Governance News

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

6 September 2023

Contents

Remuneration

New report finds more S&P 500 companies are incorporating ESG metrics into incentives, highlights a shift towards use of weighted structures

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).

This is in line with separate analysis from Meridian Compensation Partners which found that In 2023, 73% of S&P 500 companies linked a portion of incentive compensation to the achievement of ESG metrics.

Most commonly used metrics

According to Semler Brossy's analysis:

- **Human Capital Management (HCM) related metrics are by far the most common category** of ESG metric overall. Within this, Diversity and Inclusion (D&I) related metrics are the most prevalent (55% of S&P companies include some form of D&I metric) followed by safety-related metrics (26%) and employee satisfaction-related metrics (24%).
- **'Other' ESG metrics are the next most prevalent category (after HCM metrics)** with 41% of companies including them in their compensation plans. Within this category, customer satisfaction is the most prevalent (28%). Cybersecurity related metrics (which also fall into the 'other' ESG category) are relatively rare – just 6% of S&P 500 companies include them.
- **Environmental metrics are the fastest growing category of ESG metrics overall** – 48% of companies include some form of environmental metric) up from 25% in FY 20. Where environmental metrics are used, metrics relating to carbon footprint (25%) and energy efficiency (11%) are the most common, and the fastest growing environmental metric sub-categories.
- **Continued uptick in use of ESG metrics is expected:** According to the report, these trends are projected to continue in line with growing stakeholder focus on ESG.

Structure of ESG metrics

- The report found that use of formal, weighted structures for ESG metrics in incentives is trending upwards with 79% of companies now employing weighted structures (up from 72%).
- Within this, the 'Scorecard' approach is the most commonly used structure with 40% of companies using it.
- Looking forward, Semler Brossy opines:

  'We expect to see a continued shift towards formal, weighted structures in incentive plans as focus continues to shift towards incorporating ESG in incentives in a meaningful way that directly impacts executive pay.'

Australia?

- Guerdon Associates' 2022 analysis of the prevalence of ESG metrics in executive compensation plans at companies globally, found that over 85% of ASX 100 companies incorporate some form of ESG metric in their incentive plans (up from 77% in 2020). Looking at this more closely, use of environmental measures is less common - only 40% of companies were found to be including environmental measures in 2022 (up from 26% in 2020).
- Separately, The AFR reports that to date, only six ASX 200 companies include environmental targets in executive Long Term Incentive Plans. The AFR suggests the low uptake is largely due to the difficulty of setting sufficiently rigorous metrics – though it's expected that debate over how to do so will continue/there is appetite (in some quarters) to do so.
- Current market practice: KPMG's June 2023 report into ESG in executive remuneration at ASX listed companies offers insights into current market practice.

  [Source: Semler Brossy Report: ESG and Incentives 2023 Report]

Institutional Investors and Stewardship

In Brief | Number of signatories to the UK Stewardship Code climbs to 277 (up from 254), the FRC has appointed Andrea Tweedie as the new Head of Stewardship

[Source: FRC media release 30/08/2023]

ESG

Sustainability assurance: AUASB has called for feedback on the IAASB's proposed global sustainability assurance standard (ISSA 5000)

Context: IAASB Consultation on draft global sustainability assurance standard (ISA 5000) now open

- The International Auditing and Assurance Standards Board (IAASB) is consulting on a draft over-arching sustainability assurance standard – [Draft] ISSA 5000 General Requirements for Sustainability Assurance Engagements –which is intended to provide a global baseline for sustainability assurance.
- Draft ISSA 5000 is a principles-based standard, intended for use by accountant and non-accountant assurance practitioners when performing sustainability assurance engagements.
- IAASB considers the draft standard is:

  'suitable for both limited and reasonable assurance engagements on sustainability information reported across any sustainability topic'.

- The draft standard has also been drafted to work with sustainability information prepared under any 'suitable reporting framework' (eg ISSB, GRI).
- The due date for submissions is 1 December 2023.

AUASB seeking feedback to inform its formal submission

- Ahead of the 1 December 2023 deadline, the Australian Auditing and Assurance Standards Board (AUASB) has released a consultation paper seeking feedback on draft ISSA 5000 to inform its response to the IAASB's consultation and to identify any 'compelling reasons' to modify the proposed' standard for application in Australia.
- The due date for submissions on the AUASB's consultation is 10 November 2023.

[Source: AUASB media release 30/08/2023]

Climate risk | IIGCC led investor group calls on ISS to further integrate climate into its proxy voting recommendations

Coinciding with proxy adviser Institutional Shareholder Services' (ISS) benchmark policy consultation, 35 investors (led by The Institutional Investors Group on Climate Change (IIGCC)) have written to ISS calling on the firm to both:

- **provide a specialty net zero policy for the 2024 proxy season**. Investors contend that there is a 'clear' need for a net zero policy given the number of investors who have committed to net zero/are pursuing Paris alignment.
- **'further integrate climate into its proxy voting recommendations on a more robust and consistent basis'.** Specifically, investors have called for ISS to tighten its approach in four key areas: board climate accountability, transition planning, shareholder resolutions and climate action 100+ net zero company benchmark alignment.

Further integrating climate into proxy vote recommendations – specific asks

The table below provides a snapshot of investors' asks on each of the four areas identified under the second point.

TOPIC AREA	INVESTOR ASKS
Board Climate Accountability	Investors have called on ISS to consult expanding its existing policy to: ▪ 'go beyond Climate Action 100+ companies' ▪ set an expectation that companies have in place 'robust short-term targets' ▪ set an expectation that companies set 'material Scope 3 emissions reduction targets' The letter also calls on ISS to disclose the number of directors captured by the 2023 policy and an estimate of those that would be captured in 2024 (assuming the requested expansion of the scope of the policy).
Transition Planning	Investors have called on ISS to specify more clearly what 'shortcomings' in transition planning would lead to an 'against' recommendation – especially in the context of 'Say on Climate' proposals (ie advisory resolutions on transition plans/progress against transition plan).
Shareholder Resolutions	Investors have called for 'a clearer and more consistent' policy on shareholder-proposed climate resolutions to address what they consider to be 'inconsistencies' in ISS' current approach. The letter also raises concerns about the use of '*future* regulation as a rationale for recommending against shareholder resolutions given the ever-changing policy environment'.
Climate Action 100+ net zero company benchmark alignment	Finally, investors suggest that ISS' benchmark policy would also 'benefit from further alignment with the Climate Action 100+ Net zero Company benchmark' including for example, how climate is integrated into executive remuneration for Climate Action 100+ focus companies.

