Governance News

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

10 April 2024

Contents

Boards and Directors

ASIC Chair urges directors to see the benefit (not just the burden) in new obligations

Here are our key takeaways from Australian Securities and Investments Commission (ASIC) Chair Joe Longo's 21 March 2024 keynote address to the Australian Institute of Company Directors (AICD) 2024 Governance Summit.

It is difficult, but not impossible for directors to comply with their obligations (and there are benefits)

Mr Longo acknowledged the increased (and increasing) demands being made of directors – eg combined impact of: regulatory changes, incoming mandatory climate disclosure requirements, cyber security and AI – but emphasised that these challenges neither render it impossible for directors to comply with their obligations or lessen ASIC's expectation of compliance. Mr Longo commented:

> 'I'm going to say it's not impossible to comply. It's tough love but being a director isn't easy – if it were, anyone could do it. Good directors run successful, profitable businesses. That's not going to happen unless every director takes an active stance of curiosity and asks the right questions – to understand their business, and how that business makes money. When that happens, you have a good chance of having a business that doesn't just comply – it thrives'.

Increased expectations and/or new obligations are not necessarily 'an increased burden' but an opportunity

Mr Longo underlined that 'increased expectations' and/or new obligations on directors don't 'necessarily mean an increased burden', or 'decreased profits or 'a meaningless list of endless tasks', but rather can have benefits - they 'mean better business'.

In illustration, Mr Longo pointed to (not yet legislated) incoming new climate reporting obligations (read: Mandatory climate reporting in Australia | Landmark Climate Disclosure Bill introduced - Technical update - MinterEllison) and increased scrutiny or cyber preparedness.

On the new climate reporting/assurance requirements, Mr Longo commented:

> 'Yes, new climate-related reporting requirements will impose new obligations on directors and reporting entities. But they also create opportunities. The reporting requirements need to be seen in the overall context of the objective of the reporting regime – which is to disclose 'information about … climate-related risks and opportunities that is useful to primary users of general purpose financial reports in making decisions relating to providing resources to the entity'.
>
> In plain English, this means directors and the boards they sit on and the companies they run will actually and ultimately benefit from more disclosure across the economy. Why? Because you yourselves are in fact users of the information prepared by other entities. Access to more climate-related information on these other entities in your value chain can support you in better managing climate change-related risks and opportunities, and in potentially preserving or enhancing shareholder value'.

'Advice' for directors: Four questions for directors to be asking to ensure compliance

Mr Longo offered the following advice to directors on the steps they can take to help ensure they are complying with their obligations (and realising the benefits of doing so).

> 'Asking these questions is precisely how the winding roads of judgement are made straighter, and the thickets of decisions along the way, made a little less thorny.
>
> Four questions – all of them important:
>
> Are you acting honestly?
>
> Are you putting the company first?
>
> Do you have a continuous curiosity to understand all aspects of the company's core business and the risks associated with it? and
>
> Are you challenging management to ensure your understanding is well-founded, and getting trusted professional advice?
>
> Ask these questions, not just once, but again and again.
>
> If the answer is yes – not just once, but again and again – then you will get to a point where concerns about complying with your directors' duties won't keep you up at night.
>
> And you'll go a long way toward meeting the compliance challenges, and seeing past them to the opportunities and benefits'.
>
> [Source: ASIC Chair Joe Longo keynote address to the AICD Governance Summit 21/03/2024]

Director ID | ASIC commences proceedings against director over (alleged) failure to have a DirectorID

The Australian Securities and Investments Commission (ASIC) has commenced its first ever court action against a director over the directors' (alleged) failure to get their DirectorID within the required timeframe. According to ASIC's announcement, the director could be facing a maximum fine of $13,320.

For more on which directors need to apply, and how to apply read our update: Director IDs: What directors need to know now - Insight - MinterEllison

Diversity

Why aren't ASX300 boards shifting their mindset on who makes a good director?

Here are our key takeaways from the latest Gender Diversity Index from the Governance Institute and Watermark.

Key Takeouts

- **The 'least risk hire' mindset predominates**: The standout finding is that overall, boards continue to hire directors drawn from the same talent pool they have traditionally drawn on, despite acknowledging the value/benefits of increased diversity. Though more gender diverse than ten years ago, boards remain predominantly male, (very) pale, and are (increasingly) stale.
- **The report acknowledges that the DEI conversation has broadened** beyond culture/ethnicity, age, gender, skills and independence. Calls are getting louder for the focus on diverse leadership to expand to encompass other attributes - people with disabilities, members of the LGBTQ+ community and those from more diverse socio-economic backgrounds. The report suggests various (potential) changes to support a shift in mindset/practice notably: a) recalibrating the 40:40:20 (voluntary) target to aim for 40% men, 40% women and 20% people from underrepresented groups of either gender; and b) potentially broadening the focus on gender diversity in the ASX Corporate Governance Principles and Expectations to explicitly include an expectation of disclosure of broader board diversity characteristics.

Report overview

The Governance Institute, in partnership with Watermark Search International, have released their tenth annual board diversity index. The report tracks progress (or lack of progress) toward improving five aspects of diversity on ASX 300 boards - 1) gender diversity; 2) cultural diversity; 3) skills diversity; 4) age diversity; and 5) tenure/independence - over the past ten years.

The report also acknowledges that these five facets of diversity do not offer a full/holistic picture and includes discussion around why this is the case, the implications and offers suggestions to help support change.

The data on which the report is based is current to 1 January 2024.

Our key takeaways are below.

Lack of DEI accepted as a risk in principle (but not so much in practice)…

The report proceeds on the basis that more diverse boards in the broad sense – boards that are (for example) ethnically/culturally, gender, skills and age diverse – make better decisions than less diverse boards, chiefly because they bring different viewpoints to the decision making process and guard against the dangers 'group think'.

However, it's submitted that though directors are accepting of this in principle it isn't having enough impact on who directors are willing to consider as a potential board candidate in practice.

For example, the report highlights that:

- There has been no progress toward increasing cultural diversity on ASX 300 boards. In fact, the report highlights that in 2024, the proportion of seats held by people of Anglo-Celtic background stands at 91.2% (higher than the 90.5% it was seven years ago in 2017).
- Boards are continuing to prioritise accounting/finance skills – finance sector experience among directors has risen to 40% (despite the many and varied challenges facing directors)
- Boards are getting older – the proportion of directors aged under 50 has been on the decline since 2021 – significantly there are fewer younger women directors on boards (11% in 2024 vs 17% in 2021)
- Tenure is also identified as a barrier to change – the number of Chairs staying on 20 years or more is increasing.

Boards are more gender diverse

Gender diversity is highlighted in the report as the area where there has been the most significant improvement over the past decade – though it is not suggested that there is no room for improvement. For example, gender parity is yet to be achieved on most individual boards, all-male boards are not extinct and women remain underrepresented in Chair roles.

While welcoming of the progress that has been made, the report queries whether adding women of similar backgrounds/skillsets/experience to existing boards necessarily increases diversity of thought/outlook. On this, the report comments:

> 'We've made some progress on the gender make-up of ASX300 boards, but we're often simply replacing white men with white women from a similar background. That's a shortfall when it comes to diversity. As a recent report from Diversity Council Australia points out, "Gender equity overlooks race". Boards are missing opportunities by not recruiting directors from different cultural backgrounds – Asia, India, Pakistan and elsewhere'.

> [Note: The Diversity Council of Australia Council report referred to is available to DCA members here: CARM women in leadership - Diversity Council Australia (dca.org.au).]

