting clients and portfolio companies to execute their own transition plans	Principle 5 states that: 'Financial institutions should align engagement practices — with clients, portfolio companies, and other stakeholders — to their commitments'. For context, commentary under this principle states that: 'One of the most effective ways for clients and portfolio companies to improve their emissions profiles and align with limiting the increase in the global average temperature to 1.5°C is to develop and execute their own net-zero transition plans. Given that a financial institution's financed emissions reflect the emissions of its clients and portfolio companies, a financial institution's net-zero transition plan should — to the extent consistent with fiduciary, regulatory, and legal obligations — include a strategy for collaborating with and supporting relevant clients and portfolio companies to adopt and implement net-zero transition plans.'
Principle 6: Transition plans	Principle 5 states that: 'Financial institutions should develop and execute an implementation strategy that integrates the goals of their commitments into relevant aspects of their businesses and operating procedures'. Commentary under this principle suggests that when formulating transition plans, institutions should consider (depending on their own circumstances) the following: – 'Leveraging existing or creating new products (e.g., green financial instruments and tools) and services that support client and portfolio company efforts to transition to net zero. – Establishing policies and conditions — or a timeline for establishing them — related to activities in sectors highly relevant to the net-zero transition (e.g., thresholds or boundaries for financing, investment, and advisory services for select activities that will face greater challenges as the transition continues). – Incorporating net-zero objectives and practices in core evaluation and decision-making processes (e.g., by incorporating relevant

NINE PRINCIPLES	
	considerations into portfolio management, transaction approval, due diligence, marketing, and sales processes). – Incorporating net-zero objectives into resource allocation and business planning'
Principle 7: Governance	Principle 7 states that: 'Financial institutions should establish robust governance processes to provide oversight of the implementation of their commitments.' Commentary under this principle suggests that governance policies, procedures and processes should address (among other things): board oversight, senior management roles/responsibilities, incentives and remuneration and 'any other relevant accountability mechanisms'. It's also suggested that governance structures should allow for regular reviews of the net zero transition plan by the board and senior management.
Principle 8: 'Environmental justice and environmental impacts' (including impacts on nature and biodiversity)	Principle 8 states that: 'Financial institutions should, in the context of activities associated with their net-zero transition plans, account for environmental justice and environmental impacts, where applicable'. Commentary under this principle suggests that institutions should (among other things) 'demonstrate an understanding of how transition planning activities may impact the environment, including nature and biodiversity. Financial institutions should put safeguards in place to account for unintended consequences and consider emerging frameworks and resources that seek to protect nature and biodiversity'.
Principle 9: Transparency around progress	Principle 9 states that: 'Financial institutions should be transparent about their commitments and progress towards them'. Commentary under this principle suggests that disclosure should include: 'Disclosed information should include relevant data and data sources, frameworks and methodologies leveraged (eg related to transition planning), approaches to and progress of client and portfolio company engagement, and other key decisions that a financial institution makes in developing and executing its transition plan'. Scope 3 emissions disclosure: The 'challenges' around data quality/availability associated with reporting on Scope 3 emissions are acknowledged. The commentary notes that 'Data quality and availability challenges represent a priority for market participants, civil society, and governments to resolve'. Use of carbon credits: Where institutions use carbon credits, the commentary underlines the importance of disclosure, suggesting that institutions should 'provide sufficient information to give stakeholders a clear understanding of whether and/or the extent to which the voluntary use of carbon credits is part of its [emissions reduction] commitment'.

[Sources: Remarks by Secretary of the US Treasury Janet L Yellen in New York, New York on Treasury's Principles for Net-Zero Financing & Investment 19/09/2023; US Treasury media release 19/09/2023; US Department of Treasury Principles for Net-Zero Financing & Investment 19/09/2023]

A framework to enable exchanges to designate listed shares as 'green': WFE opens public consultation on WFE Green Equity Principles and Guidance

- The World Federation of Exchanges (WFE) - the global industry association for operators of regulated exchanges and clearing houses (CCPs) - has opened a public consultation on both:

- The WFE Green Equity Principles - a (voluntary) 'global framework for designating listed shares as green' (the criteria for obtaining the WFE Green Equity Classification)
- An accompanying Guidance Note on applying the principles

- The Principles are structured around the following five 'pillars':
  - **Revenues/investments:** The amount of a company's revenues/ investments that must be derived from 'green' activities in order to be classified as 'green'. Under the principles:
    - listed issuers would need to generate more than 50% of their total annual revenues from activities that contribute to the green economy;
    - for issuers that are in the pre-revenue stage, more than 50% of their investments would need to be allocated to activities considered green or 100 % of their expected total annual revenues would need to be from activities that contribute to the green economy.
  - **Use of a specified taxonomy:** The issuer would need to publicly disclose the taxonomy utilised, together with any other criteria and definitions used to ascertain that revenues are green or that investments are contributing to the green economy
  - **Governance** (ie issuers would need to meet existing listing requirements in their jurisdiction)
  - **Annual assessment by approved reviewers:** An exchange-approved reviewer would need to conduct an annual review/assessment of the issuers activities and the related revenues (or investments or expected revenues for pre-revenue stage issuers) that are contributing to the green economy
  - **Disclosure:** Listed issuers would need to disclose how they meet the green classification criteria

- The accompanying guidance is intended to assist exchanges to establish offerings in line with the WFE Green Equity Classification. As well as covering the principles themselves, the guidance also offers guidance on:
  - 'Designation of responsibility within the exchange for overseeing the classification
  - Establishing relevant processes including criteria for revoking classification
  - Development of the classification mark and provision of public information
  - Criteria for assessing the appropriateness of reviewers'.

- The due date for submissions is 15 January 2024.

[Sources: WFE media release 14/09/2023; Consultation: Green Equity Principles & Guidance - Public call for comments 14/09/2023]

Report puts forward suggested measures to overcome key barriers to accelerating the pace of the net zero transition

A global survey of senior/executive level sustainability executives (commissioned by Zurich Insurance Group) explores how organisations are approaching the net zero transition and what is driving action as well as what executives consider to be the key challenges to accelerating the pace of climate action.