[Source: IIGCC Letter to ISS: Net Zero Proxy Advice 30/08/2023; IIGCC media release 31/08/2023]

Global climate litigation: NGFS releases two complementary reports

The Network for Greening the Financial System (NGFS) has released two reports on climate-related litigation.

- Climate-related litigation: recent trends and developments (September 2023) provides an update on trends/developments in climate-related litigation since the publication of NGFS' 2021 report. The standout message is that 'climate-related litigation is growing rapidly, not only in terms of the volume of cases being initiated, but also crucially in terms of the legal arguments being used, and the diversity of addressees of such claims' and this is only expected to increase. The report identifies three main drivers behind this, namely:

  > 'the further development of climate attribution science may gradually fill the "evidence gap", particularly in respect of cases for damages. Second, litigation may be accelerated by the evolution of jurisprudence in respect of the duty of care attributed to corporates. Third, climate science is showing the acceleration of climate change and, as a consequence, the need for decisive action in the current decade 2020-2030'.

  The report also suggests that going forward, the risk to financial institutions in particular, is likely to increase significantly. The report states:

  > 'In particular, the NGFS expects that some of that litigation may become more closely linked to the development of climate-related legislation, particularly in the fields of greenwashing, climate disclosures and corporate due diligence, with a consequent impact on transition risks. This may become particularly relevant for the financial sector, where the recent expansion of regulatory reporting requirements may increase the likelihood of cases being taken directly against financial institutions.

- Building on this, the second report - Report on micro-prudential supervision of climate-related litigation risks (September 2023) - provides insight into the 'growing relevance' of climate-related litigation from a regulatory standpoint and suggests that currently, supervisors' approach is not keeping pace. Box 3 at page 10 of the report provides a snapshot of how climate-related litigation risk is a driver of various prudential risks. The report also offers suggestions (from page 18) around how supervisors could strengthen their supervisory approach/practices.

[Source: NGFS media release 01/09/2023]

Successful engagement: Green Century points to engagement as the driver behind Hormel's progress on reducing antibiotics usage

- Green Century has claimed credit for a decision by Hormel Foods Corp (Hormel) to increase transparency around its use of medically important antibiotics in food animals on company owned/contract farms, and to set targets for reducing usage.
- Green Century comments:

  > 'Prior to Green Century's engagement, Hormel had not disclosed how its animals were being dosed with antibiotics on its company-owned turkey and pork farms and on farms it contracted with for those animals…In exchange for a withdrawal of the 2019 shareholder proposal, Hormel agreed to publish the amounts of medically-important antibiotics routinely administered in the food and water supplies of turkey and pork raised on company-owned farms and in contract turkey farms'.

- Hormel has since set targets to eliminate routine use of medically important antibiotics and published its second antibiotics stewardship report tracking its progress toward the goals set.
- Green Century Shareholder Advocate Andrea Ranger considers this an example of the power of engagement. Ms Ranger said:

  > 'What I'm seeing from this multi-year engagement is the power of shareholder advocacy to affect change…Hormel is really scrutinising the practices used on its farms and partner farms, and it's now figuring out how to proactively treat illnesses without reaching for medically-important antibiotics. It's a win for people, a win for Hormel, and a win for keeping antibiotics effective.'

Broader context

'Responsible use' of antibiotics in meat supply chains – to mitigate the threat of global antibiotic resistance – has been a continued area of focus for Green Century (for example, Green Century filed a shareholder proposal at McDonalds in 2023 on the issue which secured 16.6% support. For context, BlackRock puts the median level of support for shareholder ESG proposals at 15% for the 2023 proxy season.

The issue has also been a focus for other investor groups. For example, As You Sow has also filed a number of shareholder proposals on the issue and separately other investors (led by FAIRR) have been engaging with companies for some time.

Looking forward, FAIRR with the backing of 71 institutional investors and investor representatives, announced in July 2023 that it is set to push for 12 US fast food companies (eg McDonald's, Yum! Brands (owners of KFC and Pizza Hut) and Restaurant Brands International (owners of Burger King)) on disclosure around the quantify and type of antibiotics used in their meat supply chains and their progress towards antibiotics reduction targets.

[Source: Green Century media release 21/08/2023]

In Brief | Not walking the walk? Report from Ceres flags inconsistencies between the largest 13 US banks' publicly stated climate goals and their climate lobbying efforts. Ceres has called on lenders to proactively 'advocate for policies that support borrowers in the shift to a decarbonised economy…balanced regulation that de-risks climate finance, improves disclosure and positions banks and clients for long-term success'

[Sources: Ceres media release 24/08/2023; Full text report: Responsible Policy Engagement Benchmarking for Banks]

In Brief | Supporting Asia-Pacific net zero transition: The Glasgow Financial Alliance for Net Zero (GFANZ) has announced that Hong Kong will host a GFANZ Chapter (joining the Japan Chapter) as part of the broader GFANZ Asia-Pacific Network

[Source: GFANZ media release 31/08/2023]

Diversity

Too slow: Latest CEW Census projects we are 50 years away from gender parity in ASX 200 CEO roles, CEW has urged business to accelerate change

- The latest Chief Executive Women Senior Executive Census flags that while progress towards increasing the number of women in leadership is continuing, led primarily by the larger companies, gender parity in top roles remains a considerable way off. According to the report, 91% of ASX300 CEOs are held by men, and at the current rate of change, the report predicts that we are 50 years away from achieving gender parity in ASX 200 CEO roles. You can find the full text of the CEW Senior Executive Census 2023 here.
- CEW considers that the current rate of progress is too slow and has called on corporate Australia to 'accelerate change to deliver gender equality at the highest levels by 2033' including:
  - setting targets with real accountability and transparency. CEW observes that 'companies with 40:40 or better gender targets are proven to be three times more likely to achieve gender balance than those without targets'.
  - creating CEO and Leadership team pipelines that have an equal representation of men and women.
  - 'ambitious leadership from Australian companies to build inclusive, flexible, and respectful workplaces that foster women leaders'.