In her keynote address to the 2024 AICD Corporate Governance Conference, Catherine Livingstone made a similar observations. Ms Livingstone commented:

> 'Diversity of thinking, together with the ability to contribute, are key attributes– and may result from factors such as experience, qualifications, age, gender – but may not; gender diversity is a very necessary, but not sufficient condition: there is an important distinction between difference and diversity: you may have a gender balanced board without enough diversity of thinking; you may have a range of experience around the table but not enough ability of those directors to contribute to the specific needs of the organisation. We risk too much ticking of the box, and not enough thought, around the question of diversity on Boards'.

Ms Livingstone also raised the issue of tenure as a barrier to change.

> 'Every seat around a Board table counts – so it may be appropriate to balance corporate memory and diversity, with continuing ability to contribute, and comparison against the changing needs demanded by the organisation's strategic context.
>
> There may be individuals who would be great directors, but do not wish to commit to 9 years, nor be seen to let the organisation down by leaving after three or four years\
>
> Perhaps we should consider whether 6 years could be a more appropriate balance point. This is not to suggest that 6 years should be a tenure limit, rather that the fixed tenure limits being a lower bound as well as an upper bound results in an unhelpful rigidity'.

A 'least risk hire' mindset: Better the devil you know…

The report attributes the overall lack of progress to a 'least risk hire' mindset on the part of directors – directors continue to prioritise 'traditional' skills/expertise (eg finance expertise/skills and prior board experience) and 'good cultural fit' (which the report submits, tends to mean 'similar mindset').

However, the report suggests that this is not in fact less risky.

Watermark Managing Director David Evans comments:

> 'On many occasions when leaders hear this call to action they initially seem keen, so we come up with broader talent pools than they've previously considered. But ultimately, they still go with someone who they perceive as a "least risk hire" because they've been on the board of a similar company.
>
> This old mindset is why we are still struggling to shift the needle on board diversity…
>
> Diverse talent shouldn't be seen as risky. Instead, you stand to gain the opposite of groupthink: true diversity of thought…improving diversity on boards encourages more business innovation, strengthens relationships with customers and broadens accountability. And, of course, diversity on a board fosters organisation-wide inclusiveness, which helps attract (and retain) great talent'.

What changes would support progress on increased diversity?

Mark Baxter, co-founder of the Australian Association of LGBTQ+ Board and Executive Inclusion (ALBEI) suggests (among other things) that recalibrating the voluntary 40:40:20 board gender diversity ambition that a number of boards have chosen to adopt, to aim for 40% men, 40% women and 20% underrepresented groups of either gender could be helpful in driving progress.

Likewise, it's submitted that setting the expectation that listed companies disclose broader board diversity characteristics (by incorporating this into the ASX Corporate Governance Principles and Recommendations) could potentially assist.

For context, the ASX Corporate Governance Council is currently consulting on proposed changes to the ASX Corporate Governance Principles and Recommendations. The proposed changes include, among others, proposals to:

- Amend Recommendation 2.3 to set the expectation that S&P/ASX300 entities set a goal for achieving gender balance on their board (ie at least 40% women, 40% men and the remaining 20% open) within a period to be specified by the entity (up from the existing 30% goal).
- Set the expectation that entities disclose 'any other relevant diversity characteristics' (in addition to gender) which are being considered for the board's membership.

For more on the proposed changes to the ASX Corporate Governance Principles and Recommendations see: Governance News 6/03/2024 at p13.

The report queries whether the proposed approach is enough to support change:

> 'Gender diversity remains front and centre in the proposed corporate governance principles, and the only nod to other aspects of diversity being whether the board considers other characteristics relevant. Developments internationally which go beyond gender – such as ethnicity – have been dismissed by the ASX CGC as reflecting diversity "priorities" in those jurisdictions…
>
> The requirement that boards need to decide on whether other forms of diversity are "relevant" could be very problematic'.
>
> [Sources: Governance Institute of Australia media release; Full text report: Board Diversity Index 2024]

Shareholder Activism

Preliminary vote results indicate that Disney shareholders have backed their existing board, rejected Trian and Blackwells candidates

Walt Disney Company (Disney) has released preliminary vote results indicating that all twelve board-endorsed director nominees were elected to the board at the recent shareholder meeting.

This is significant as two separate activist groups – Trian Asset Management and Blackwells Capital – were pushing for leadership change at the company and put forward their own board candidates to address (what they each considered to be) the company's lacklustre financial performance.

A key driver behind Blackwells campaign was (what it submitted) was a failure by the company (and the board) to lead on, and successfully monetise, the potential of Artificial Intelligence and technology more broadly, due to a dearth of board expertise in these areas.

Blackwells launched a website – thefutureofdisney.com - outlining its case, the five point AI strategy it would like to see the company adopt and urging Disney shareholders to back its three board nominees - Leah Solivan, Jessica Schell and Craig Hatkoff to:

> 'ensure the [Disney] Board has the support it requires across critical areas: media and content, real estate and asset optimisation, and the proficiency to guide Disney through a new world where Physical, Spatial Computing and AI-driven Experiences converge'.

In particular, board nominee Leah Solivan was put forward by Blackwells as a necessary addition to Disney's board bringing 'technological and entrepreneurial expertise' as well as the ability to 'drive greater management accountability around Disney's adoption of transformative technologies'.

Separately, Trian Group put forward two nominees Nelson Peltz and Jay Rasulo - to turnaround the company's financial performance, though it is less specific about the change in strategic direction it would like to see.

Trian stated ahead of the meeting that it considers board change to be necessary to increase the boards' overall effectiveness. Trian writes:

> 'To improve the focus, alignment and accountability of the Board, Disney needs new independent directors. Help us elect Nelson Peltz and Jay Rasulo, who pledge to ask hard questions, work with the rest of the Board and management to develop thoughtful strategies, align the interests of executives with shareholders and hold the leadership team accountable for performance. And to do so all the time, not just when the company faces a proxy contest'.

Ahead of the meeting, Disney's board recommended shareholders reject the nominees put forward by both groups and strongly endorsed the performance of the current board and CEO.

[Sources: Trian Partners letter to shareholders 14/02/2024; Blackwells Capital media releases 26/02/2024; 06/02/2024; website: thefutureofdisney.com; Walt Disney Company preliminary vote results 03/04/2024]

Vote no | ACCR-led campaign against energy company Chair continues ahead of AGM

The Australasian Centre for Corporate Responsibility (ACCR) led campaign, calling on Woodside Energy Group Ltd (Woodside) shareholders to vote against the reelection of the Chair on climate grounds looks to be gaining ground ahead of the 24 April 2024 AGM with media reports (The Australian, The AFR) reporting that influential proxy adviser Glass Lewis has recommended shareholders vote 'against' the Chair's reelection.

Having said this, subsequent media reports (SMH) suggest that Institutional Shareholder Services (ISS) backs the Chair's reelection as does a third proxy adviser Ownership Matters.

Woodside is also facing pressure from HESTA on climate, with HESTA escalating its engagement on the issue by putting forward board candidates for consideration by the company – a suggestion the Woodside board has not taken up.

Upcoming 'Say on climate' vote

Shareholders will also have an opportunity to vote on Woodside's updated climate plan (a 'say on climate' vote) which for the first time will include Scope 3 (value chain/supply chain emissions).

Both the ACCR and Market Forces have been vocal in criticising the company's climate strategy ahead of the meeting.

Both ISS and Glass Lewis have reportedly issued 'against' recommendations. Ownership Matters has reportedly recommended voting in support.

Disclosure and Reporting

Mandatory climate reporting in Australia | Landmark Climate Disclosure Bill introduced

Long awaited legislation - Schedule 4 to the Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 (Cth) - to establish an ISSB-aligned mandatory climate reporting regime in Australia was introduced into the House of Representatives on 27 March 2024.