The starting point for the survey is that as things stand, commitments by government and the private sector are not keeping pace with the scale of action required to limit global temperature rise to 1.5 degrees Celsius – if nothing changes, global warming could exceed 1.5 degree Celsius as early as 2040.

Key takeaways from the survey include:

- **Most companies are already actively setting net-zero targets and developing transition plans**: According to the report 70% of those surveyed including those targets in their annual reports, and 77% of respondents reported Importantly, Zurich found that the driver behind this is the potential revenue/profit impact.

- **The most frequently mentioned barriers to transition** were: a) the cost and scale of capital required; b) the absence of technological solutions; and c) regulatory challenges. The absence of 'clear and credible data' was also a 'common concern' when it comes to tackling emissions.

How to accelerate action

The report also includes a number of recommendations to accelerate action. These include:

- **Creating policy certainty in the short and long term** including through addressing unnecessarily 'complex and lengthy regulatory requirements for renewable technologies that have the potential to slow down adoption by business and simplify regulatory processes for net-zero adaptation in areas such as building codes'.

- **Unlocking finance/creating financial incentives**: The report calls for: a) the elimination of 'implicit subsidies for fossil fuels [in carbon pricing]' so that 'the true value of low carbon solutions reflected in the cost of finance'; b) enabling 'development finance institutions to invest and develop innovative financial instruments in a wider range of blended finance products' eg specialised funds or impact bonds; and c) attracting local and private sector investment.

- Incentivising/supporting technological innovation: The report calls (among other things) for: a) increased investment in research and development; b) funding/grants/financial incentives for start-ups and SMEs to develop and commercialise green technologies/sustainable products; and c) more focus to go into facilitating the 'transfer of climate-friendly technologies from developed to developing countries'.

  [Source: Full text report: Accelerating the Climate Transition: Long-term thinking for near-term action September 2023]

As You Sow says 'out of control' executive pay is a 'material risk' for business deserving of sharper shareholder focus

- As You Sow has issued a short statement pointing to an announcement from United Autoworkers of America (UAW) flagging plans to hold strikes in three States against Ford, General Motors and Chrysler, as evidence of the risk that 'out of control' executive pay poses for businesses (and ultimately for shareholders).
- According to As You Sow, the planned strikes are motivated by worker dissatisfaction over (what the UAW considers to be) the companies' failure to value workers' contribution to their financial success appropriately. An issue which is highlighted, As you Sow suggests, by the gap between CEO pay and worker pay in each case.
- As You Sow's Director of wage justice and executive compensation Rosanna Landis Weaver said that from a shareholder perspective, the situation underlines that excessive CEO pay poses a material risk deserving of sharper shareholder focus. Ms Landis Weaver said:

  'As a consequence of out-of-control executive compensation, shareholders are now faced with striking workers at a critical juncture as these companies transition to EV production…UAW members see the CEO pay disparity as a measurement of how they are undervalued. Skyrocketing CEO pay is linked to worker dissatisfaction and lower profits, making excessive pay a distinct material risk that shareholders must take seriously.'

  [Source: As You Sow media release 15/09/2023]

In Brief | The Taskforce on Nature-related Financial Disclosures (TNFD) has launched its final recommendations – a risk management and disclosure framework to identity, assess and manage nature-related risks. The TNFD framework has been developed to be consistent with the ISSB standards. The IFRS has welcomed the release of the TNFD framework and confirmed that the ISSB will 'look to the TNFD recommendations…in its future work'

[Sources: TNFD Recommendations September 2023; IFRS media release 19/09/2023]

Financial Services

Top Story | FAR status update: FAR Bills now law

Legislation to introduce the long-awaited FAR - the Financial Accountability Regime (Consequential Amendments) Bill 2023 and Financial Accountability Regime Bill 2023 – received Assent on 14 September 2023.

Key Takeouts

- The Financial Accountability Regime Bill 2023 and the Financial Accountability Regime (Consequential Amendments) Bill 2023 passed both Houses on 5 September 2023 without further amendment and received Assent on 14 September 2023
- The FAR will apply to the banking sector from March 2024 and the insurance and superannuation sectors from March 2025

What is the FAR?

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.

The substantive Bill to establish the FAR is essentially unchanged

As flagged, the Financial Accountability Regime Bill 2023 is substantially the same as the previous version of the same name. You can access our detailed summary of the FAR here.

The one change flagged by the Assistant Treasurer in his second reading speech is that the 2023 FAR Bill has been amended:

> 'to incorporate an amendment, previously circulated by Senator David Pocock, to articulate more clearly the scope of the minister's exemption power [ie the Minister's power to provide an exemption to an accountable entity] and to provide for parliamentary oversight of the exercise of that power'.

No individual civil penalties included

The Financial Accountability Regime Bill 2023 does not include individual penalties for breaches of accountability obligations (as recommended by the Greens in the Senate Report on the 2022 Bill). This is because the government considers that:

> 'The government's bill already contains effective measures to address executive failures to comply, including disqualification, loss of deferred bonuses, and individual civil penalties for assisting in an entity's contravention of its obligations. That is to say, the bill already contains instances where individual civil penalties apply. These sanctions are on top of penalties for misconduct already in place in other financial services laws.
>
> These measures are finely balanced to improve, on the one hand, executive conduct and accountability in the financial services sector without adversely impacting the sector's efficiency. Adding individual civil penalties on top of those that are already extant within the general law and within this bill is not likely to substantially increase the level of deterrence that already exists, noting that the removal of access to deferred remuneration acts as a financial penalty on individual accountable persons under the regime. So, while it may impact on firms seeking to attract and retain the best executive talent, it would not add to the already extant penalties in a meaningful way'.

Attempts by the Greens to introduce amendments in the House and the Senate to include civil penalties were unsuccessful.

What's included in the Financial Accountability Regime (Consequential Amendments) Bill 2023?