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

Regulators

Impact of climate risk on monetary policy – insights from RBA Deputy Governor Michele Bullock

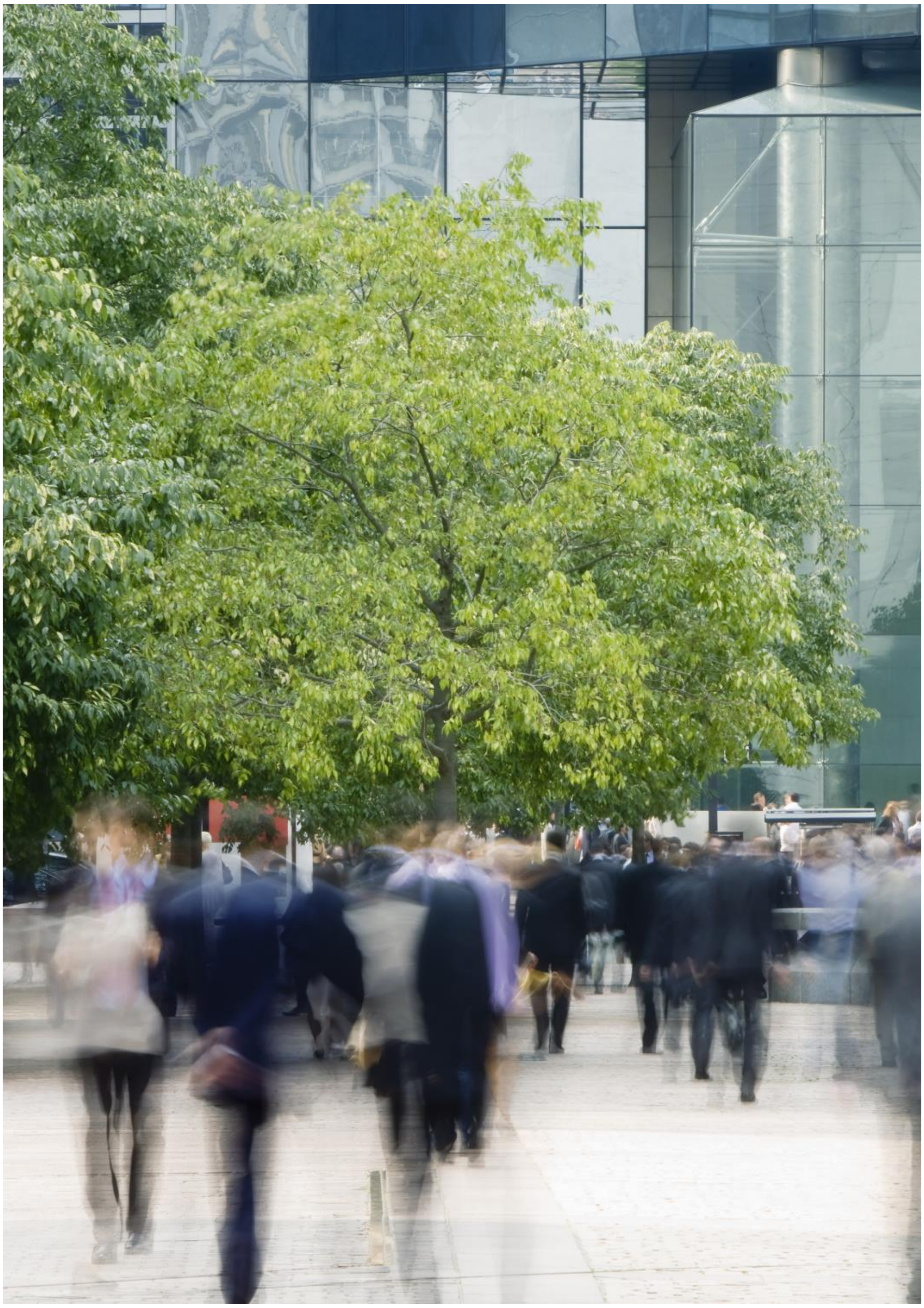
In a 29 August 202In a 29 August 2023 speech entitled Climate Change and Central Banks incoming Reserve Bank of Australia Governor Michele Bullock spoke about the relevance of climate risks (physical and transition risks) in the context of setting monetary policy, how the bank is monitoring financial stability and some of the work regulators in Australia have on foot to support financial markets/institutions in managing climate-related risks/opportunities.

Our key takeaways are below.

Climate-related risks and monetary policy

Ms Bullock summed up the link between monetary policy setting and climate risk as follows.

> 'The Bank sets monetary policy according to a flexible inflation target of between 2 and 3 per cent. To consider the implications of climate change for monetary policy, the Bank needs to understand how the physical effects of a changing climate and the transition to a lower emissions economy will affect inflation and its determinants. Many of the physical and transition impacts of climate change affect the supply side of the economy. While monetary policy works primarily by influencing the level of demand and expectations of inflation, supply-side developments also need to be considered. As well as short-term effects on supply, climate change may also have an impact on longer run



concepts like potential output and the neutral real interest rate, which can help to inform assessments on the appropriate stance of monetary policy'.

To illustrate the possible economic impacts of the climate transition on monetary policy, Ms Bullock pointed to developments in electricity generation as an example. Ms Bullock talked through how the transition away from coal to renewables (to a greater or lesser extent etc) will have inevitable direct and indirect consequences for overall inflation. Ms Bullock observed:

> 'Whatever the outcomes, trends in energy prices have significant effects on overall inflation. This is because energy prices have a sizeable direct impact on inflation, with retail electricity and gas prices accounting for around 3 per cent of the CPI basket. There are also indirect effects, as businesses can be expected to gradually pass on higher energy costs to the prices consumers pay for goods and services. So how the transition plays out for energy prices is going to be an important consideration for monetary policy over coming years'.

Setting monetary policy – could climate-related trends trigger a rethink of flexible inflation targeting?

Ms Bullock opined that 'climate-related economic effects…may affect the Bank's ability to assess the stance of monetary policy' due to the uncertainties involved.

Taking this further, Ms Bullock observed that:

> 'On a broader scale, there is a question about whether climate-related trends could cause central banks to re-examine the relative merits of flexible inflation targeting. The RBA Review considered this question but found that flexible inflation targeting had served the Bank well and recommended its continued use. Nevertheless, I expect that debate will continue'.

How the RBA is monitoring the impact of climate change

As part of the RBA's mandate to contribute to the stability of the financial system, Ms Bullock noted that the RBA is monitoring the 'build-up of climate-related risks' and working with other members of the Council of Financial Regulators (CFR) to 'create a framework for financial system participants to manage their climate-related risks and opportunities'.

