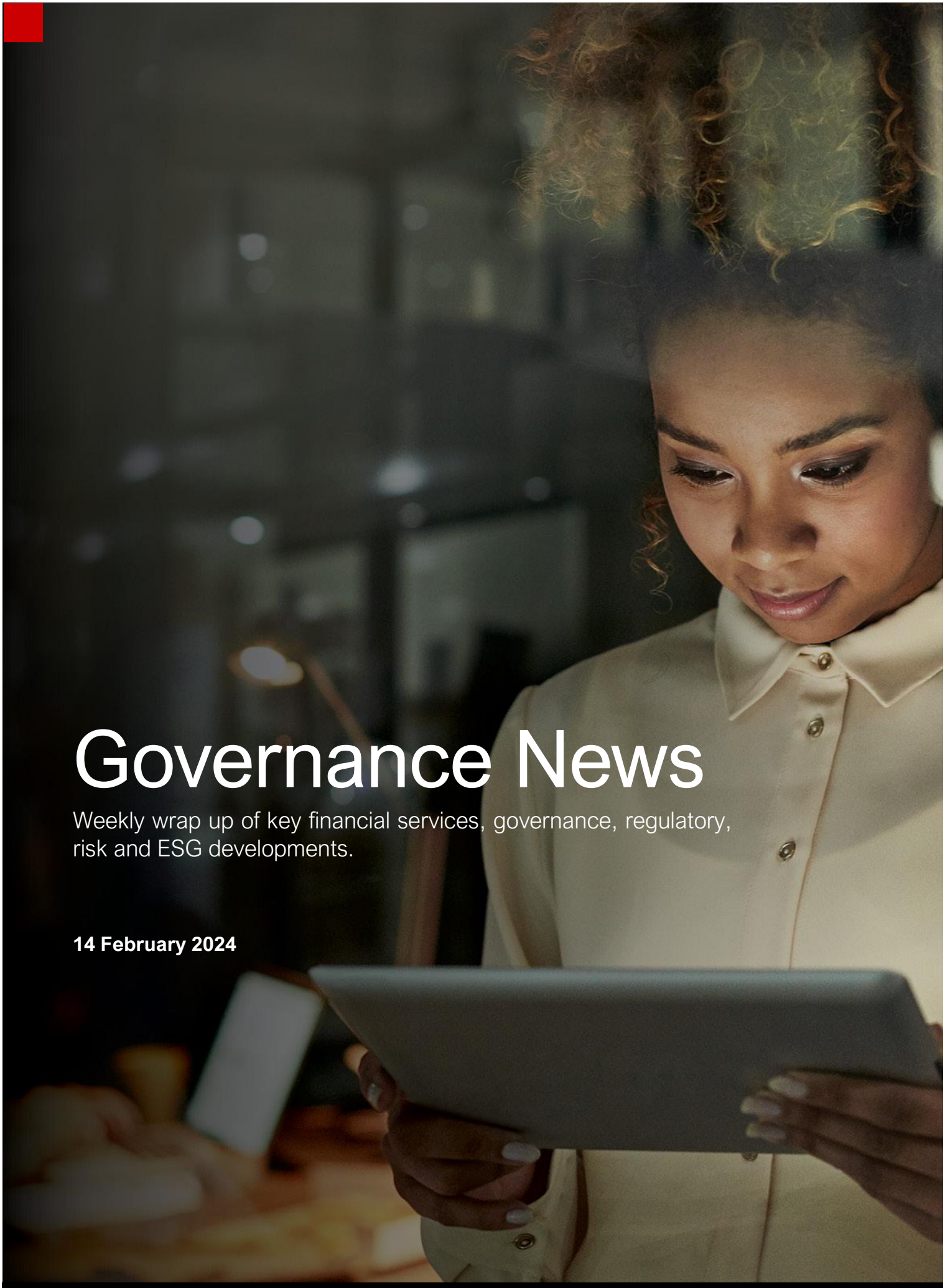


Governance News

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

14 February 2024

Contents

Shareholder Activism

Diverging paths: European asset managers' support for ESG shareholder proposals remains high and steady while US asset managers' support drops

Morningstar highlights that when it comes to supporting ESG shareholder proposals, European asset managers appear significantly more willing/likely than their US counterparts to lend their support.