Who is proposed to need to report what and when? Read our overview of the Bill here: Mandatory climate reporting in Australia | Landmark Climate Disclosure Bill introduced - Technical update - MinterEllison

Mandatory climate disclosure | SEC has temporarily paused enforcement of its new climate disclosure rule

In a letter to the 8th Circuit Court of Appeals, the US Securities and Exchange Commission (SEC) announced that it has paused enforcement of its newly minted climate disclosure rule pending the outcome of multiple legal challenges to the rule's validity.

Notably, SEC's letter states that:

> 'In issuing a stay, the Commission is not departing from its view that the Final Rules are consistent with applicable law and within the Commission's long-standing authority to require the disclosure of information important to investors in making investment and voting decisions. Thus, **the Commission will continue vigorously defending the Final Rules' validity in court** and looks forward to expeditious resolution of the litigation.' [emphasis added]
>
> [Source: SEC letter: 33-11280.pdf (sec.gov)]

Greenwashing | ASIC successful in first-ever greenwashing court action

In July 2023, the Australian Securities and Investments Commission (ASIC) commenced civil penalty proceedings against a fund manager, over the fund manager's (alleged) failure to ensure that ESG screening criteria were applied - as claimed - to exclude bond issuers with significant business activities in certain industries (eg fossil fuels) from an 'ethically conscious' bond product. The product was alleged to have 'exposed investor funds to investments which had ties to fossil fuels, including those with activities linked to oil and gas exploration'.

Summing up ASIC's case, ASIC Deputy Chair Sarah Court said:

> '[the fund manager] promised its investors and potential investors that the product would be screened to exclude bond issuers with significant business activities in certain industries, including fossil fuels. We consider that the screening and research undertaken on behalf of…[the fund] was far more limited than that being promised to investors, and we consider this constitutes another example of greenwashing.'

What the Court found

Justice O'Bryan accepted (at [74]) on the admissions made by the parties and the evidence submitted by ASIC that during the relevant period, the fund:

> [1] 'engaged in conduct in relation to financial services that was liable to mislead the public as to the nature, the characteristics and the suitability for their purpose of those financial services, and thereby contravened s 12DF(1) of the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act)d in conduct that was liable to mislead the public'…
>
> [2] '[the fund]…in trade or commerce made representations in connection with the supply or possible supply of financial services that were false or misleading in representing that the Fund and interests in it were of a particular standard, quality or grade, and had certain performance characteristics or benefits, and thereby contravened s 12DB(1)(a) and (e) of the ASIC Act'…

However, the Court rejected [discussion at 109-111] ASIC's submissions concerning the fund's liability for certain statements, not made directly by the fund, but about the fund by a third party. O'Bryan J opined:

[109] [the fund]…cannot be held liable for the misleading statements in the fact sheet unless [the fund]…adopted and repeated those statements. That is not alleged by ASIC. The relevant circumstances are that…[the fund] made one set of statements about the ESG screening methodology and Bloomberg made another set of statements. If potential investors read the Bloomberg fact sheets and formed the erroneous impression that ESG screening was applied to all securities in the Fund, that would have been the fault of the misleading statements in Bloomberg's fact sheets. The erroneous impression would not have been caused by the statements in…[the fund's] PDSs and on its website'.

A penalty hearing will be held on 1 August 2024.

Commenting on the broader import of the decision, ASIC Deputy Chair Sarah Court said:

> 'As ASIC's first greenwashing court outcome, the case shows our commitment to taking on misleading marketing and greenwashing claims made by companies in the financial services industry. It sends a strong message to companies making sustainable investment claims that they need to reflect the true position'

[Sources: ASIC media release 25/07/2023; 28/03/2024]

Greenwashing | UK regulator sets new 'benchmark' expectations for the fashion sector, issues renewed call on the whole of the sector to review their green claims

CMA completes greenwashing investigation into Boohoo, Asos and Asda: companies sign new green claims undertakings with the regulator

The UK Competition and Markets Authority (CMA) has announced that following a review commenced in 2022 into green claims made by clothing retailers Boohoo, Asos and George at Asda, the three companies have signed formal undertakings requiring them to adhere to a 'set of rules' governing their use of green claims.

The CMA sums up these 'rules' as follows:

> 'Green claims: ASOS, Boohoo and George at Asda must ensure all green claims are accurate and not misleading. Key information must be clear and prominent, meaning it must be expressed in plain language, easy to read, and clearly visible to shoppers.
>
> Statements regarding fabrics: Statements made about materials in green ranges must be specific and clear, such as 'organic' or 'recycled', rather than ambiguous – e.g., using terms like 'eco', 'responsible', or 'sustainable' without further explanation. The percentage of recycled or organic fibres must be clearly displayed and easy for customers to see. A product cannot be called 'recycled' or 'organic' unless it meets certain criteria.
>
> Criteria for green ranges: The criteria used to decide which products are included in environmental collections – such as ASOS's former 'Responsible edit', Boohoo's 'Ready for the Future' range, and George at Asda's 'George for Good', and any further ranges – must be clearly set out and detail any minimum requirements. For example, if products need to contain a certain percentage of recycled fibres to be included in the range, this should be made clear. Products must not be marketed or labelled as part of an environmental range unless they meet all the relevant criteria.
>
> Use of imagery: The firms must not use 'natural' imagery – such as green leaves – logos, or icons in a way that suggests a product is more environmentally friendly than it actually is.
>
> Product filters: Search filters must be accurate, only showing items that meet the filter requirements – for example, if a consumer uses a filter to show 'recycled' trousers, only trousers made from predominantly recycled materials should be shown.
>
> Environmental targets: Any claims made to consumers about environmental targets must be supported by a clear and verifiable strategy, and customers must be able to access more details about it. Such information should include what the target is aiming to achieve, the date by which it is expected to be met, and how the company in question will seek to achieve that target.

Accreditation schemes: Statements made by the companies about accreditation schemes and standards must not be misleading. For example, statements must make clear whether an accreditation applies to particular products or to the firm's wider practices'.

The CMA considers that these 'rules' build on the existing anti-greenwashing guidance in the Green Claims Code (the Code on which Australia's ACCC guidance is based).

In addition, the undertakings oblige the three companies to report regulatory to the regulator on their compliance with the 'rules' stated above, and to take steps to improve their internal processes.

Expectation of compliance with new industry benchmark – CMA issues broader call to action for the fashion sector

The CMA has published an open letter to the fashion sector, urging retailers to review their green claims in light of the 'rules' outlined above and in light of the six principles set out in the Green Claims Code and 'take all necessary steps to ensure that any environmental claims they make comply with consumer protection law, including that their processes to ensure compliance are robust'.

The regular expects to issue additional guidance for the fashion sector (no timeline is given for this).

The also letter underlines the CMA's continuing focus on taking action to address greenwashing and cautions that noncompliance may result in enforcement action.

Greenwashing may expose firms to the risk of monetary penalties (should new Bill be enacted)

The letter further cautions firms that should a Bill currently before the UK Parliament - the Digital Markets, Competition and Consumers Bill – be enacted, firms could potentially face 'significant monetary penalties' (10% of a businesses' worldwide turnover) if they are found to be in breach of certain consumer protection legislation, including (potentially) misleading green claims.

[Source: CMA media release 27/03/2024]

ISSB-aligned disclosure | Japan consults on proposed ISSB-aligned sustainability disclosure standards

The Sustainability Standards Board of Japan (SSBJ) is consulting on three draft sustainability standards (based on the International Sustainability Standards Board (ISSB) global standards: IFRS S1 and IFRS S2) until 31 July 2024.

The consultation is occurring on the basis that the standards, once finalised are expected to become mandatory for certain companies ie companies listed on the Prime Market of the Tokyo Stock Exchange.