Ms Bullock observed that though much of the focus to date has been on banks, regulatory focus is now also narrowing in on insurers – for example, starting this year, APRA, on behalf of the CFR, will conduct a climate scenario analysis with insurers.

More broadly, Ms Bullock said that CFR members are 'working together to create a framework to enable participants in the financial system to manage their climate-related risks and opportunities, which will support the transition to a lower emissions economy'.

Current priorities include: a) supporting the government in its implementation of internationally aligned climate disclosure requirements; overseeing the development of an Australian sustainable finance taxonomy and coordinated strategies to prevent greenwashing; and 'strengthening international engagement on sustainable finance'.

> [Source: Sir Leslie Melville Lecture Canberra, Address from RBA Deputy Governor Michele Bullock, Climate Change and Central Banks 29/08/2023]

Financial Services

Top Story | FAR status update: FAR Bills have passed both Houses, now await Assent

Legislation to introduce the long-awaited FAR - the Financial Accountability Regime (Consequential Amendments) Bill 2023 and Financial Accountability Regime Bill 2023 – passed both Houses on 5 September 2023 and now await Assent.

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.
- Assuming Assent is given this month (as is likely), 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 extends 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 proposed FAR is essentially unchanged from the previous Bill

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 proposed 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 as passed, 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 ultimately 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. If legislated in its current form, the changes would 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, would 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 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.

Commencement of the proposed FAR

The FAR Bill will commence on the day after it receives Assent. Though the timeframe varies, Assent is typically given within seven to ten days of a Bill being passed.

- the FAR will apply to the banking industry six months after commencement of the FAR Bill and 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 18 months after commencement of the FAR Bill and to any new entrants beyond that, from the time they become licensed.

Assuming Assent is given this month, the FAR will apply for the banking sector from March 2024 (and March 2025 for the insurance and superannuation sectors).

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 of the key points 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.

Top Story | The New World for FFSPs

The government is consulting on Exposure Draft legislation (FFSP Bill) which, if legislated, would codify licensing exemptions for foreign financial service providers (FFSPs).

The FFSP Bill draws heavily on the previous Bill that lapsed with the calling of the May 2022 Federal election. However, there are several changes as flagged previously here: The FFSP logjam breaks - POST - MinterEllison

MinterEllison has now released a detailed overview of the regime proposed in the FFSP Bill. You can access the full text on our website here: The New World for FFSPs - INSIGHT - MinterEllison

Compliance with the Banking Code: BCCC releases report into Banking Code compliance for H2 2022

The Banking Code Compliance Committee (BCCC) has released its latest report into banks' compliance the Banking Code of Practice (Code) for the period July to December 2022.

Key Points

- Overall, the number of breaches reported increased 3% on H1 2022, with three of the four major banks reporting an overall decrease.
- Looking more closely, though the number of reported breaches fell in some areas including (for example) a 77% decrease in reported breaches concerning Banking services for people with a low income (Ch 15 of the Code), a 41% decrease in breaches concerning Direct Debits and recurring payments (Ch 34 of the Code) breaches in other areas increased. For example,
  - Breaches concerning compliance with the Code's Responsible Lending obligations increased 14% with two major banks reported increases in breaches of responsible lending obligations of 59% and 31%, respectively.
  - Complaints handling breaches increased 19% overall
  - Complaints concerning obligations in the code to protect customer's privacy also increased 14% overall – with two major banks reporting a 31% increase
- Most breaches attributed to human error: 80% of reported breaches were attributed to human error (vs 81% for the last six month period). The BCCC has called on banks to:

  'analyse breaches thoroughly to identify the root causes and make improvements to rectify them and prevent recurrence. Attributing breaches to human error as the easy default option is poor practice'.
- Breaches were most often identified through Line 1 monitoring (including by all four major banks, though for other banks, customer complaints was still reported as the most common way breaches are identified). On this point, the report comments that:

  'Identifying most breaches through Line 1 monitoring indicates that banks had a more proactive compliance approach in July–December 2022. This increases the likelihood of capturing all breaches and using them to learn and improve…The other banks still identified more through customer complaints, indicating more work is needed to enhance their proactive efforts to identify breaches'.

Related News

The Australian reports that the Australian Banking Associated has submitted a revised Banking Code of Conduct to ASIC for approval. According to The Australian, the updated Code has been streamlined to remove duplication with existing laws (eg Privacy obligations, Responsible Lending Obligations) and adopts a number of changes, suggested by consumer groups, to bolster customer protections.

[Source: BCCC media release 04/09/2023; BCCC Report: Compliance with the Banking Code of Practice July – December 2022]

Room for improvement: Banking Code Compliance Committee has released its follow up report into compliance with requirements around bank guarantees

- In August 2021, the Banking Code Compliance Committee (BCCC) published a report into how Code signatories are complying with their Part 7 obligations (2021 Guarantees Report). The report included 23 recommendations to improve practice on guarantees.
- A follow up inquiry was conducted into 2022 to assess banks' progress toward acting on the previous report recommendations and a report has now been released (2023 Report).
- Overall, the 2023 Report found that though banks had made some 'meaningful' improvements – for example, introducing enhanced training to raise staff awareness of Code standards - there remains scope for further uplift in compliance.
- In particular, the report highlights a 'lack of progress' towards implementing three recommendations from the 2021 report.

THREE 2021 RECOMMENDATIONS THE BCCC WOULD LIKE TO SEE BANKS IMPLEMENT	ASSESSMENT OF BANKS' PROGRESS
Recommendation 4: 'Where possible, banks should meet face to face with the prospective guarantor to highlight the matters disclosed in the terms and conditions under clause 96 of the Code.	The report found that 'some banks' still have not implemented a requirement for staff/brokers to conduct interviews with prospective guarantors.
Recommendation 12: 'Banks should audit compliance with the current Code's guarantee obligations. Audits should include an assessment of the controls in place to ensure compliance with the Code's guarantee obligations'.	The report found that 'some banks' have also not conducted had conducted an audit of their compliance with Code guarantee obligations to identify areas of risk/issues to be addressed.
Recommendation 23: 'Banks should strengthen their data capability by collecting guarantor outcome data, such as enforcement and complaints data, to gain insights into guarantee trends, compliance risks and customer outcomes for continuous improvement across the guarantee process'.	The report found that 'most banks do not utilise guarantee-related data to proactively identify issues and make continuous improvements to their guarantee process'.