According to Morningstar over the 2021-2023 period:

- Overall average support - across the 15 European and 20 US asset managers in the sample - for 'key' ESG shareholder proposals (ie proposals that address environmental and social topics and gain more than 40% adjusted support ie support for the proposal from shareholders who are independent of the company and its management) has declined from 63% in 2021 to 48% in 2023
- Morningstar attributes this to US asset managers walking back their support - looking at US asset managers Morningstar found that average support on 'key' ESG shareholder proposals fell from 67% in 2021 to just 50% in 2023 with most of the largest US asset managers showing negative trends. Morningstar identifies Vanguard, BlackRock, Capital Group, and T Rowe Price as the largest firms with a clear decline in support in 2023.
- In contrast, looking at EU asset managers support has remained significantly higher and has remained stable at 98%. Average support was above 90%, for all 15 asset managers, both in 2023 alone and over the last three years.

NBIM supported more shareholder ESG proposals in 2023 than previously

The data also includes Norges Bank Investment Management (NBIM) the Norwegian sovereign wealth fund manager. According to Morningstar's analysis, while NBIM supported 84% of 'key' ESG resolutions over the last three years – which is lower than the European average – it supported 100% of 'key' environmental proposals in 2023.

Morningstar's expectation is that these trends are likely to continue in 2024.

> [Sources: Morningstar report: ESG Proxy Voting: Voting records for the largest US and European managers; Harvard Law School Forum 07/02/2024]

Barclays commits to stop direct financing of new oil/gas projects following multi-year engagement

Brunei Pension Partnership (Brunei) together with ShareAction have claimed credit for Barclays' strengthened stance on oil/gas project financing, announcing that they have withdrawn a shareholder proposal on the issue in light of the banks' new commitments. For context, Barclays summarises these commitments as follows:

- 'No project finance, or other direct finance to energy clients, for upstream oil and gas expansion projects or related infrastructure.
- Restrictions for new energy clients engaged in expansion.
- Restrictions on non-diversified energy clients engaged in long lead expansion.
- Additional restrictions on unconventional oil and gas, including Amazon and extra heavy oil.
- Requirements for energy clients to have 2030 methane reduction targets, a commitment to end all routine / non-essential venting and flaring by 2030 and near-term net zero aligned Scope 1 and 2 targets by January 2026.
- Expectation for energy clients to produce transition plans or decarbonisation strategies by January 2025'.

Brunei sees this as evidence of the effectiveness of its multi-year engagement efforts with the bank – through voting and engagement – on the issue.

Brunei has signalled its intention to continue to engage with Barclays (and with other banks) to push for further action. Brunei writes:

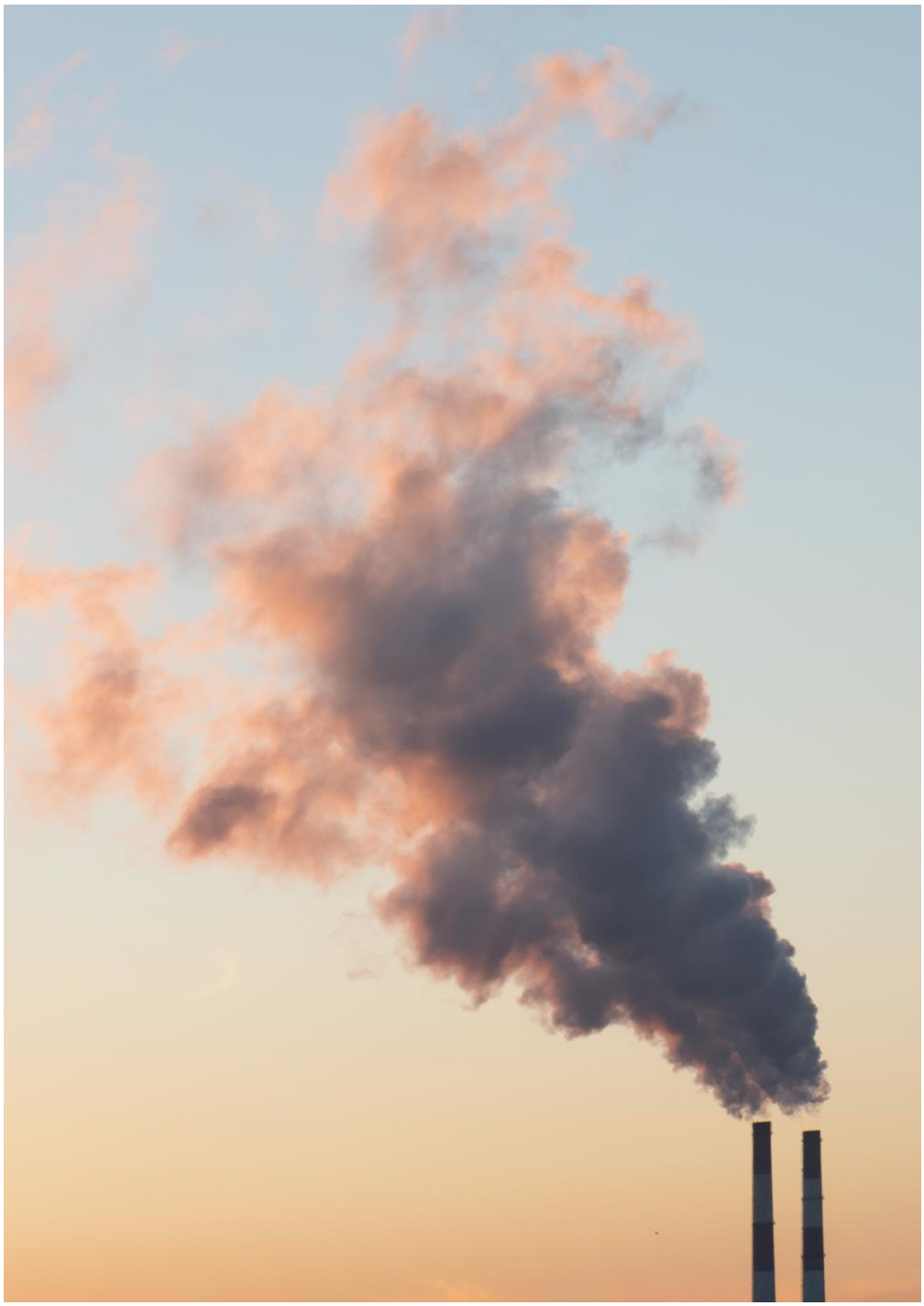
> 'We have already told Barclays the specific areas where the updated policy needs to be strengthened in future iterations, and we welcome Barclays' willingness to continue to engage with us on implementation, and on furthering its commitments in this crucial area...engagement is always a long-term process, and progress usually comes in steps. We are committed to long-term engagement in order to maximise our impact'.

Similarly ShareAction, though welcoming of the banks' updated commitments, makes clear it considers more is needed. Specifically ShareAction considers that:

- Barclays should, in addition to requesting decarbonisation plans from oil/gas clients, also 'demand clients stop engaging in activities that increase the climate crisis such as oil and gas exploration'.
- Barclays should rule out financing companies that focus on fossil fuel extraction including fracking

ShareAction writes:

> 'We should expect the banks' shareholders to hold them to account on this policy and make significant efforts to close the loopholes in this strategy.'
>
> [Sources: Brunei Pension Partnership media release 09/02/2024; ShareAction media release 09/02/2024]



Shareholder Proposal calling on State Street to review and report on its 2023 proxy voting record withdrawn

United Church Funds (UCF) has withdrawn a shareholder proposal filed at State Street calling on the board to:

> 'initiate a review of both SSGA's 2023 proxy voting record and proxy voting policies related to diversity and climate change'

State Street had sought SEC approval to block the from proceeding to a vote, but the proposal was withdrawn ahead of SEC making any decision.

It is not clear whether the proposal was withdrawn by UCF in exchange for concessions/an agreement of some kind with State Street.

One of a number of similar proposals filed at asset managers

The proposal is one of four similar proposals filed by Interfaith Centre on Corporate Responsibility (ICCR) members at asset managers - BlackRock (coordinated by Mercy Investment Service), Goldman Sachs (coordinated by Faith-Based Investing and Shareholder Engagement for the Presbyterian Church, (U.S.A.)) and JP Morgan (filed by Socially Responsible Investments at Trinity Health on behalf of the Maryknoll Sisters) - following the decline in their support for shareholder ESG proposals in 2023.