The draft standards are only available in Japanese, but the SSBJ has published summaries of the differences between the proposed standards and IFRS S1 and S2 in English see: Summary of Differences between IFRS Sustainability Disclosure Standards and the SSBJ Exposure Drafts and Table of Concordance between IFRS Sustainability Disclosure Standards and the SSBJ Exposure Drafts

[Source: SSBJ media release]

TNFD adoption | Kellanova will (reportedly) report on its nature impacts from next year in response to shareholder pressure

- Kellanova (formerly Kellogs) plans to publicly report on its nature-impacts 'by adopting the recommendations of the Taskforce on Nature-related Financial Disclosures ("TNFD") and publishing TNFD reports, or by reporting under GRI 101: Biodiversity 2024'. The first disclosure is planned to be published in 2026 based on 2025 data.
- Green Century has claimed credit for this, submitting that the move was prompted by a shareholder proposal (filed by Green Century).
- As you Sow identifies nature-related proposals (including proposals of this kind) as an emerging area of focus among the shareholder proposals filed so far in 2024.

[Source: Green Century media release 21/03/2024]

AI risk disclosure | S&P 500 boards are beginning to disclose (limited information) about AI board oversight arrangements

A new report from Institutional Shareholder Services (ISS) highlights (what ISS considers) will be an emerging trend towards larger US companies voluntarily disclosing information around AI risk management, and more specifically board oversight of AI risk and board AI capability.

Here are our key takeaways.

- **Disclosure is rare**: Just 15% of companies in the S&P 500 disclosed some information around board oversight of AI in the proxy statements included in the sample. This disclosure included: director AI expertise, specific committee oversight responsibility and/or the existence of an AI ethics board.
- **Disclosure is limited:** Companies are most likely to disclose directors' AI skills/expertise – in the S&P 500, 13% of companies disclose that their board includes at least one director with AI expertise. Disclosure of board-level committee oversight or the existence of an AI ethics board is very rare (1.6% and 0.8% respectively)
- **Disclosure is more prevalent in some sectors:** Disclosure is most prevalent in the IT sector (30%), Consumer Discretionary and Health Care sectors (both 15%) and lowest in the utilities and energy sectors (3% and 4% respectively).

Outlook?

ISS considers that pressure (activist investors) is building on firms to disclose how they are managing AI-related risks/opportunities and that this pressure will intensify.

> [Note: In illustration of the increasing pressure companies face around AI oversight more generally, Walt Disney Company (Disney) came under pressure from two separate activist groups ahead of its 3 April 2024 shareholder meeting – Trian Asset Management and Blackwells Capital – both of which were pushing for board change at the company to address (what they each consider to be) the company's lacklustre financial performance. Notably, a key driver behind Blackwells campaign was (what it submits) was a failure by the company (and the board) to lead on, and successfully monetise, the potential of Artificial Intelligence and technology more broadly, due to a dearth of board expertise in these areas. Blackwells launched a website – thefutureofdisney.com - outlining its case, the five point AI strategy it would like to see the company adopt and urging Disney shareholders to back its three board nominees - Leah Solivan, Jessica Schell and Craig Hatkoff to:
>
> > 'ensure the [Disney] Board has the support it requires across critical areas: media and content, real estate and asset optimisation, and the proficiency to guide Disney through a new world where Physical, Spatial Computing and AI-driven Experiences converge'.
>
> In particular, board nominee Leah Solivan was put forward by Blackwells as a necessary addition to Disney's board bringing 'technological and entrepreneurial expertise' as well as the ability to 'drive greater management accountability around Disney's adoption of transformative technologies'.
>
> It is not yet clear what level of support Trian or Blackwell nominees secured. Preliminary vote results indicate that all 12 board-endorsed nominees were elected to the Disney board – no further detail is given.]

Outlook?

ISS considers that:

> 'explicit disclosure of oversight responsibilities may become more prevalent in the coming years as AI gains adoption…
>
> As AI becomes a material factor, investors may begin to expect that companies, at least those in industries more heavily impacted by AI, start disclosing relevant board skills and oversight responsibilities.'

ISS is not alone in this view. In her keynote address to the Australian Institute of Company Directors (AICD) Dr Ayesha Khanna also opined that management/oversight of AI-related risk – eg regulation of AI-related risk, and accompanying disclosure requirements – is likely, including in Australia.

> [Source: ISS report: AI and Board Of Directors Oversight: AI Governance Appears on Corporate Radar 21/03/2024]

ESG

How are APRA-regulated entities managing climate-related risk? APRA to open (voluntary) self-assessment survey to all APRA-regulated entities

In 2022 the Australian Prudential Regulation Authority (APRA) conducted a voluntary climate self-assessment exercise gathering data on how entities were identifying, assessing and managing climate-related risks (using APRA's Prudential Practice Guide CPG 229 Climate Change and Financial Risks) with Tier 1 and Tier 2 entities.

APRA has plans to roll out a similar voluntary self-assessment exercise 'shortly' (no specific timing is given), which will be open to all APRA-regulated entities to elect to participate in.

The online survey (which is largely multiple choice) will include many of the same questions as were included in the 2024 survey to enable APRA to assess how entities' approaches to managing climate risk have evolved since 2022.

The 2024 survey will also include a number of new questions aimed at gathering

> 'additional insight on existing topics, respond to changes in the policy landscape, and seek insights on emerging issues including nature risk and transition plans'.

Entities choosing to participate in the survey will have six weeks from receiving the questionnaire to provide their responses.

Once the survey has closed, APRA expects to publish industry-level insights and themes from the results and provide participating entities with 'de-identified peer-comparison results to enable them to better understand how their approaches and practices compare to others across their industry'.

APRA also plans to incorporate insights from the survey into its 'ongoing supervisory approaches to addressing the financial risks of climate change'.

> [Source: APRA letter to industry 03/04/2024]

Should we be talking about GSE (not ESG)?

Here are our key takeaways from UTS Chancellor and experienced company director Catherine Livingstone's keynote address to 2024 Australian Institute of Company Directors Governance Summit.

Governance is key: Touching on the ESG acronym, Ms Livingstone commented:

> 'Well, with apologies to Paul Krugman, Governance isn't everything, but it's almost everything. I despair every time I see the ESG acronym, which effectively consigns Governance to being a compliance subtext to the E and the S. The acronym should actually be reversed to read GSE… This defeaturing ignores the fact that true governance is anchored in strategy and purpose. To what end are great processes and policies without direction? They create little value in and of themselves…even that deep repository of policies and processes, the Risk Management Framework, starts with the organisation's Strategy'.

Box ticking isn't enough - there needs to be genuine focus on diversity of thought/approach on boards: Ms Livingstone commented:

> 'Diversity of thinking, together with the ability to contribute, are key attributes– and may result from factors such as experience, qualifications, age, gender – but may not; gender diversity is a very necessary, but not sufficient condition: there is an important distinction between difference and diversity: you may have a gender balanced board without enough diversity of thinking; you may have a range of experience around the table but not enough ability of those directors to contribute to the specific needs of the organisation. We risk too much ticking of the box, and not enough thought, around the question of diversity on Boards'.

How long is too long to sit on a board – 'time to evolve' our thinking? Further to this, Ms Livingstone suggested that consideration should be given to whether shorter - six year terms (rather than nine years) - might be more appropriate (as a rule of thumb, not a rigid rule) in today's environment.

> 'Every seat around a Board table counts – so it may be appropriate to balance corporate memory and diversity, with continuing ability to contribute, and comparison against the changing needs demanded by the organisation's strategic context. There may be individuals who would be great directors, but do not wish to commit to 9 years, nor be seen to let the organisation down by leaving after three or four years. Perhaps we should consider whether 6 years could be a more appropriate balance point. This is not to suggest that 6

years should be a tenure limit, rather that the fixed tenure limits being a lower bound as well as an upper bound results in an unhelpful rigidity'.