The report makes clear that the BCCC would like to see banks implement these recommendations. The report states:

> 'While banks provided some explanations for not adopting these recommendations, we still consider they should be implemented where possible'

Additional areas for improvement: New recommendations

The 2023 report includes the following three new recommendations to lift bank practices.

- Apply effective controls to ensure that processes related to guarantee obligations are effective and operating as intended.
- Ensure processes, record management and controls are applied consistently across retail and business banking units and across subsidiary brands.
- Extend controls to third parties, such as brokers and solicitors, who undertake part of the guarantees process on behalf of the bank.

[Sources: BCCC media release 28/08/2023; BCCC Guarantee Follow Up Report]

Funding financial counselling services: FCA disappointed some sectors/organisations have elected not to contribute

Financial Counselling Australia (FCA) has issued a statement welcoming commitments by several industries/organisations – banking, insurance, energy retail, online wagering, Tabcorp, Telstra and Credit Corp - to voluntarily, financially contribute to funding more financial counselling services.

The statement also expresses 'disappointment' that others have elected not to do so. The FCA comments:

> 'These companies [ie those that have chosen not to contribute funds] refer their customers to financial counsellors and benefit when they get back on track. In some cases, it is the company's conduct itself that is the root cause of financial problems…Sometimes a company's own internal hardship processes can make a person's existing financial issues worse'.

The FCA adds that it would prefer a mandatory funding model based on industry levies to the current approach. The FCA comments:

> 'The experience in trying to secure voluntary contributions highlights the inherent flaws in a voluntary mode'.
>
> [Source: FCA media release 31/08/2023]

Legislating the proposed objective of superannuation: Draft legislation released for consultation

Treasury has released two draft Bills for consultation – [Exposure draft] Superannuation (Objective) Bill 2023 (Cth) and [Exposure draft] Superannuation (Objective) (Consequential and Transitional Provisions) Bill 2023 (Cth) – which propose to enshrine the following objective of superannuation in legislation:

> 'to preserve savings to deliver income for a dignified retirement, alongside government support, in an equitable and sustainable way'.

The intent behind the proposed reforms is to:

> 'require policy-makers to demonstrate to the Parliament, and Australians, how any future changes to superannuation law are consistent with the legislated objective'.

In practical terms, one outcome of this would be that (if the legislation is passed), a statement of compatibility – ie an assessment of whether the Bill or Regulation is compatible with the objective set out above - would need to be prepared for any Bill or Regulation that relates to superannuation (unless an exception applies).

Importantly, the draft explanatory materials make clear that the proposed change

> 'is not intended to change the operation or interpretation of existing superannuation law, prudential standards or governing rules of superannuation entities. For example, it will not change or prevent how members can currently access their superannuation such as the payment of a lump sum on retirement or early access to their superannuation in exceptional circumstances'.

Timing

- The due date for submissions is 29 September 2023.
- The proposed commencement date is 28 days after the Superannuation (Objective) Bill 2023 (Cth) takes effect.

[Source: Treasury consultation: Legislating the objective of superannuation – August 2023 01/09/2023 – 29/09/2023]

APRA has released the 2023 superannuation performance test results

The Australian Prudential Regulation Authority (APRA) has released the results of the 2023 superannuation performance test.

The annual performance test assesses the long-term performance of superannuation products – MySuper products, and for the first time, 805 'trustee directed products' – against 'tailored benchmarks'. Products that 'fail' to meet these benchmarks are required to notify their members of the test outcomes within a set timeframe. Where products have failed for two years, they are barred from accepting new members.

The aim of the exercise is to improve member outcomes.

Key outcomes

- 96 trustee directed products did not meet the test benchmarks. Within this group, 75% of products were offered by only four trustees
- One MySuper product failed to meet the test benchmarks (down from five in 2022 and 13 in 2021). This is the third consecutive year that the product has failed the test and APRA states that the trustee has plans in place to cease the product. The product has been closed to new members since 2022.
- The median administration fees and costs for platform trustee directed products were the highest at 0.54%. Next highest at 0,27% were non-platform trustee directed products, and 0.26% for MySuper products.

[Source: APRA media release 31/08/2023]

ASIC launches proceedings against Youpla Group directors

- The Australian Securities and Investments Commission (ASIC) has commenced civil penalty proceedings against five former directors and officers of funeral insurance provider Youpla Group (formerly Aboriginal Community Benefit Fund (ACBF)) over (alleged) breaches of their duties between September 2017 and November 2018.
- Broadly, ASIC alleges that over this period the directors and officers maintained insurance arrangements with a Vanuatu-based company - Crown Insurance Services Limited (Crown) – which was beneficially owned and controlled by two of ACBF's directors. ASIC alleges that these insurance arrangements stood to benefit the two directors, while exposing ACBF entities to increased risk (contrary to the interests of ACBF entities). The concise statement sums up ASIC's case as follows:

  > 'the directors breached their duties under ss 180 to 182 of the Corporations Act 2001 (Cth) (Corporations Act) by failing to pursue alternatives to and maintaining insurance arrangements with Crown, where those arrangements were not in the interests of the ACBF Entities and the members of the funds they operated. As a result, substantial sums were paid by the ACBF Entities to Crown which was not in the ACBF Entities' interests, impacting their viability and putting at risk their ability to meet their commitments to members'.

- ASIC is seeking declarations of contraventions of s180, s181 and s182 of the Corporations Act 2001 (Cth), pecuniary penalty orders and orders disqualifying the defendants from managing corporations.
- Further details of ASIC's case are included in the concise statement and originating process.

[Source: ASIC media release 31/08/2023]

ASIC consults on proposed 12 month extension of electronic precontractual disclosure instrument

- Ahead of the expiration of ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835 (the instrument) on 1 October 2023, and pending the passage of Treasury Laws Amendment (2023 Law Improvement Package No. 1) Bill 2023 (the Bill), the Australian Securities and Investments Commission (ASIC) is consulting on a proposal to extend the operation of the instrument for 12 months.
- For context, the instrument operates to 'allow credit licensees and representatives to give precontractual disclosure to consumers in the same electronic manner that applies to other credit disclosure documents'.
- Assuming the Bill is passed, exemptions/modifications to the law currently contained in the instrument will be transferred into primary legislation. The Bill has passed the House of Representatives and has progressed to second reading stage in the Senate without amendment.
- The due date for submissions on ASIC's proposed 12 month extension of the instrument is 13 September 2023.