Transitional arrangements for the banking sector

The FAR Consequential Amendments Bill sets out the transitional arrangements for the banking sector to transition from the BEAR to the FAR. The changes mean that:

- Once the Financial Accountability Regime starts applying to the banking industry, ADIs and their authorised NOHCs will become accountable entities, and the BEAR will be repealed.
- Accountability statements provided to APRA under the BEAR will automatically transition to become accountability statements under the FAR.
- APRA and ASIC will be able to jointly make rules prescribing transitional arrangements.

Transitioning of accountable persons

- Accountable persons of entities in the banking industry will automatically have their registration transitioned from the BEAR to the new FAR (though the transition from the BEAR to the FAR will likely result in changes to the details of the responsibilities of accountable persons which will need to be flagged with the regulator).
- A person who became an accountable person under the BEAR on a temporary basis, will be taken to be a new temporary accountable person when the FAR starts to apply to the banking sector.
- Any applications to register accountable persons under the BEAR that are pending when the FAR commences, will be considered to be applications for registration under the FAR.
- Entities will be able to register new accountable persons in the 30 days prior to the FAR applying to the banking sector.

Deferred remuneration

- The FAR deferred remuneration obligations for the banking industry will 'apply when the decision to provide remuneration occurs in first financial year that begins six months after the Financial Accountability Regime applies to the banking industry'.
- Remuneration that was decided to be provided to an accountable person before this, will still be subject to existing BEAR remuneration requirements.
- Despite the repeal of the BEAR, BEAR deferred remuneration obligations will continue to apply to accountable persons who do not transition to the proposed FAR until the period for the deferral finishes.

Transitional arrangements for insurance and superannuation industries

- The FAR will apply in full (including deferred remuneration obligations) to the accountable entities in the insurance and superannuation industries 18 months after commencement of the Financial Accountability Regime Bill 2022.
- For clarity, deferred remuneration obligations under the proposed FAR will apply to remuneration that was determined after the start of the first financial year after the Financial Accountability Regime applies to the insurance and superannuation industries.

When will the FAR apply?

The legislation commenced on the day after Assent was given.   This means that:

- The FAR will apply to the banking industry from March 2024 (six months after commencement of the FAR Bill will apply to any new entrants beyond that, from the time they become an ADI or a non-operating holding company (NOHC)).
- The FAR will apply to the insurance and superannuation industries from March 2025 (18 months after commencement of the FAR Bill and to any new entrants beyond that, from the time they become licensed)

FAR implementation – ASIC/APRA consultation on draft rules

ASIC and APRA (which will jointly administer the FAR) recently completed a four week consultation on draft Rules to support the transition from the existing BEAR to the FAR and FAR implementation. You can access our summary here: FAR status update: Regulators consult on FAR implementation - POST - MinterEllison

Both regulators included working to support FAR implementation in their most recent corporate plans.

Supporting FAR implementation: National Consumer Credit Protection (Large ADI) Determination 2023 registered

- The National Consumer Credit Protection (Large ADI) Determination 2023 (the Determination) was registered on 14 September 2023.
- Broadly, the Determination replaces an existing Determination - the Banking Executive Accountability Regime (Size of an Authorised Deposit-taking Institution) Determination 2021 (BEAR Determination) - to set out the methodology to determine whether an ADI is a large ADI for the purpose of the National Consumer Credit Protection Act 2009 (Cth).
- The purpose of the new Determination is to

  'ensure continuity in the meaning of large ADI, consequential to the establishment of the Financial Accountability Regime' (FAR).

- According to the explanatory statement, the changes in the Instrument are 'minor in nature' and for this reason, no consultation was conducted. The new Determination continues the definition of large ADI under the BEAR determination. The 'key change' from the BEAR Determination is the rebase of indexation calculations.

  [Source: National Consumer Credit Protection (Large ADI) Determination 2023]

New Banking Code anticipated to be in place in 'early 2024' (subject to ASIC approval)

- The Australian Banking Association (ABA) has submitted a proposed new Banking Code of Practice to the Australian Securities and Investments Commission (ASIC) for approval.
- According to the ABA's announcement, the new Code includes the following six 'increased protections for customers':
  - 'an expanded definition for small business which means an additional 10,000 small business customers will have the protections of the Code
  - new obligations for banks to meet with customers intending to act as guarantor to help them understand their obligations before accepting a guarantee
  - a new vulnerable customer definition, acknowledging anyone can become vulnerable at any time in their life due to a life changing circumstance such as losing a partner or a job or becoming ill
  - a new commitment to organise or refer customers to free support services such as interpreters, AUSLAN and National Relay Services
  - greater clarity on the types of support available to all customers, including financial difficulty options for small businesses
  - an updated section on inclusive and accessible banking which recognises banking services should be inclusive of people with diverse sexual orientations and gender identities'.
- The ABA states that the new Code has also been 'streamlined' and simplified including by 'removing parts of the Code that were either already in law or have been recently superseded by new legislation'. According to The Australian, this includes removing duplication with existing laws (eg Privacy obligations, Responsible Lending Obligations) as well as adopting a number of changes (suggested by consumer groups) to bolster customer protections.

Next steps

- It's envisaged that ASIC will now undertake its own consultation on the proposed Code as part of its approval process.
- Subject to ASIC's approval, the new Code is expected to be 'in place in early 2024'.