[Source: Catherine Livingstone: Keynote address to the AICD 2024 Governance Conference]

Continued push for expanded climate disclosure | Three North American banks have agreed to NYC Comptroller and NYC Public Pension Boards' demands for Energy Supply Ratio disclosure

New York City Comptroller Brad Lander and trustees of the New York City Employees' Retirement System, Teachers' Retirement System, and Board of Education Retirement System (the Pension Systems) say they have reached agreements with JPMorgan Chase, Citi, and the Royal Bank of Canada for the banks to disclose specific information about their transition progress - their Energy Supply Ratios (and their underlying methodology).

For context, the Energy Supply Ratio a comparison of investment in low carbon energy sources vs investment in traditional energy sources. For example, a ratio of 4:1 means that for each dollar invested in fossil fuel energy supply, four dollars would be invested in low carbon energy supply.

Announcing this, investors described the agreements with the banks to disclose this information as 'a critical step to better assess the role banks play in the climate transition, and whether or not they are on track to meet their emissions reduction commitments'.

The NYC Pension Systems have outstanding shareholder proposals with Bank of America, Goldman Sachs and Morgan Stanley and have signalled their intention to continue engagement with these lenders.

Shareholder climate proposal filed at Citi, withdrawn

Separately, As You Sow has withdrawn a shareholder proposal at Citi calling on the bank to disclose annually:

> 'for each of its sectors with a Net Zero-aligned 2030 target…the proportion of sector emissions attributable to clients that are not aligned with a credible Net Zero pathway, whether this proportion of unaligned clients will prevent Citi from meeting its 2030 targets, and actions it proposes to address any such emissions reduction shortfalls'.

The proposal was withdrawn after the bank – in response to As You Sow's proposal - provided expanded disclosure on its energy and power clients' climate transition progress in its latest climate report.

[Source: NYC Comptroller Brad Lander media release 04/04/2024]

CalSTRS to step up pressure to act on methane emissions

California State Teachers' Retirement System (CalSTRS) has identified: methane emissions; climate risk disclosure; and disclosure of workforce diversity data as its top three engagement priorities for 2024.

Specifics:

- **Continuing focus on climate disclosure:** CalSTRS' focus on climate disclosure is set to continue – CalSTRS remains a member of Climate Action 100+ and points to its 2023 voting record as evidence of its willingness to vote against directors on climate grounds (in 2023, CalSTRS voted against directors at 2035 companies over failure to provide 'necessary' climate disclosures.
- **Methane emissions**: CalSTRS is calling on companies to join the Oil and Gas Methane Partnership 2.0 (OGNP 2.0) an independent initiative that requires members to measure (not just estimate) their methane emissions and set reduction targets. CalSTRS has said it plans to support 'all' shareholder proposals calling on portfolio companies to join OGNP 2.0. Since 2023 when CalSTRS commenced engaging with energy companies on the issue 15 (eg ExxonMobil and Chevron) have joined the OGNP 2.0 initiative.
- **Workforce diversity disclosure:** CalSTRS is calling on companies to annually disclose their Employer Information Report to investors in full. CalSTRS has flagged that though it has not filed shareholder proposals calling for workforce disclosure this proxy season, it plans to support proposals filed by others on the issue.

[Sources: CalSTRS media release 27/03/2024; CalSTRS Stewardship Priorities]

Nature/biodiversity loss | Chemical company Chemours, and paint carriers Sherwin-Williams and Home Depot successfully block shareholder nature proposals from proceeding to a vote

- The US Securities and Exchange Commission (SEC) has approved separate requests from chemical company Chemours Company (Chemours), carriers of titanium-dioxide based paint Sherwin-Williams and Home Depot to block three separate shareholder nature proposals (filed by Green Century and Felician Sisters of North America Endowment Trust) from proceeding to a vote.
- For context:
  - The proposal filed at Chemours called on the board to issue a public report assessing the benefits and drawbacks of permanently committing not to engage in titanium mining, nor to purchase titanium mined by others, on the Okefenokee's hydrologic boundary, and assessing risks to the company (climate, regulatory/legal and reputational risks) associated with doing so.
  - The proposal filed at Sherwin-Williams called on the board to issue a public report assessing the benefits and drawbacks of permanently committing not to sell paint containing titanium dioxide sourced from the Okefenokee and assessing risks to the company climate, regulatory/legal and reputational risks) associated with doing so.
  - Similarly, the proposal filed at Home Depot called on the board to:

    > 'issue a public report, within a reasonable time, assessing the benefits and drawbacks of permanently committing not to sell paint containing titanium dioxide sourced from the Okefenokee, and assessing risks to the company associated with same'.
- All three companies sought to exclude the proposals in reliance on the 'ordinary business exception' – they submitted that the proposals seek to micromanage the company. SEC agreed that the proposals could be excluded on this basis.
- Responding to this Green Century welcomed commitments from each of the companies not to support mining of the Okefenokee in the 'near term' but urged the companies to go further by publicly pledging their commitment to permanently avoid Okefenokee titanium.

[Sources: SEC no action response letter Chemours Company; SEC no action response letter Sherwin Williams Company]

Nature loss | SEC greenlights deep sea mining proposal to proceed to a vote at Tesla

The US Securities and Exchange Commission (SEC) has rejected Tesla Inc's application to block a shareholder biodiversity/nature proposal (filed by As You Sow) calling on the company to commit to a moratorium on sourcing minerals from deep sea mining from proceeding to a vote at the company's 2024 shareholder meeting.

Tesla sought to rely on the ordinary business exception submitting that the proposal could be properly excluded because:

> 'By requesting the Company “commit to a moratorium on sourcing minerals for deep sea mining,” the Proponent’s Proposal implicates core matters involving the Company’s business and operations – (i) the Company’s selection of suppliers and (ii) the source and types of raw materials used in the Company’s products – which are fundamental to management’s ability to run the Company on a day-to-day basis and therefore, cannot, as a practical matter, be subject to direct stockholder oversight'.

As You Sow has filed a similar proposal with General Motors Co – which at this stage, does not look to have been challenged by the company.

[Source: SEC No Action Letter]

Australia's energy transition | Net Zero Economy Authority Bills introduced

On 27 March 2024, two Bills – Net Zero Economy Authority Bill 2024 (Cth) (NZEA Bill) and the Net Zero Economy Authority (Transitional Provisions) Bill 2024 (Cth) (Transitional Provisions Bill) – were introduced into the House of Representatives.

Broadly, if enacted the:

- NZEA Bill would establish and set out the functions, powers and governance arrangements for a new independent statutory authority – the net zero economy authority - to 'promote orderly and positive economic transformation as the world decarbonises'
- Transitional Provisions Bill would facilitate the transition from the current interim Net Zero Economy Agency within the Department of Prime Minister and Cabinet to the new statutory authority.

Announcing the introduction of the Bills, Prime Minister Anthony Albanese emphasised that the new Authority will focus on ensuring a 'just transition' stating:

> 'the Government has introduced legislation to establish the Net Zero Economy Authority to ensure Australian workers and regions realise and share the benefits of the net zero economy'.

The Prime Minister also announced $189.3 million over four years from 2023-24 (and $53.3 million per year ongoing) in resourcing for the Authority.

Outlook: The Bills have been referred to the Senate Standing Committee on Finance and Public Administration for report by 10 May 2024. The due date for submissions is 19 April 2024.

> [Sources: Department of Prime Minister and Cabinet media release 27/03/2024; Joint media release Prime Minister Anthony Albanese and Minister for Climate Change and Energy Chris Bowen media release 27/03/2024]

BlackRock Chair says the energy transition is a 'mega force' that is being further amplified by the demand for energy security

In his 2024 annual letter, BlackRock Chair Laurence Fink reflected on the role of global capital markets in addressing the three 'major economic issues of the mid-21st century'. Namely: infrastructure (and in particular energy infrastructure), retirement and debt.