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

In Brief | DDO compliance: ASIC Report 770 outlines ASIC's assessment of how issuers of retail OTC derivatives are meeting DDO and highlights areas for improvement. Broadly, ASIC calls on issuers to: a) 'address their over-reliance on client questionnaires as a primary distribution filter; b) review their mass marketing of OTC derivatives; and c) 'make greater use of available data to assist the design of derivative products, target market determinations (TMDs) and distribution arrangements'. ASIC has urged issuers to address these issues, and has cautioned that it 'will not hesitate to take further action, from stop orders through to court proceedings, especially where we see egregious failures'

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

In Brief | Experience pathway Bill - Treasury Laws Amendment (2023 Measures No. 3) Bill 2023 – passed both Houses on 6 September 2023 without amendment. Schedule 2 to the Bill will implement the government's election commitment to 'better recognise the experience of existing financial advisers as equivalent to tertiary study'

[Source: Treasury Laws Amendment (2023 Measures No. 3) Bill 2023]

In Brief | ASIC is consulting on a proposal to remake ASIC Class Order [CO 13/1050] Financial reporting by stapled entities (which is otherwise due to sunset on 1 October 2023). The due date for submissions is 13 September 2023

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

Risk Management

Top Story | Making commercial crime insurance claims: Proven tips

With the increase in employee theft, electronic fraud, forgery and other organisational crimes, businesses increasingly face issues in the aftermath. This often involves making a claim and preparing a proof of loss under a commercial crime insurance or a related policy.

MinterEllison has released an article offering insights to assist in creating a strong proof of loss, to help maximise the potential recovery under an insurance policy. You can find the full text here: Making commercial crime insurance claims: Proven tips - Insight - MinterEllison

Unfair Trading Practices | Consultation paper seeks views on four potential options to address the issue

The government has released a consultation paper (referred to as a consultation regulation impact statement) seeking feedback on possible options to address the use of unfair trading practices not currently prohibited under Australia's consumer laws (eg the existing prohibitions on misleading or deception or unconscionable conduct).

What are unfair trading practices?

The Australian Competition and Consumer Commission (ACCC) explains unfair trading practices as conduct that is:

- 'harmful but does not reach the legal threshold for unconscionable conduct
- not misleading or deceptive but distorts consumer choice by creating confusion or hiding or omitting relevant information
- not captured by the unfair contract term provisions as harmful terms in non-standard form contracts or unfair conduct engaged in pursuant to a contract term that is, on the face of it, a reasonable contract term'.

Examples of potentially unfair trading practices highlighted in the consultation paper include:

- 'Exploiting bargaining power imbalances in supply chain arrangements, including by unilaterally varying supply terms at short notice'
- 'Omitting or obfuscating material information which distorts consumers' expectations or understanding of the product or service being offered'
- 'Using opaque data-driven targeting or other interface design strategies to undermine consumer autonomy'
- 'Exploiting or ignoring the behavioural vulnerabilities of consumers that are present in the 'choice architecture' of products or services (digital or otherwise)'
- 'Non-disclosure of contract terms including financial obligations (at least until after the contract is entered into)'
- 'All or nothing 'clickwrap' consents that result in harmful and excessive tracking, collection and use of data, and don't provide consumers with meaningful control of the collection and use of their data'
- 'Providing ineffective and/or complex disclosures of key information when obtaining consent or agreement to enter into contracts'.

Importantly, the consultation paper makes clear that while many of these issues occur in the digital context, they are not necessarily confined to the digital economy.

Scope of the consultation

The focus of the paper is on potential changes to Australia's consumer laws – the options put forward do not extend to (potential) reform of the Australian Securities and Investments Commission Act 2001 (Cth) or to the Australian Securities and Investments Commission. This is planned to be considered separately in 2024.

Four potential options for reform

The paper puts seeks feedback on the regulatory, financial, business and community impacts of the following four policy options.

FOUR (POTENTIAL) OPTIONS FOR REFORM	
Option 1: Status quo (no change)	▪ Under this option, there would be no change to the existing legislative framework.
Option 2: Extend the existing prohibition on unconscionable conduct in the ACL	▪ Under this option, the existing prohibition on unconscionable conduct in s21 of the Australian Consumer Law would be extended to capture unfair conduct within subsection 21(3) or s22 as a factor/element that must be assessed in determining whether conduct is unconscionable in connection with the supply/acquisition of goods/services. ▪ Alternatively, it's proposed that 'the concept of unfairness' would be added to s21 of the ACL.
Option 3: Introduce a general prohibition on unfair trading practices	▪ This option would create a new general prohibition on unfair trading practices in the ACL which would apply to business across all sectors. ▪ The consultation paper does propose a definition of 'unfair' in this context, noting that this would be developed if this option is progressed. ▪ Penalties: It's suggested that the approach to penalties could align with the approach introduced under the Treasury Laws Amendment (More Competition, Better Prices) Act 2022 (Cth)
Option 4: Introduce a combination of general and specific prohibitions on unfair trading practices	▪ This option builds on Option 3, in that in addition to the introduction of a general, principles-based prohibition on unfair trading practices in the ACL, certain specific practices that 'commonly result in consumer and/or small business harm' would also be explicitly prohibited.

Next steps

The due date for submissions is 29 November 2023.

It is not clear what the timeframe for progressing the preferred policy option may be beyond this – the consultation paper flags that once a decision is reached on the preferred policy option, there may be further consultation.

ACCC has welcomed the consultation – appears to favour the introduction of a general prohibition on unfair trading practices

In a statement welcoming the consultation, the Australian Competition and Consumer Commission (ACCC) said that it has long advocated for the introduction of an unfair trading practices prohibition into the Australian Consumer Law to address unfair trading practices, including in the 2019 Digital Platforms Inquiry Final Report.

Separately the Consumer Policy Research Centre, Consumer Action Law Centre, CHOICE, Financial Counselling Australia, and the Financial Rights Legal Centre have issued a joint statement welcoming the consultation on the potential introduction of an unfair trading law.