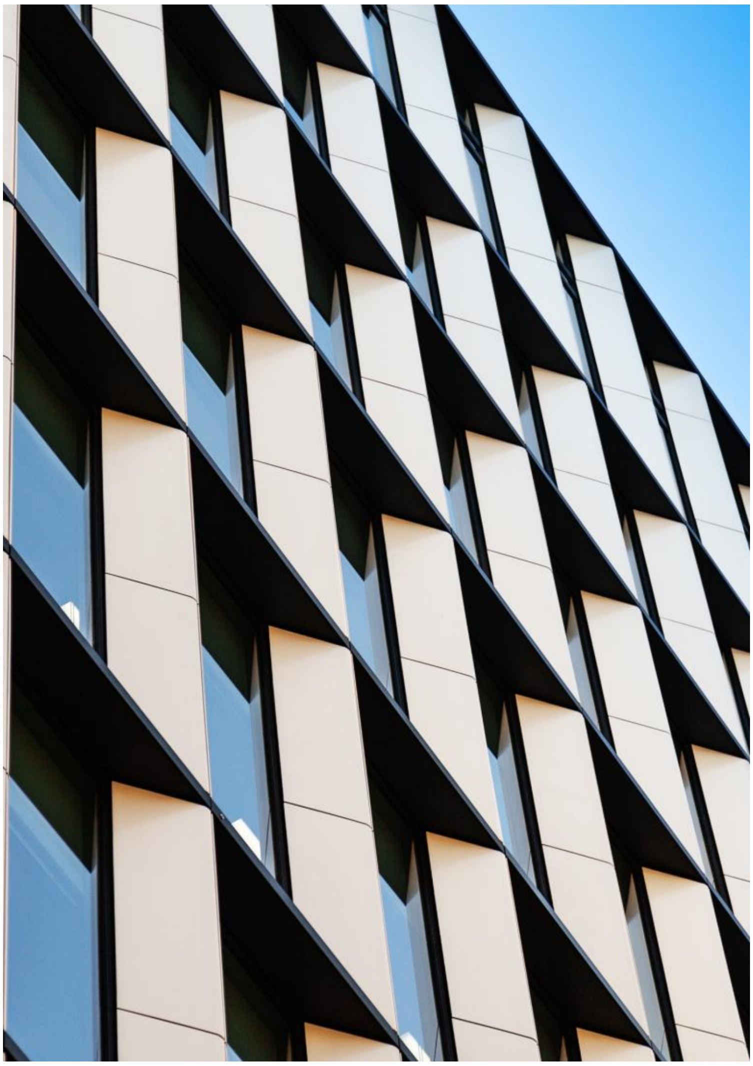
  [Source: ABA media release 06/09/2023]

Financial advice registration requirement (further) extended to 1 February 2024

- ASIC Corporations (Amendment) Instrument 2023/730 (amending instrument) was registered on 18 September 2023.

- The amending instrument further extends the delay to the requirement for relevant providers to be registered with ASIC as a precondition for providing personal advice to retail clients about relevant financial products to 1 February 2024.
- According to the explanatory statement, this additional delay is required in order to allow time for:
  - The passage of Treasury Laws Amendment (2023 Measures No. 1) Bill 2023 which is currently before the Senate. For context, Schedule 1 to the Bill would both: a) 'allow ASIC to approve applications from one or more licensees to register on the Financial Advisers Register the same relevant provider', and b) 'allow assisted decision-making to be used for any purpose for which ASIC may make decisions in the performance or exercise of ASIC's functions or powers to register a relevant provider'.
  - ASIC to implement the Bill (assuming it is enacted) and industry to prepare for the changes
  - Australian Financial Services Licensees to register their relevant providers with ASIC prior to the commencement of the Registration Requirement.

[Source: ASIC Corporations (Amendment) Instrument 2023/730]



CPS 230 implementation: Existing APRA prudential standards on operation risk management to be replaced

- Following the finalisation of new cross industry prudential standard CPS 230 Operation Risk Management, the Australian Prudential Regulation Authority (APRA) has registered a new instrument - Banking, Insurance, Life Insurance, Health Insurance and Superannuation (prudential standard) determination No. 2 of 2023 – to:
  - formally revoke (from 1 July 2025) five existing prudential standards - Prudential Standard CPS 231 Outsourcing; Prudential Standard CPS 232 Business Continuity Management; Prudential Standard SPS 231 Outsourcing; Prudential Standard SPS 232 Business Continuity Management; and Prudential Standard HPS 231Outsourcin - which will be replaced by CPS 230
  - determines CPS 230 (and sets out which entities the standard applies to)
- The instrument commences on 1 July 2025 (the date the new standard commences).
- For more on the new requirements under CPS 230 see:
  - APRA's new operational risk standard finalised - POST - MinterEllison
  - CPS 230: The Practical Playbook - Insight - MinterEllison

[Source: Banking, Insurance, Life Insurance, Health Insurance and Superannuation (prudential standard) determination No. 2 of 2023]

In Brief | The AFR reports that banks have called on the government to follow the UK in adopting a 'regulatory grid' – a two-year outlook of upcoming regulatory reforms – to provide banks with certainty around upcoming reforms

[Sources: The AFR 12/09/2023; 14/09/2023]

Accounting and Audit

PJC Audit Inquiry: ASIC's submission to PJC Inquiry underlines it has limited jurisdiction to act, suggests two changes to 'enhance the quality of financial reporting and its audits'

In its submission to the Parliamentary Joint Committee on Corporations and Financial Services (PJC) Inquiry into recent allegations of and responses to misconduct in the Australian operations of the major accounting, audit, and consultancy firms (Terms of Reference here), the Australian Securities and Investments Commission (ASIC) writes that:

- **It is limited in its ability to act on misconduct** because it

  > 'does not have general jurisdiction to regulate partnerships. It is only when the partnership performs certain specific roles, such as where the partnership holds an Australian Financial Services (AFS) licence, that ASIC has jurisdiction (in this example, over the entity's provision of financial services)'.

- **It is a 'matter for government' whether it will expand ASIC's (and/or other regulators' jurisdiction)** in this context, noting that the UK and the US have opted to do so.

ASIC's approach to financial reporting and audit surveillance

- The submission notes that there is 'no legislative requirement for ASIC to undertake proactive surveillance of financial reports and audits', though ASIC has elected to do so in the interests of promoting 'confident and informed participation by investors and consumers in the financial system'.
- The submission also 'explain[s] ASIC's new approach to financial report and audit surveillance' ie its shift from conducting separate financial report surveillances and audit surveillances of the Big Six audit firms to a 'targeted approach' that entails conducting combined surveillance of financial reports and audit.
- ASIC submits that:

  > 'While this risk-based approach will result in a smaller number of audit files being reviewed by ASIC, it will ensure our focus is directed to those files where there is more likely to be harm to consumers and investors through deficient financial reports and may result in a larger proportion of matters being referred for enforcement action. A targeted approach also represents a more effective use of our resources, which have declined in real terms in recent years'.

- ASIC also considers its new approach is in line with the requirements and principles of the International Forum of Independent Audit Regulators, which includes regulators from the UK, Canada and the US.