Infrastructure challenge

Mr Fink opines that record demand for energy infrastructure is being driven by both – **the imperative to decarbonise** and the desire for energy security (which has become a much higher priority since the Ukraine invasion which highlighted a number of countries' vulnerability) – by what Mr Fink terms 'energy pragmatism'. Mr Fink writes:

> 'As countries decarbonise and digitise their economies, they're supercharging demand for all sorts of infrastructure, from telecom networks to new ways to generate power. In fact, in my nearly 50 years in finance, I've never seen more demand for energy infrastructure. And that's because many countries have twin aims: They **want to transition to lower-carbon sources of power while also achieving energy security**. The capital markets can help countries meet their energy goals, including decarbonisation, in an affordable way'.

Though not explicitly ranked among his list of top three challenges, the energy transition is acknowledged as a 'mega force' that is being further amplified by the demand for energy security.

'Energy pragmatism'

As flagged, Mr Fink identified decarbonisation and the desire for energy security as the key drivers behind the record demand for energy infrastructure. Mr Fink observes that while in some instances this twin focus will help accelerate investment in new technologies – where for example, investment in new technologies reduces reliance on foreign powers to fulfill energy needs – this is not always/will not always be the case.

Mr Fink observed:

> 'The energy transition is not proceeding in a straight line. As I've written many times before, it's moving in different ways and at different paces in different parts of the world. At BlackRock, our job is to help our clients navigate the big shifts in the energy market no matter where they are'.

Mr Fink's comments have been interpreted in some quarters (The Australian) as evidence of a shift in BlackRock's stance on climate and on ESG more generally - the letter does not for example, explicitly reference ESG and acknowledges that continued investment in traditional energy firms is expected to continue for some time into the future (though at a decreasing rate)

However Mr Fink has not stepped away entirely from urging action/investment in decarbonisation.

In addition to acknowledging decarbonisation as an economic 'mega force', the letter underlines the role that capital markets can play in helping all countries to meet their energy needs (including through decarbonisation), by bringing down the 'green premium' and ensuring the transition is 'fair'. Mr Fink observes that:

> 'Private investment can help energy companies reduce the cost of their innovations and scale them around the world'.

[Source: Larry Fink's 2024 Annual Chairman's Letter to Investors | BlackRock]

European Court of Human Rights finds Article 8 of the European Convention on Human Rights encompasses a right to effective protection by State authorities from the adverse effects of climate change

The European Court of Human Rights has delivered its judgment in Verein KlimaSeniorinnen Schweiz and Others v. Switzerland (sometimes referred to as the Swiss Grandmothers Case).

Very briefly, the key point is this:

> [519]. 'Drawing on the above considerations, and having regard to the causal relationship between State actions and/or omissions relating to climate change and the harm, or risk of harm, affecting individuals (see paragraphs 435, 436 and 478 above), **Article 8** [of the European Convention on Human Rights] **must be seen as encompassing a right for individuals to effective protection by the State authorities from serious adverse effects of climate change on their life, health, well-being and quality of life'**. [emphasis added]

You can find the Court's helpful summary of the decision here: https://hudoc.echr.coe.int/eng-press?i=003-7919428-11026177 A separate 'question and answer' also prepared by the court provides additional context: https://www.echr.coe.int/documents/d/echr/press-q-a-climate-cases-eng. The Court's media release

The case is expected to have implications beyond the EU. Professor Jacqueline Pee (University of Melbourne)l comments:

> 'This ruling on the linkages between climate change and human rights—the first ever to be issued by an international court—will certainly put European states that are party to the Convention on notice that inadequacies in their domestic regulatory frameworks for addressing climate change could give rise to human rights' violations in breach of their Convention obligations. Beyond Europe, the case points to the ways in which inadequate action by governments to mitigate climate change can be linked to impacts that result in actionable human rights' violations. As we increasingly see the effects of climate change on people, communities and the planet, this ruling offers the prospect of citizens holding their governments accountable where they fail to do enough to safeguard those citizens against climate-related harms'.

Columbia Law School's global climate litigation database lists 146 human rights related cases being brought against governments outside the US.

[Source: European Court of Human Rights media release 09/04/2024]

Do nation states have a legal duty to safeguard people from the impacts of climate change/nature loss? | ICJ is another step closer to issuing a landmark advisory opinion

What is the requested opinion? The International Court of Justice (ICJ) is another step closer towards issuing what is expected to be a landmark opinion on the obligations of nation states to safeguard people from the impacts of climate change with the passing of the deadline for States to make written submissions.

Specifically, the opinion will address the following questions:

> '(a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;
>
> (b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
>
>> (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
>>
>> (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?'

What is this hoped to achieve? While it will not be legally binding, the opinion is expected to be influential in that it's expected to influence the outcome of climate court cases globally.

Greenpeace has expressed the hope that it may 'force governments to consider the human rights impacts of climate policy, compel more ambitious action under the Paris Agreements, and give lawyers the tools to affect broad, accelerated change'.

Why is it significant? The resolution which was co-sponsored by 130+ countries (including Australia) was adopted unanimously in March 2023. This level of support is unusual and a signal of the level of concern globally around the content of state obligations in this context.

It also is likely (as flagged above) to have implications for the many climate-related cases currently before the courts which draw on these issues/questions. For example, Columbia Law School's climate litigation database lists 36 cases globally, that centre around the 'right to a healthy environment'.

Australia? In Australia we are seeing cases on this issue. For example, a recent case - Sharma and others v Minister for the Environment - turned on the questions of whether the Minister for Environment had a duty of care to avoid causing harm to Australian children when deciding whether or not to approve a coal mine expansion; and if so, whether an injunction could be sought to stop the Minister from approving the coal mine expansion. For more see: Sharma and others v, Minister for the Environment - Climate Change Litigation (climatecasechart,com)

Though the Court did not find that the Minister had a duty in that instance, the Bill has triggered an attempt by Independent Senator David Pocock to legislate such a duty. The Bill - the Climate Change Amendment (Duty of Care and Intergenerational Equity) Bill 2023 (Cth) – is currently before the Senate. The Senate Standing Committee on Environment and Communications is due to deliver its report on the Bill on 27 March 2024.

[Source: International Court of Justice Order 23/04/2024]

Sustainability assurance | IAASB remains on track to finalise global sustainability assurance standard (ISSA 5000) in September 2024

- The International Auditing and Assurance Standards Board (IAASB) released a draft over-arching sustainability assurance standard – [Draft] ISSA 5000 General Requirements for Sustainability Assurance Engagements – for consultation in 2023.
- The standard 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).
- In a LinkedIn update, IAASB Chair Tom Seidenstein has confirmed that the proposed sustainability assurance standard (ISSA5000) is on track for 'approval' (ie to be issued in final form) in September 2024

Relevance for Australia

The Bill to establish the framework for Australia's mandatory climate disclosure regime is currently before parliament (read: Mandatory climate reporting in Australia | Landmark Climate Disclosure Bill introduced - Technical update - MinterEllison). The Bill envisages that climate disclosures would be subject to similar assurance requirements to those that apply to financial reports, starting with the largest (Group 1) entities.