[Source: SEC 2023-2024 No-Action Responses Issued Under Exchange Act Rule 14a-8: State Street Corporations 01/02/2024; ICCR media release 14/12/2024]

Equitable access to healthcare | JB Hunt fails to secure SEC approval to block shareholder proposal from proceeding to a vote

The Securities and Exchange Commission (SEC) has turned down JN Hunt Transport Services' application to exclude a shareholder proposal (filed by Trillium Asset Management) and supporting statement from the proxy materials for the Company's 2024 annual meeting.

For context, the proposal called on the company to:

> 'adopt and publicly disclose a policy (with details and timing at the discretion of the Company) of equitable healthcare coverage for all employees, regardless of sexual orientation or gender identity'.

In its supporting statement, Trillium submits that providing 'equal health coverage for transgender individuals' and 'equivalency in same and different sex domestic partner benefits' could assist in attracting new drivers from the LBTQ+ community – helping to solve the company's difficulties in attracting/retaining drivers and delivery personnel (a risk flagged by the company).

SEC rejected the company's submissions that the proposal could be properly omitted because:

- the company has substantially implemented the Proposal;
- it deals with matters relating to the conduct of the ordinary business operations of the company and further seeks to "micromanage" the daily business operations and decisions of the company
- is so vague and indefinite that is it materially misleading
- it did not meet documentation requirements (and was therefore not properly submitted)

The SEC's refusal enables the proposal to proceed to a vote at the company's 2024 annual shareholder meeting. As yet no date has been announced.

[Source: SEC no action response 02/02/2024]

Shareholders vote down all four shareholder ESG proposals at Tyson Foods Inc annual meeting

In line with management's 'against' recommendation, Tyson Foods Inc shareholders voted to reject the four shareholder ESG proposals that went to a vote at the company's 8 February 2024 annual shareholder meeting – with support ranging from 3% to 12%.

The table below provides a snapshot of the proposals and an indication of how (some) investors voted on each.

TYSON FOODS INC			
SHAREHOLDER ESG PROPOSALS	**WHY THE BOARD RECOMMENDED 'AGAINST'**	**APPROX SUPPORT**	**HOW INVESTORS VOTED**
Climate Lobbying: The proposal calls on the company to: 'conduct an evaluation and issue a report annually…describing if, and how, its lobbying, directly and through the activities of its trade	In essence, the board recommended shareholders vote down the proposal because it considers that: 'The requested evaluation, disclosure, and reporting are	10% support	▪ Norges Bank Investment Management (NBIM) voted in support of the proposal. The justification given is that, in line with its global voting guidelines and expectations around

TYSON FOODS INC			
SHAREHOLDER ESG PROPOSALS	**WHY THE BOARD RECOMMENDED 'AGAINST'**	**APPROX SUPPORT**	**HOW INVESTORS VOTED**
associations and social welfare organisations, aligns with the Company's science-based targets and long term net zero ambitions. The report should also address the risks presented by any misaligned lobbying and Tyson's efforts, if any, to mitigate these risks.'	unnecessary and duplicative because we already report on political contributions, lobbying expenditures, and our engagement on policies, laws, and regulations that have the potential to impact climate'.		sustainability reporting, NBIM considers: 'The board should account for material sustainability risks facing the company, and the broader environmental and social consequences of its operations and products. Sustainability disclosures should be aligned with applicable global reporting standards and frameworks to support investors in their analysis of risks and opportunities. Where a company's disclosure does not meet our needs as a financial investor, we will consider supporting a well-founded shareholder proposal calling for reasonable disclosure'. ▪ California State Teachers Retirement System (CalSTRS) also voted in support ▪ NYC pension funds (New York City Board of Education Retirement System; New York City Employees' Retirement System; New York City Fire Pension Fund; New York City Police Pension Fund; and Teachers' Retirement System of the City of New York) voted in support ▪ California Public Employees Retirement System (CalPERS) voted in support