Suggested reforms

The submission suggests that the following changes 'would significantly enhance the quality of financial reporting and its audits':

- 'requiring auditors to report on the accuracy of the company management assertion that internal accounting controls in place are operational and effective (similar to requirements under the Sarbanes-Oxley Act)'; and
- 'mandating digital financial reporting by listed companies and other entities preparing financial reports under the Corporations Act'.

The committee is due to report by 'mid-2024'.

> [Source: ASIC submission to the Parliamentary Joint Committee on Corporations and Financial Services (PJC) Inquiry into recent allegations of and responses to misconduct in the Australian operations of the major accounting, audit, and consultancy firms]

Insolvency and Reconstruction

ASIC consults on proposed updates to RG 217 Duty to prevent insolvent trading

- The independent review into the operation of safe harbour provisions in the Corporations Act 2001 (Cth) identified a lack of awareness and understanding by directors and their advisers of a director's duty to prevent insolvent trading (and the related safe harbour provisions). To help address this, the report 'strongly support[s]' ASIC updating existing guidance in guidance in Regulatory Guide 217 Duty to prevent insolvent trading: Guide for directors (RG 217) to reflect not only the prohibition on insolvent trading, but also the safe harbour provisions'.

- In response, ASIC is consulting - CP 372 Guidance on insolvent trading safe harbour provisions: Update to RG 217 - on proposed changes to RG 217. Broadly, ASIC sums up the proposed changes as follows:
  - 'updating existing guidance to include information about when a holding company may be liable for debts incurred by a subsidiary when the subsidiary has continued to trade while insolvent,
  - providing information and general guidance about the operation of the safe harbour provisions and the factors ASIC will consider when assessing whether safe harbour protection is available to a director, and
  - providing guidance for directors about the key principles they should consider in carrying out their duty to prevent insolvent trading'.
- The due date for submissions is 26 October 2023.

[Source: ASIC media release 14/09/2023]

Risk Management

Top Story | Key insights from the latest NDB data breach report

The OAIC recently published its latest NDB report, providing key insights into Australian data breaches during the first half of 2023.

MinterEllison has released an article highlighting the key findings and the implications for business. You can access the full text here: Key insights from the latest NDB data breach report - Insight - MinterEllison

Top Story | Directors on notice: ASIC urges boards to prioritise cyber

In his address to the AFR Cyber Summit, ASIC Chair Joe Longo urged boards prioritise addressing cyber weaknesses, including third party vulnerabilities, flagging that failure to give cyber security and cyber resilience sufficient priority 'creates a foreseeable risk of harm to the company and thereby exposes the directors to potential enforcement action by ASIC based on the directors not acting with reasonable care and diligence'.

Key Takeouts

- ASIC has urged organisations to focus their efforts not only on the security of their systems/processes, but on planning their response to a cyber incident.
- Over-reliance on the security measures third party providers have in place is an area particular concern and an issue ASIC urges organisations to prioritise addressing. ASIC Chair Joe Longo identified three key ways organisations can reduce their third party risk (summarised in the article below).
- ASIC considers that ensuring 'good cyber risk management' is in place, forms part of directors' duty to act with care and diligence. Mr Longo cautioned that boards that fail to prioritise cyber are exposing themselves to the (potential) risk of enforcement action by ASIC

In his Australian Securities and Investments Commission (ASIC) Chair Joe Longo's 18 September 2023 address to the AFR Cyber summit, was the importance of cyber-preparedness and ASIC's expectations in this context.

Our key takeaways are below.

'Every system is vulnerable, and we must plan for that'

In light of the accelerating risk and the potentially serious consequences of a cyber incident, Mr Longo underlined ASIC's expectation that businesses focus not only on designing systems to be as secure as possible – noting that no system can ever be assumed to be completely secure – but also on planning their response to a breach. Mr Longo said:

> 'Today, too, however much we may marvel at technological developments, the reality is that the building blocks of that technology are not exclusive. The challenge is to anticipate risks. Systems should be designed with a "threat thinking" approach, in a way that considers how they might be broken or exploited…The lesson is simple: cyber preparedness is not simply a question of having impregnable systems. That's not possible. Instead, while preparedness must include security, it must also involve resilience, meaning the ability to respond and weather a significant cyber security incident….This can only be built on thorough and comprehensive planning for significant cyber security incidents, and a clearly thought-out risk management strategy'.