Interaction with the AASB and AUASB standards:

- The specific content of Australia's (proposed) new disclosure requirements will be set out in new accounting standards, currently under development by Australian Accounting Standards Board (AASB). The AASB consultation on three initial draft standards, based on the ISSB standards: IFRS S1 and IFRS S2 closed on 1 March 2024 (read: Another step closer towards implementing mandatory climate disclosure in Australia).
- New assurance standards, planned to be phased in starting with the largest entities, will be made and maintained by the Australian Auditing and Assurance Standards Board (AUASB). It's envisioned that the Australian standards will be informed by ISSA 5000.
- The AUASB 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 ahead of submitting its response to the IAASB in December 2023..
- Broadly, while 'overall supportive' of the IAASB's proposed approach, the AUASB raised concerns about several aspects of draft ISSA 5000. The IAASB sums these concerns as follows:
  - 'Strong reservations on the ability of the standard to be applied by all assurance practitioners and considers that ED-5000 would not be very accessible or easily understood by non-accountants with no knowledge of the IAASB standards;
  - Strongly disagrees with the approach to quality management and ethics underpinning ED-5000; and
  - Anticipates some practical challenges that practitioners will face in implementing ISSA 5000 mainly relating to differentiation of work effort for limited and reasonable assurance, extent of pre-acceptance work, using the work of experts, and the critical need for sustainability competency'.
- Ahead of the release of final ISSA 5000, the AUASB is consulting on its proposed approach. The due date for submissions is 3 May 2024.

Driving climate action through engagement | Climate Action 100+ announces initial list of 'flagged' votes for 2024

Climate Action 100+ has published its initial list of 'flagged' votes for the 2024 proxy season. The list if planned to be updated weekly.

For context 'flagging' a vote aims to put a spotlight on certain shareholder proposals or management proposals, ahead of focus companies' upcoming meetings to raise awareness. Vote 'flagging' does not bind Climate Action 100+ signatories to vote in a particular way – signatories to the initiative have complete discretion to determine how they wish to vote. of each Climate Action 100+ signatory to determine how they vote -

So far votes at Rio Tinto, Paccar Inc and Berkshire Hathaway have been 'flagged' (see: Proxy Season | Climate Action 100+)

Directors face 'no credible threat' of being voted off boards? Market Forces queries the impact of 'active ownership' on driving climate action (including through the Climate Action 100+ initiative)

Market Forces has released a report calling into question the value/priority investors, including Climate Action 100+ signatories, are placing on companies taking climate action. This criticism is chiefly based on Market Forces' analysis of how investors are choosing to exercise their voting power in the context of director elections.

Market Forces considers that there should have been a drop in the level of support for directors of focus companies if Climate Action 100+ signatories were influenced in their voting decisions by the Climate Action 100+ benchmark. However, the report found there has been no drop in the level of support for the election of directors of companies (assessed as having) 'major fossil fuel expansion plans' in the six+ years since the launch of the Climate Action 100+ initiative - directors of these companies continue to be elected with strong support (over 96% support on average).

Commenting on this Market Forces CEO Will van de Pol urged investors to:

> 'take more meaningful action in line with their active ownership claims, including pre-declaring votes against directors failing on climate risk management'.
>
> [Sources: Climate Action 100+ 2024 Proxy Season and flagged votes]

In Brief | Carbon offsets: ANU study into the impact of 182 forest regeneration projects (which dominate Australia's carbon offset scheme) concludes they have 'negligible impact on woody vegetation cover and carbon sequestration'

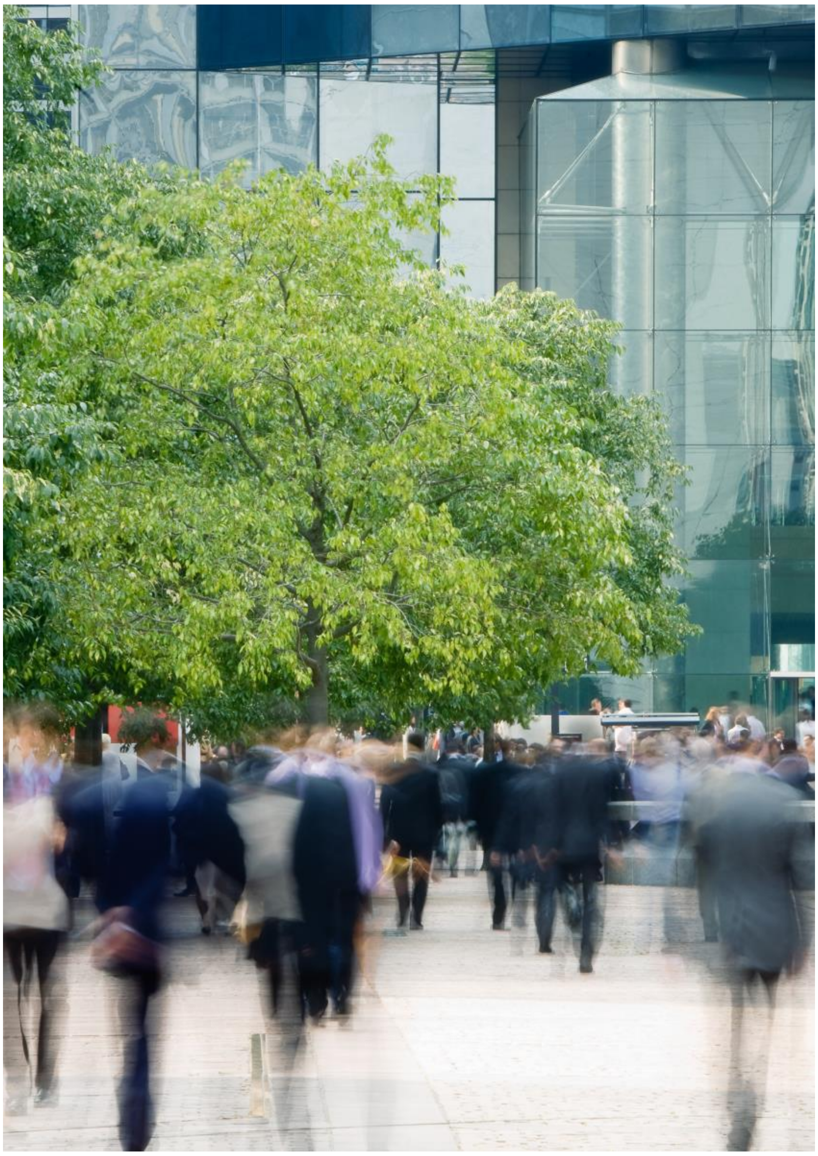
> [Source: ANU media release 27/04/2024]

Regulators

ACCC designated complaints function: Treasury consults on details following the passage of the Bill

The Competition and Consumer Amendment (Fair Go for Consumers and Small Business) Bill 2024 (Cth) passed both Houses on 26 March 2024.

Broadly, the legislation establishes a designated framework that will require the Australian Competition and Consumer Commission (ACCC) to assess and respond to designated complaints (ie complaints about significant or systemic market issues impacting consumers or small businesses that relate to a potential breach of the CCA) from designated complainants (consumer and small business advocates approved by the Minister).



Following the passage of the Bill, the government has released a draft determination for consultation setting out the details of how this is proposed to operate. The draft determination seeks feedback on the proposed:

- maximum number of designated complainants
- maximum number of designated complaints a designated complainant may make during a specified period of time
- matters relating to no further action notices
- when the ACCC does not have to publish information
- when the ACCC is not required to take further action after issuing a further action notice
- the period when an entity may apply to be a designated complainant and
- matters for the minister to consider when approving a designated complainant.

The due date for submissions on the draft determination is **11 April 2024.**

In a statement, the government said it expects to open the application process for consumer and small business advocates interested in becoming a designated complainant in May 2024. Further information about this process is planned to be made available on the Treasury website 'in due course'.

[Sources: Treasury Consultation: Designated complaints determination 27 March 2024 – 11 April 2024; Joint media release: Assistant Minister for Competition Charities and Treasury, Assistant Minister for Employment Andrew Leigh; Minister for Housing, Homelessness and Small Business Julie Collins 27/03/2024]

Financial Services

New parliamentary inquiry will examine the role of banks and government agencies in preventing, detecting and responding to financial abuse

The Labor Chaired Parliamentary Joint Committee on Corporations and Financial Services is conducting an inquiry into the role of financial institutions (primarily banks) and government agencies in preventing, detecting and responding to financial abuse.