[Sources: Assistant Treasurer Stephen Jones media release 31/08/2023; Treasury Consultation: Unfair trading practices - Consultation Regulation Impact Statement 31/08/2023 – 29 November 2023]

Realising the potential benefits of the CDR | Key takeaways from the Assistant Treasurer's speech to the Intersekt Conference, screen scraping consultation launched

In his 30 August 2023 Address to the Intersekt Conference, Assistant Treasurer and Minister for Financial Services Stephen Jones spoke about the government's continued focus on combatting scams and the potential for the Consumer Data Right (CDR) to assist in this context. Mr Jones also touched on some of the other potential benefits of the CDR and the work on foot to help realise these potential benefits.

Our key takeaways are below.

Finding a better alternative to 'screen scraping'

- Mr Jones identified the practice of 'screen scraping' which describe consumers 'hand[ing] over their credentials, like log in details and passwords, for a third party to access their account' in order for that third party to undertake an action on the consumers' behalf, as a priority to address, because of the associated risks. Mr Jones said that the practice, 'cuts against the work we as a Government and many parts of the fintech industry are trying to do to use data more safely, and to store it more safely.
- Mr Jones noted that last year's statutory review of the Consumer Data Right (CDR) recommended that screen scraping be banned, and the Consumer Data Right (CDR) used where viable.
- Mr Jones pointed to the release of a discussion paper seeking feedback on how screen scraping is currently used, and why it is favoured over other forms of data sharing, as a first step towards formulating a response to the issue. While making clear that the government does not intend to 'force CDR into uses it isn't suitable for, or where it isn't yet mature enough to be effective', Mr Jones also underlined that he considers there must be a better alternative to the practice. Mr Jones observed:

  > 'We also know that screen scraping is often seen as the least bad option, and that many people and businesses only use it due to a perceived lack of alternatives. But let me say this: I really don't think that asking people to hand over their online banking passwords to lenders, mortgage brokers, and others is the best we can do. The world has moved on. It's hard to see a big future for any business model that relies on people sending through their log in details. I find it hard to accept that we can't do better for consumers'.

Driving uptake of the CDR

- Mr Jones said that the government's strategy for the next two years aims to drive take up and 'use cases' – to ensure the potential benefits of the CDR (including, its use as an alternative to screen scraping among many others) are realised.
- Mr Jones identified the potential to support increased competition as another potential benefit of the CDR. Mr Jones said that proposed rules (on which the government is consulting) to expand the CDR to non-bank lending would support this aim – 'these rules would give consumers a more complete view of their finances, and allow them to shop around and make other important financial decisions with confidence'.
- Mr Jones also identified a potential role for the CDR in the context of regulating Buy Now, Pay Later (BNPL) products as credit. Mr Jones submitted that:

  > 'Having CDR available in non-bank lending may make it quicker and easier for BNPL providers to make the checks that will be necessary to comply with the new, scalable responsible lending obligations that we have proposed for their industry.
- Finally, Mr Jones pointed to the potential benefits of the CDR for small business. Mr Jones said that enhancements to allow businesses to share their CDR data more easily/safely with bookkeepers and software providers would help realise these benefits.

Treasury Consultation: Screen scraping practices

- Treasury has released a discussion paper seeking views on how screen scraping is currently being used, the comparability of data accessed through screen scraping with the CDR, and the risks that the practice poses to consumers.
- The consultation also seeks views on the recommendation of the Statutory Review of the CDR that screen scraping be banned where the CDR is a viable alternative.
- Feedback will inform policy development on potential options for regulating screen scraping practices.
- The due date for submission is 25 October 2023.

  [Sources: Assistant Treasurer and Minister for Financial Services Stephen Jones Address to the Intersekt Conference 30/08/2023; Treasury Consultation: Screen scraping – policy and regulatory implications 30/08/2023]

Data scraping | Privacy and data protection regulators release global statement of expectations on the practice

- In response to the uptick of 'mass data scraping' from social media applications and other websites hosting publicly accessible personal information, the Office of the Australian Information Commissioner (OAIC), together with 11 international data protection and privacy agencies, has issued a joint statement on the practice.
- The statement sets out:
  - The key privacy risks associated with data scraping. On this point, OAIC states that

    'Data scraping technologies, which are being increasingly used to collect and process vast amounts of individuals' personal information from the internet, raise significant privacy concerns as these technologies can be exploited for purposes including monetisation through reselling data to third-party websites, including to malicious actors, private analysis or intelligence gathering'.
  - The measures social media companies and others 'should' take to protect individuals' personal information from unlawful data scraping to meet existing regulatory expectations. Importantly, the statement makes clear that agencies consider social media companies (and others) have existing legal obligations to protect the personal information on their platforms from unlawful data scraping and the agencies expect them to have in place measures to comply.
  - The steps individuals can take to minimise the privacy risks from data scraping.
- OAIC (and the other agencies) expect the companies running social media platforms to respond 'over the coming weeks' about how they are complying with/intend to comply with the expectations detailed in the statement.

  [Source: OAIC media release and joint statement on data scraping 24/08/2023]

New report offers insights into how publicly listed companies managing AI-related risks/opportunities

Deloitte and the Society for Corporate Governance have released the findings of a survey into publicly listed companies are managing the risks/opportunities presented by use of artificial intelligence (AI). The findings are based on a sample of 97 publicly listed companies of varying sizes and operating across various sectors.

Our key takeaways are below.

- **Two areas of focus:** Asked where they are considering AI usage, strategy, impact (eg disruption, competitive advantage, risk) etc within their organisation, the application of AI was sales/marketing was the most common response overall. Looking more closely, there was variation in the responses along size lines:
  - Large caps: Sales/marketing (55% of respondents) was the most common response, followed by product development (48%) and Legal (42%)
  - Mid caps: Don't know/not applicable was the most common response (48%), followed by sales/marketing (33%) and product development (30%)
- **Functional responsibility**: Asked what functional department within their organisation has primary responsibility for 'AI matters', 56% of respondents nominated the IT/technical department. 'Cross functional working group' was the next most common response (40% of respondents).