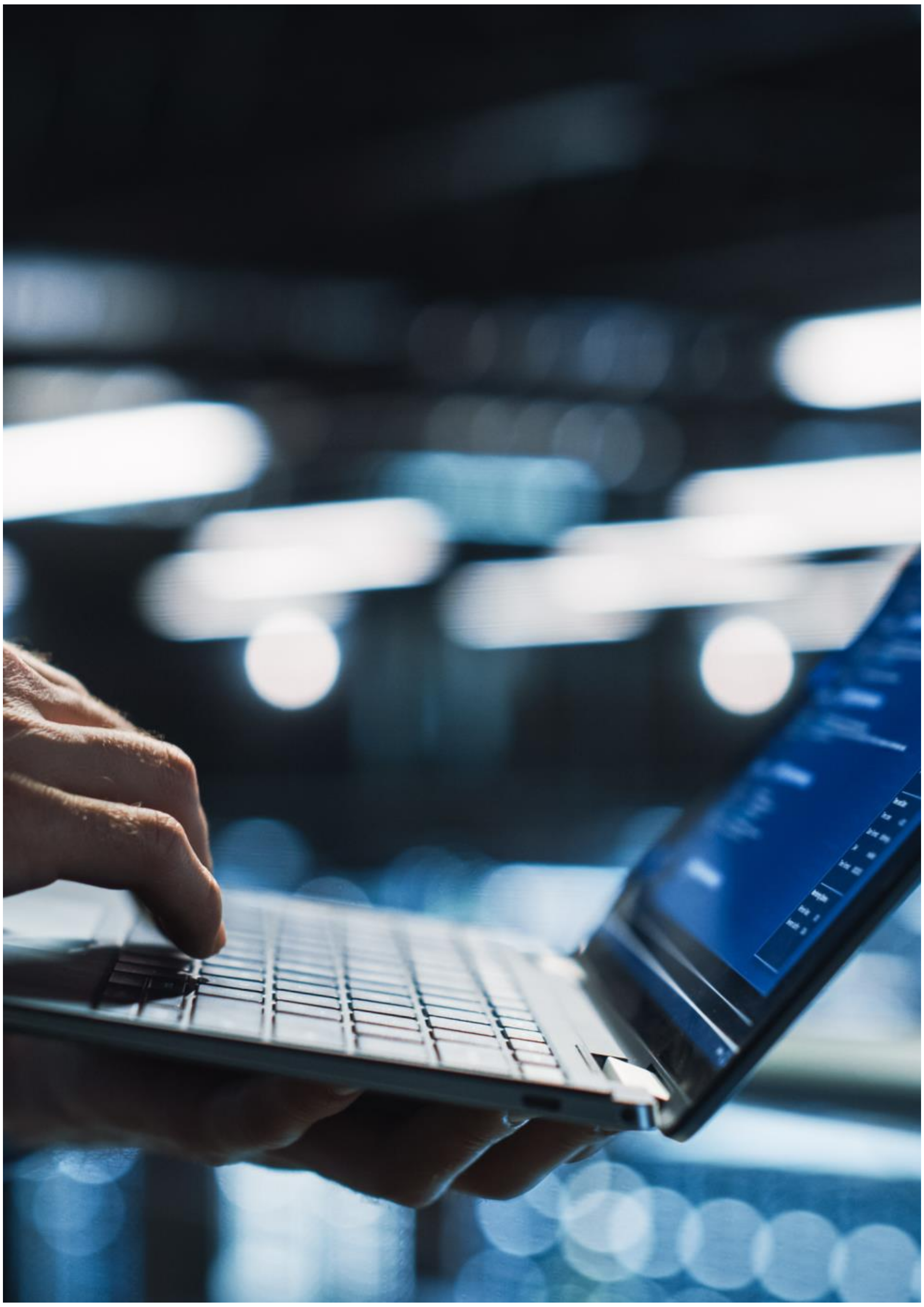
'Reliance on third party providers is always a risk'

Further to this, Mr Longo identified the level of reliance placed on the security measures third party providers have in place as an area of particular vulnerability/concern for the regulator – and an issue that ASIC would like to see organisations prioritise.

This is based on the initial findings of ASIC's yet to be released, Cyber Pulse Survey (a voluntary self assessment exercise designed to measure the cyber resilience of regulated entities). The survey identified that:

- 44% of respondents reported that they did not manage third party or supply chain risk

- over 50% reported they had limited or no capability to protect confidential information adequately ('whether that information is held within the organisation or by third-party suppliers').



Mr Longo commented:

> 'If we rely solely on the security measures those providers [ie third party providers] have in place, we leave a wide opening for a data breach if those measures are compromised…This should be a cause for concern for any organisation. In the face of what may be a vast array of considerations about how to shore up an organisation against cyber-attack, these numbers provide a clear path for where to begin. Look to your third-party suppliers, vendors, and managed service providers, and evaluate your third-party supplier cyber risk'.

A board responsibility

Mr Longo emphasised the key role ASIC considers boards have to play in this context, underlining that ASIC considers ensuring 'good cyber risk management' is in place, forms part of directors' duty to act with care and diligence.

Mr Longo said:

> 'Good cyber risk management must start at the top. It's only by starting there, with good governance and a comprehensive risk assessment, that we can successfully set the right tone… Cyber security and resilience are not merely technical matters on the fringes of directors' duties. ASIC expects directors to ensure their organisation's risk management framework adequately addresses cyber security risk, and that controls are implemented to protect key assets and enhance cyber resilience. Failing to do so could mean failing to meet your regulatory obligations'.

Mr Longo also cautioned that boards that fail to prioritise cyber are exposing themselves to the (potential) risk of enforcement action by ASIC:

> 'For all boards, cyber security and cyber resilience have got to be top priorities. If boards do not give cyber security and cyber resilience sufficient priority, this creates a foreseeable risk of harm to the company and thereby exposes the directors to potential enforcement action by ASIC based on the directors not acting with reasonable care and diligence'.

Broad improvement areas

Mr Longo identified a number of areas where ASIC considers improvement is needed observing that:

> 'In ASIC's work in this space, we've found there's often a disconnect between several important elements, including:
>
> – Boards' oversight of cyber risk,
>
> – Management reporting of cyber risk to boards,
>
> – Management identification and remediation of cyber risk,
>
> – Cyber risk assessments, and
>
> – How cyber risk controls are implemented'.

Mr Longo also underlined the need for continuing engagement by boards on the issue, and the need for board oversight to extend across organisation's digital supply chain.

> 'Measures taken should be proportionate to the nature, scale, and complexity of your organisation – and the criticality and sensitivity of the key assets held. This includes reassessment of cyber security risks on an ongoing basis, based on threat intelligence and vulnerability identification. ASIC also expects this to include oversight of cyber security risk throughout your organisation's digital supply chain'.

Three ways to reduce third-party risk

Mr Longo identified the following as three key ways organisations can reduce their third party risk.

- **'Never set and forget':** Mr Longo emphasised ASIC's expectation that there is continuing focus and engagement on the issue observing that:

  > 'It's not enough to sign a contract with a third-party supplier – you need to take an active approach to managing supply chain and vendor risk. Setting it and forgetting it, does not, cannot, and will not work.

- **'Plan for and test for attacks':** Building on this, Mr Longo said that it is not sufficient to have an incident response and recovery plan in place. Mr Longo said that ASIC expects: a) that the plan 'must include third party suppliers and vendors' and b) that the plan is 'tested regularly'.
- **'You can't protect what you aren't aware of':** Finally, noting that a number of respondents to the Cyber Pulse survey reported that they don't identify critical information and business critical systems, Mr Longo urged organisations to make sure they do identify it noting that if 'information isn't identified before an attack, it can't be protected'.