The Committee will consider the effectiveness of existing regulatory settings and whether reform of the existing regulatory framework is required as well as considering other potential areas for reform including (among other things) the introduction of new mandatory reporting requirements.

The due date for submissions is 14 June 2024. The Committee is due to report by 'October 2024'.

> [Source: Inquiry home page: Financial Services Regulatory Framework in Relation to Financial Abuse]

Hayne reform | CSLR commences

The Compensation Scheme of Last Resort (CSLR) proposed by the 2017 Ramsay Review and backed by the Banking Royal Commission commenced operation on 2 April 2024.

To be eligible for compensation, claimants must first have:

- lodged a complaint with the Australian Financial Complaints Authority (AFCA) about misconduct by a financial firm (about an in scope product/service);
- AFCA must have completed the complaint process with an award of compensation to the complainant; and
- the financial firm must have failed to pay the awarded compensation (which also must be reported to AFCA).

Only once all of these steps are completed are consumer able to apply for compensation under the CSLR. CSLR has published a quiz to assist people wanting to apply through the scheme to determine their eligibility: Am I ready to claim - checklist | CSLR

> [Source: CSLR media release 08/04/2024]

Status update | Senate Committee paves the way for the passage of the Bill proposing to legislate an 'objective' for superannuation

The Superannuation (Objective) Bill 2023 (Cth) was introduced into the House of Representatives on 16 November 2023.

The Bill proposes to legislate the following 'objective' for superannuation:

> 'The objective of superannuation is to preserve savings to deliver income for a dignified retirement, alongside government support, in an equitable and sustainable way (the objective)'.

The policy intent of the Bill is to:

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

The explanatory memorandum emphasises that this 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'.

Outlook: The Bill was referred to the Labor-Chaired Senate Economics Legislation Committee for report by 28 March 2024. The Committee has that recommended the Bill be passed.

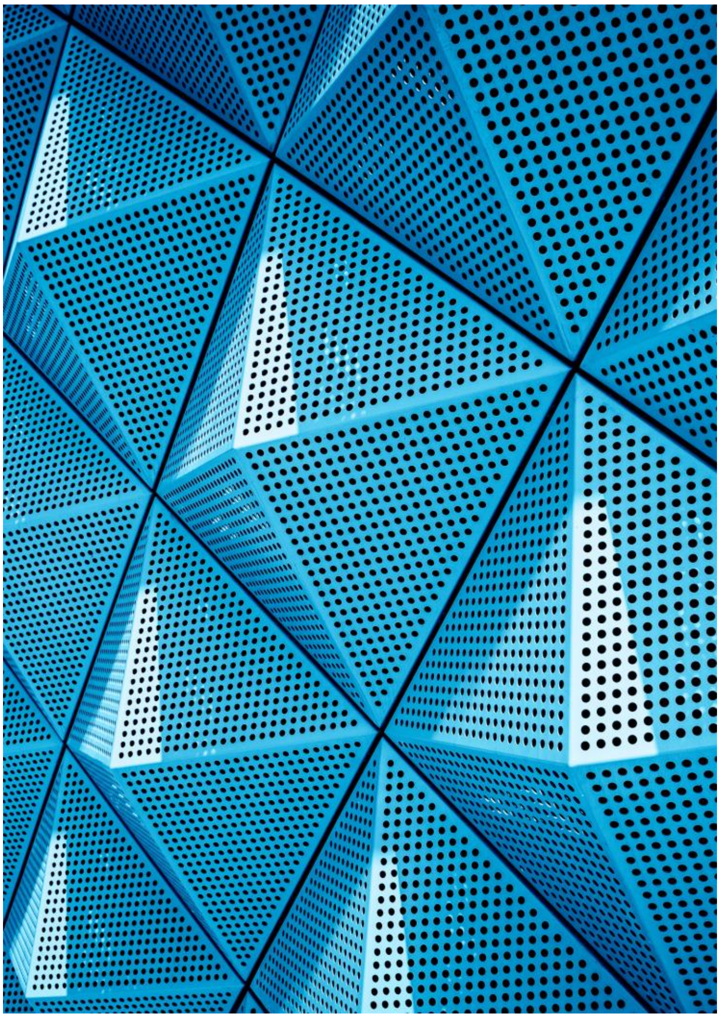
The Committee was not unanimous in this view. Coalition Senators recommended that:

'the Government develop a whole-of-system retirement income system objective, outlining the objective of the retirement income system and the roles of the pillars, as suggested by the 2020 Retirement Income Review. Factors impacting home ownership in retirement should be considered as part of the development of this objective'.

The Bill is currently before the Senate, having passed the House of Representatives without amendment. Parliament has now risen and will not resume until 14 May 2024.

If the Bill were enacted in its current form, the changes would commence 28 days after Assent is given.

[Source: Superannuation (Objective) Bill 2023 (Cth)]



New parliamentary joint inquiry into wholesale investor and wholesale clients tests launched

On 20 March 2023, the Parliamentary Joint Committee on Corporations and Financial Services (Committee) commenced an inquiry into:

'the Corporations Act 2001 laws and related regulations on the wholesale investor test for offers of securities (Section 708 of Chapter 6D) and the wholesale client test for financial products and services (Sections 761G & 761GA of Chapter 7) (referred to collectively as the wholesale investor/client tests'.

Among other things, the Committee will consider proposals to change the tests to address 'the concerns of stakeholders'.

[Note: This appears to be a reference to issues raised in submissions to the Treasury Review of the regulatory framework for management investment schemes. As part of this review, Treasury sought feedback (among other things) on potential changes to the wholesale investor test. Treasury has indicated it expects to provide its findings to the government in 'early 2024'.]

The Committee has called for written submissions by 15 May 2024 and intends to report to Parliament by the end of 2024.

[Source: Parliamentary Joint Committee on Corporations and Financial Services Committee Inquiry: Wholesale investor and wholesale client tests]

In Brief | QAR Reform Bill now before parliament: Following consultation, the government has introduced a Bill - Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Bill 2024 (Cth) – into the House of Representatives which if enacted, will legislate the first stage of its planned response to the Quality of Advice (QAR) Review.

[Source: Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Bill 2024 (Cth) (Bill)]

Risk Management

Government announces sweeping reforms to merger control law in Australia

The Treasurer has announced reforms to Australia's merger control regime, described as the biggest changes to Australian merger control law in 50 years. The package will have a significant impact on how parties seek merger approval.

You can access MinterEllison's analysis of the proposed changes here: Government announces sweeping reforms to merger control law in Australia - Insight - MinterEllison

Top Story | AI and scraped data: Data protection implications

MinterEllison has released an article exploring the data protection implications that arise when data scraping is conducted for the purpose of training artificial intelligence tools. You can access the full text here: AI and scraped data: Data protection implications - Insight - MinterEllison

Upcoming webinar | Perspectives on cyber risk

Carly Kind (Privacy Commissioner Office of the Australian Information Commissioner) and Paul Kallenbach (MinterEllison's Head of Cyber) are set to explore the findings of MinterEllison's latest report in a webinar to be held on 17 April 2024 at 12pm-1pm (AEST).

You can register to attend here: 17 April 2024 - Cyber Report Launch webinar | RSVP blank - WEBINAR (vuture.net)

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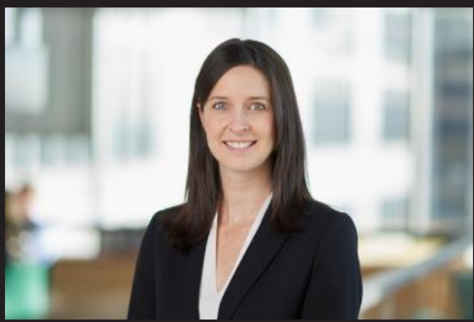

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