TYSON FOODS INC			
SHAREHOLDER ESG PROPOSALS	**WHY THE BOARD RECOMMENDED 'AGAINST'**	**APPROX SUPPORT**	**HOW INVESTORS VOTED**
			▪ Legal and General Investment Management (LGIM) voted in support on the basis that: 'LGIM encourages all companies to report their climate lobbying activity in line with the Global standard on responsible corporate climate lobbying'.
Third party audit of labour practices in supply chains: The proposal calls on the board to: 'commission an independent third-party audit assessing the effectiveness of the Company's policies and practices in preventing illegal child labour throughout its value chain. A report on the audit…should be made available on the company's website'.	Again, the key reason given for the boards' 'against' recommendation is that the board considers the requested audit to be 'unnecessary and duplicative because the Company has already strengthened its policies and practices in this area which include a robust system of checks and audits following the allegations against PSSI and other sanitation providers'.	12% support	▪ NBIM voted in support. The justification given is identical to that given for supporting the climate lobbying proposal above. ▪ CalSTRS also voted in support ▪ NYC pension funds voted in support ▪ CalPERS voted in support ▪ (LGIM) voted in support on the basis that: 'LGIM supports such risk assessments as we consider human rights issues to be a material risk to companies'.
Deforestation in supply chains: The proposal calls on the company to: 'accelerate its efforts to eliminate deforestation, native vegetation conversion, and primary forest degradation from its supply chains to achieve independently verified deforestation-free supply chains by 2025'.	Similarly, the board recommended against because it considers that: 'the requested deforestation-free initiatives are duplicative and unnecessary. Given our current practices and disclosures, the Board also believes that the request set forth in the proposal would not provide material benefits or	3% support	▪ NBIM voted in support. The justification given is identical to that given for supporting the climate lobbying and labour practices proposals above. ▪ CalSTRS voted against ▪ NYC pension funds voted in support ▪ CalPERS voted in support

TYSON FOODS INC			
SHAREHOLDER ESG PROPOSALS	**WHY THE BOARD RECOMMENDED 'AGAINST'**	**APPROX SUPPORT**	**HOW INVESTORS VOTED**
	result in additional disclosures not already available to shareholders and is therefore not in the best interests of the Company or its shareholders'.		▪ LGIM voted in support. The reason given is that: 'We note the relatively short timeline in the resolution text but the company should accelerate efforts to eliminate deforestation from its supply chain as we deem this to be a material risk'
Circular Economy for Packaging: The proposal calls on the board to: 'issue a report…describing opportunities for Tyson to support a circular economy for packaging'.	Again, the board considers the requested report is unnecessary/duplicative and not in the best interests of shareholders in light of the measures the company already has in place.	4% support	▪ NBIM voted against – no further details around why are provided. ▪ CalSTRS voted against ▪ NYC pension funds voted in support ▪ CalPERS voted in support ▪ LGIM voted in support on the basis that: 'A vote for is applied because the company should accelerate efforts to transition to a circular economy approach as we deem this a material risk'.

[Source: Tyson Foods Inc Notice of Meeting; Preliminary vote results; Results of meeting]

Disclosure and Reporting

Mandatory climate disclosure in Australia | Support builds for pushing back commencement of the regime

Context: Consultation on draft Bill to establish the framework for a mandatory climate disclosure regime in Australia

- The Australian government is progressing plans to phase in a new, internationally aligned, mandatory climate disclosure reporting regime for heavy emitters, large listed companies, large private companies and superannuation funds/asset managers, with the release of a draft Bill for consultation. If enacted, the draft Bill would establish the framework for the proposed new disclosure regime. The due date for submissions on the draft Bill was 9 February 2024. For more on the draft Bill read: Mandatory Climate Reporting in Australia | Draft Bill released for consultation - Technical update - MinterEllison
- The new climate disclosure (and assurance) requirements are planned (subject to the passage of the legislation) to be phased in, starting with certain large entities from 1 July 2024 (though the government has called for feedback on whether this should be deferred to 1 January 2025).
- Interaction with the AASB and AUASB standards:
  - The specific content of the 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 is due to close on 1 March 2024 (read: Another step closer towards implementing mandatory climate disclosure in Australia).
  - New assurance standards, planned to be phased in from 1 July 2024, will be made and maintained by the Australian Auditing and Assurance Standards Board (AUASB).

Submissions on the draft Bill

Below is a broad brush overview of some of the standout concerns raised by peak bodies representing directors (the Australian Institute of Company Directors and the Governance Institute of Australia), insurers (Insurance Council of Australia) and the Australian Energy Council on some key aspects of the draft Bill.

Support for delaying commencement of the new regime

Every submission supports a delay in the commencement of the new regime.