Businesses should act now

Mr Longo concluded by urging organisations (and boards) to act with urgency – especially on addressing third party vulnerabilities. Mr Longo said:

> 'I will finish by reiterating two points: first, all the evidence points to third-party suppliers as a clear vulnerability in many organisations' cyber preparedness; second, you can only protect yourself from that vulnerability if you act now…If you're not evaluating your third-party cyber security risk, you're deceiving yourself. And recent events show that you will suffer for it. Don't put yourself in that position'.
>
> [Source: ASIC Chair Joe Longo, Address at the Australian Financial Review Cyber Summit: Marconi's illusion: what a 120-year-old magician's trick can teach us about cyber preparedness, 18/09/2023]

National 2030 Cyber strategy to centre around six 'shields'

Our key takeaways from Minister for Home Affairs Clare O'Neil's 18 September 2023 speech to the AFR Cyber Summit are below.

Government and industry needs to 'do better' on cyber

The starting point for the Minister's address is that the government considers cyber to be both an accelerating threat – cyber attacks are increasingly common and are essentially impossible to prevent – and a source of potential opportunity for the country. Managing the risks and capitalising on the opportunities, requires 'an urgent economic and security imperative to make a step change as a country for how we deal with cyber issues'.

To this end, Ms O'Neil said that the government has implemented a number of measures to step up cyber protections/lift standards during its time in office. Ms O'Neil also acknowledged the work industry has done/is doing in the area.

Ms O'Neil said that the next step will be the release of a national cybersecurity strategy, which is being developed through extensive industry consultation, and is intended to 'knit together all of the cyber activity that's going to occur over the coming years so we can bring the country together in our efforts to fight this incredibly important topic'.

Ms O'Neil confirmed that the strategy is planned to be released 'before the end of the year'.

Six 'shields'

Ms O'Neil gave a broad brush picture of the six cybersecurity 'shields' included in the yet to be released 2030 Cyber Security Strategy which are intended to step up protections for business and for the public and to ensure there is a 'cohesive, planned national response'.

Broadly these six 'shields' are as follows.

- Raising public and business awareness and understanding of cyber threats; how to protect against these; as well as awareness/understanding of the supports in place to assist those impacted by cyber incidents.
- Safe technology: The Minister queried:

  > 'Why do we continue to allow digital products for sale in our country when the makers of those products sometimes know them to be cyber insecure? We would never accept this from any other type of consumer product'.

  Accordingly, the government's 'vision for safe technology' in 2030,

  > 'is a world where we have clear global standards for digital safety in products that will help us drive the development of security into those products from their very inception, a world where just as you can't go into a car yard and buy a car that will not be safe to use, when you buy a digital product on sale in our country we know that it's safe for you to use'.

- 'World class threat sharing and threat blocking': Minister O'Neil said that by 2030, the government:

  > 'envision a world where threat intelligence can be exchanged between government and business at real-time machine speed and then threats blocked before they cause any harm to the Australian population. So there's a lot of inspiring, interesting work to be done here and a lot of things that we can do actually in the short term about it'.

- 'Protecting Australians' access to critical infrastructure' eg water systems, electricity, the energy grid, the provision of the internet. The Minister made clear that as government delivers many of these services and holds extensive data, lifting the government's own cyber defences will be a key priority 'this year'.
- Lifting Australia's 'sovereign capability': The Minister said that by 2030 the government wants Australia to be

  > 'in a thriving cyber ecosystem where we have the skills we need, where cyber security is a really desirable profession for young people around the country and that we are making sure that we have the system that's adaptable in itself. So that means that as we innovate and as we see the cyber security problem change, that Australia is at the frontier of those technologies and those changes to make sure that we're getting to the benefits out of what this problem presents to the country'.

- Coordinated global action: The strategy will also entail Australia 'pushing for a more resilient region' and stepping up engagement globally with a view to building 'really strong and valuable partnerships within our region to assist countries which are really struggling with this problem too'.

Detailed strategy

Ms O'Neil underlined that the strategy, once released, will be structured around 'two year blocks' of activity.

The government intends to revisit the strategy every two years, building out the next phase of the plan at that point.

[Source: Minister for Home Affairs, Clare O'Neil address to the AFR Cyber Summit 18/09/2023]

Legislation to ban credit cards for online gambling introduced

- The Interactive Gambling Amendment (Credit and Other Measures) Bill 2023 was introduced into the House of Representatives on 13 September 2023 and referred to the Senate Environment and Communications Legislation Committee for report by 12 October 2023.
- The explanatory memorandum states that the purpose of the Bill is to

  'minimise the significant gambling harms experienced by Australians and reduce societal harms arising from interactive wagering services through the use of credit cards and related credit products'.

- Broadly, if enacted in its current form, the Bill would amend the Interactive Gambling Act 2001 (Cth) (the Act) to:
  - ban operators of regulated interactive gambling services from accepting or offering to accept payment (for online bets) from customers by credit card, credit related products or digital currency and create a new criminal offence and civil penalty provisions related to the ban
  - give the Australian Communications and Media Authority (ACMA) 'enhanced powers' to enforce the ban and compliance with it and other existing civil penalty provisions under the Act
  - make consequential changes/remove 'spent provisions'
- It's proposed that there would be a six month transition period (from the day the Bill receives Assent) to 'give banks and gambling service providers time to prepare for and implement changes necessary to ensure compliance with the new requirements'.
- The Bill implements the government's response to the recommendations from the November 2021 Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the Regulation of the use of financial services such as credit cards and digital wallets for online gambling in Australia.
- The Bill is part of a broader suite of measures/planned measures aimed at protecting from harms caused by online gambling.
- The introduction of the Bill has been welcomed by Financial Counselling Australia (FCA) as 'a major win in the battle to reduce gambling harms in Australia'. In particular, the FCA has welcomed the inclusion of digital wallets and digital currencies in addition to credit cards in the (proposed) ban.