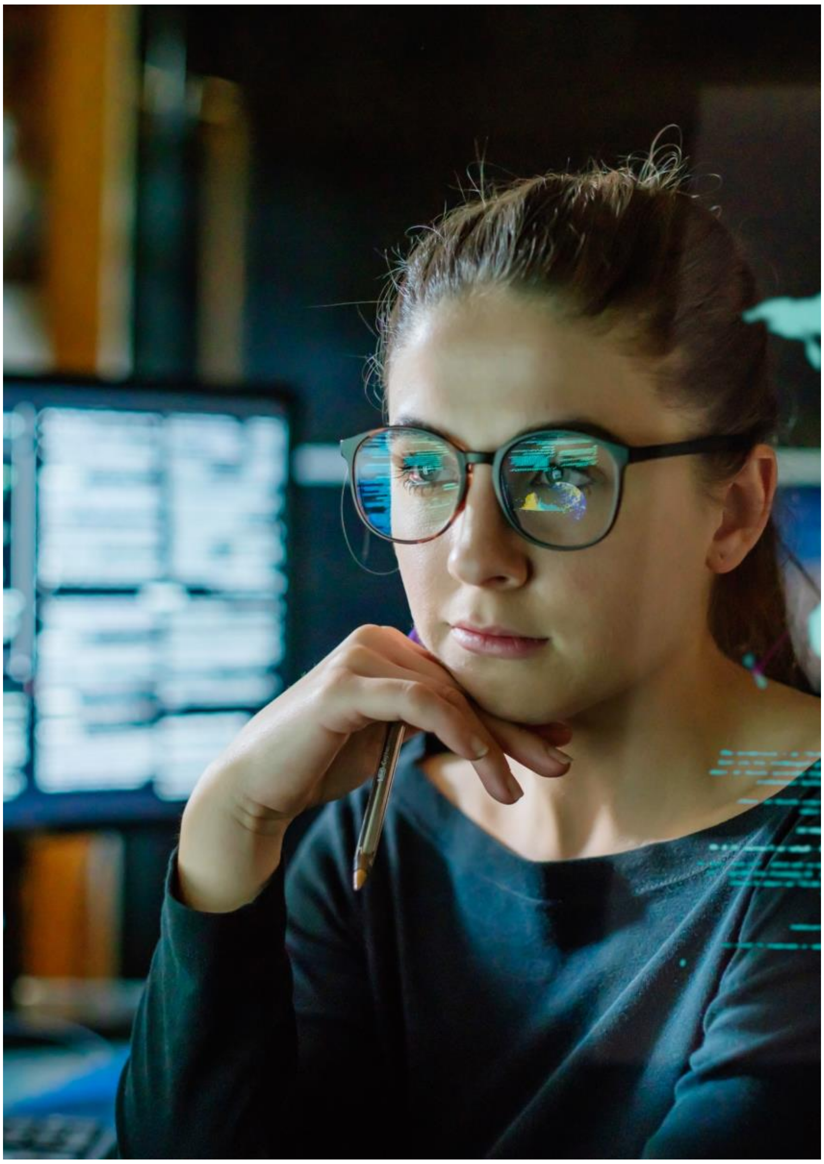
Oversight of AI

The findings appear to suggest that thinking around AI governance/oversight is not well advanced. For example:

- Asked where primary oversight lies within the organisation's board:
  - the most common response (29% of respondents) as that neither the board, nor any board-level committee has express responsibility for AI. Looking at this more closely, 25% of large caps and 38% of mid-caps returned this response.
  - The next most common response (19% of respondents) was that the issue is not yet being discussed at board level - 19% and 22% of large- and mid-caps, respectively returned this response.
- Frequency of discussion of AI on board/committee agenda:
  - The most common response overall was that AI-related issues are included on an ad hoc basis – this response was reported by 52% of large-caps and 31% of mid-caps.
  - 35% of large-caps and 53% of mid-caps reported that to date, AI related topics have not been included on the agenda

Risk management

- Use of AI by employees:
  - 48% of companies have not expressly permitted or prohibited the use of AI by employees, while 25% have expressly permitted use of AI for specific purposes. Looking at it by market cap – 25% of large caps and 63% of mid-caps returned this response.
  - For companies that allow use of AI tools by employees, 36% of large-caps and 20% of mid-caps allow use for specific purposes while 14% of large-caps and 3% of mid-caps that permit use for any purpose.
  - Large caps are more likely to be considering whether to permit use by employees relative to midcaps - 14% of large-caps reported they are currently considering whether to permit use by their employees vs 6% of mid-caps.



- AI use-framework: 33% of respondents indicated their company does not have in place an AI use framework, policies or code of conduct, though 36% of respondents indicated that their company is 'currently considering' this. Just 13% of companies currently have a use framework/policies or code of conduct in place.
- Review of existing policies to address the use of AI: Just 9% of respondents indicated that their organisation had undertaken a review of their existing policies (eg cyber, risk management, records retention) to take into account AI usage. 42% indicated that they are currently considering doing so.
- Risk mitigation measures in place: Asked which AI-related risk mitigation measures their company has adopted/implemented, 68% of respondents did not know. The next most common answer was 'additional human oversight'
- Lifting internal capability:
  - 52% of companies have no AI training programs for employees in place.
  - 11% of respondents indicated employee training had been implemented
  - Just 6% indicated board training had been implemented

[Sources: Harvard Law School Forum on Corporate Governance and Financial Regulation 02/09/2023; Full text report: Board Practices Quarterly Future of Tech: Artificial Intelligence (AI) August 2023]

In Brief | New study highlights poor data governance as a growing source of risk for Australian businesses, especially in light of the huge increase in data that organisations are creating daily

[Sources: Swinburne University of Technology media release 22/08/2023; Full text report: Information governance and information management as a service: survey report 2023]

Other News

Top Story | Further 'modernisation' of Treasury Laws on the way

Overview | Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2023

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 further expands on these changes. This new Bill builds on a lapsed Bill introduced by the former government.
- The reforms will (generally) apply from the day after the Bill receives Assent.

Overview

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 will further 'modernise' 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, Schedule 1 of the Bill includes proposed changes that will mean that:

- all documents (including deeds) which are required or permitted to be signed under the Corporations Act could 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) could be sent in either hard copy or electronic form
- companies would not be 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) will 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 commence the day after the Bill receives 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 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 commence 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 will apply 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 will 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 2023]

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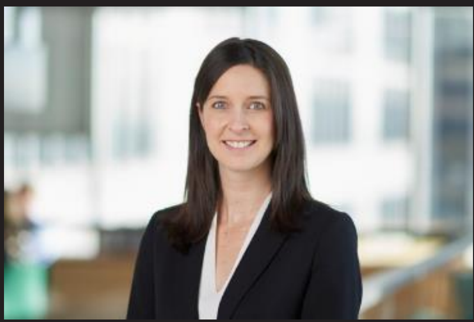

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