  [Sources: Interactive Gambling Amendment (Credit and Other Measures) Bill 2023; Joint Media release: Minister for Communications Michelle Rowland and Minister for Social Services Amanda Rishworth 13/09/2023; FCA media release 13/09/2023]

In Brief | The government has released four packages of draft legislation for consultation aimed at strengthening the integrity of the tax system (including the proposed extension of existing whistleblower protections to a new range of disclosures related to potential misconduct by tax practitioners) and increasing the powers of regulators. The legislation is planned to be introduced in 2023 (following consultation)

[Sources: Treasury Consultation: Response to PwC – whistleblower protections 20 September 2023 - 04 October 2023; Treasury Consultation: Response to PwC – information sharing 20 September 2023 – 4 October 2023; Treasury Consultation: Response to PwC – reform of promoter penalty laws 20 September 2023 – 4 October 2023; Treasury Consultation: Response to PwC – Tax Practitioners Board reforms 20 September 2023 – 4 October 2023]

Other News

Top Story | Further 'modernisation' of Treasury Laws: Bill receives Assent

Key Takeouts

- The changes introduced by the Corporations Amendment (Meetings and Documents) Act 2022 (Cth) (summarised) to electronic execution requirements as well as changes to requirements around the use of technology in meetings are now in effect.
- A new Bill - Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2023 (Cth) – passed both Houses on 4 September 2023, and which has now received Assent, further expands on these changes.

Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2022 (now referred to as Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2023) was introduced into the House of Representatives on 23 November 2022.

Broadly, the Bill further 'modernises' existing requirements in Treasury laws including the Corporations Act 2001 (Cth) (Corporations Act) to improve their technology neutrality and ensure they remain 'fit for purpose'.

The Bill builds on some aspects of a separate Bill introduced by the former government (summarised) which lapsed with the dissolution of the last parliament.

We provide a high level overview of some of the key changes below.

Key changes

Further 'modernisation' of Corporations Act requirements

Broadly, the changes in Schedule 1 mean that:

- all documents (including deeds) which are required or permitted to be signed under the Corporations Act can be signed electronically or 'in wet-ink'
- documents sent under Chapters 2A to 2M, 5 to 5D, 6-6C, 8A and 9 or Schedule 2 to the Corporations Act (other than those which are lodged with ASIC, the Registrar or the Takeovers Panel) can be sent in either hard copy or electronic form
- companies are no longer required to send documents to a member where they do not have the correct contact details for that person/the details they have are known to be incorrect
- requirements in Treasury laws to publish notices in newspapers (publication requirements) are set to be replaced with a requirement that notices be published in a manner that is 'accessible to the public and reasonably prominent'.

The reforms in Schedule 1 also make clear that Treasury portfolio regulators are able to hold hearings and examinations virtually, and separately, allow more payments to be made electronically by 'removing outdated restrictions that preserve where or how a payment may be made'.

Generally, the changes in Schedule 1 commenced the day after the Bill received Assent.

Changes to publication requirements will commence on a date to be fixed by Proclamation (or if this does not occur within six months after Assent, the day after the end of that period).

Treasury laws clean up

The changes in Schedule 2 implement the government's initial response to the recommendations of the Australian Law Reform Commission's Interim Report A and are aimed at addressing what the explanatory memorandum describes as 'unwarranted complexity in the law'. The explanatory memorandum states that:

> 'By removing erroneous references and redundant definitions, using consistent headings to definitions sections, as well as other simplifications, Schedule 2 to the Bill improves the navigability and clarity of the corporations and financial services law'.

Amendments to Schedule 2

The Bill passed the House of Representatives on 6 February 2023 with two government amendments to address drafting errors in Schedule 2. The Supplementary Explanatory Memorandum states that the changes are necessary to:

> 'preserve existing policy settings and ensure the Bill does not alter the threshold for when a special resolution has effect. The parliamentary amendments ensure that the threshold for passing a special resolution remains as 75 per cent of the votes cast by members (rather than 75 per cent of the votes that may be cast)'.

Transposing certain ASIC legislative instruments into primary legislation

The changes in Schedule 3 transfer what the explanatory memorandum describes as 'longstanding and accepted matters' currently contained in ASIC legislative instruments to primary legislation (the Corporations Act and the National Consumer Credit Protection Act 2009 (Cth) (NCCP Act)).

Specifically, the following instruments will be incorporated into the Corporations Act:

- ASIC Class Order [CO 12/340] (proposed licensed trustee companies)
- ASIC Corporations (Financial Services Guide Given in a Time Critical Situation) Instrument 2022/498
- ASIC Corporations (PDS Requirements for General Insurance Quotes) Instrument 2022/66
- ASIC Corporations (Describing Debentures—Secured Notes) Instrument 2022/61
- ASIC Class Order [CO 14/41] will also be incorporated into the NCCP Act.

The aim is to improve clarity and certainty around these requirements and to make it simpler for regulated entities and consumers to understand their rights and obligations.

The changes in Schedule 3 commenced the day after Assent.

'Miscellaneous' amendments to Treasury laws

The changes in Schedule 4 make a number of what the explanatory memorandum describes as 'miscellaneous and technical amendments' to Treasury portfolio legislation including 'correcting typographical and numbering errors', 'repealing redundant and inoperative provisions' and 'fixing incorrect legislative references' as well as 'reducing unnecessary red tape' and 'addressing unintended outcomes'.

On this last point, Schedule 4 (among other things) repeals and replaces Regulation 51 of the National Consumer Credit Protection Regulations 2010 (Cth) to ensure that in order to be able to rely on the continuing credit contract exemption, the maximum charge (ie the cap above which the National Credit Code would apply) will need to be 'calculated only by reference to continuing credit contracts which already fall within the exception in subsection 6(5) of the National Credit Code'.

This amendment applies retrospectively to contracts entered into on or after 13 June 2014 (the date at which regulation 51 came into effect).

Separately, the changes in Schedule 4 also clarify that a licensee of a registrable superannuation entity can use technology to hold annual members' meetings – that is, the proposed amendments allow the licensee to hold an annual members' meeting as a physical meeting, as a hybrid meeting or as a wholly virtual meeting.

The explanatory memorandum, states that these changes around meeting requirements apply 'in relation to an annual members' meeting of a registrable superannuation entity that ends on or after the day that Schedule 1 commences'.

[Source: Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2022]

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