- The AICD does not give a preferred commencement date but recommends that:

  'Consideration to be given to a commencement date that aligns with the finalisation of the relevant standards [ie the finalised AASB standards] and reporting cycles'.
- The GIA recommends commencement be delayed to

  'the later of either 1 July 2025 or the next financial year commencing after the new Australian Accounting Standards Board (AASB) standards have been published, with a corresponding adjustment for Group 2 and Group 3 entities'.
- The ICA gives no preferred date, but submits that 1 January 2025 commencement for Group 1 entities

  'should only occur if the final standard and legislation are released mid-2024. It is not feasible to expect entities to commence data collection and reporting simultaneously with the publication of the standard and legislation'.
- The AEC would support pushing the commencement date back by six to 12 months.

The proposed 'interim modified liability framework' should be expanded

The submissions also raise concerns about the scope of the proposed limited liability framework.

- The AICD submits that forward-looking statements, including transition plans should also be covered.
- Similarly, the GIA considers that limited immunity should be extended to all forward -looking statements. It's further submitted that limited immunity should be extended to entities in all Groups for the first three years of reporting.

- Likewise, the ICA submits that limited immunity should be extended to all forward looking statements required in an entity's sustainability report (and that this should extend to reasonable duplication). The ICA further recommends that entities in all Groups receive relief for three reporting years.
- The AEC also suggests that forward looking statements should be covered. It's further suggested that:

  'Treasury should consider that:

  – 'There is no possibility for retrospective litigation (ie third-party litigation cannot be taken after the three years have passed for an act or omission within the first three years).
  – Modified liability for Scope 3 emission reporting should only start once the requirement for limited assurance commences'.

Director declarations

- The AICD submits that director declarations should be 'suitably qualified' – that is, directors should only be required to 'opine that they have "reasonable grounds to believe that" the climate disclosures are in accordance with the Sustainability Standards and the Corporations Act'.
- Similarly, the GIA recommends that directors should be required to

  'declare that, in their opinion, they have taken reasonable steps to comply with, or to secure compliance with, the Sustainability Standards and the Corporations Act'.

  The GIA further submits that the declaration could be time limited to align with the term of the limited immunity.'

The ICA or the AEC submissions do not address this issue.

Concerns that the proposed threshold for Group 3 entities is too low

- The AICD submits that the thresholds for Group 3 entities is too low and recommends that the revenue threshold for Group 3 entities to be raised from $50 million to $100 million and the gross assets threshold from $25m to $50m and/or 'that Group 3 entities be subject to a simplified climate reporting standard (similar to the simplified financial accounting standards that apply to Tier 2 entities.)'
- The GIA also submits that the Group 3 threshold should be raised to $100m, with a 'corresponding adjustment to turnover'.
- The ICA and AEC submissions do not raise concerns about the proposed reporting threshold for Group 3 entities.

Inclusion of NFPs

- The AICD expresses 'concern' about the proposed inclusion of Not-for-Profits (NFPs) that are reporting entities under Chapter 2M of the Corporations Act in the regime 'in the absence of specific consultation with the sector'.
- The GIA considers that NFPs 'should also be excluded from the reporting requirements'. The GIA opines that there should be a 'reduced disclosure regime for these entities given they are currently eligible to produce simplified financial disclosures'.
- The issue is not addressed in the ICA or AEC submissions.

[Sources: Australian Energy Council (AEC) submission; Insurance Council of Australia (ICA) submission; Governance Institute of Australia (GIA) submission; Australian Institute of Company Directors (AICD) submission]

Climate disclosure | US Chamber of Commerce files constitutional challenge to Californian climate laws (Senate Bills 253 and 261)

The US Chamber of Commerce together with the American Farm Bureau Federation, California Chamber of Commerce, Central Valley Business Federation, Los Angeles County Business Federation, and Western Growers Association have filed a constitutional challenge to California's new climate disclosure laws - Senate Bills 253 (the Climate Corporate Data Accountability Act) and 261 (Climate-related Financial Risk Act).

Broadly, it's alleged that SB 253 and 261 are unconstitutional because they 'violate':

> 'the First Amendment, which bars California from compelling a business to engage in subjective speech, and the federal Clean Air Act, which pre-empts a state's ability to regulate emissions in other states — as California seeks to do by mandating reporting on out-of-state emissions'.

For full details are included in the complaint see: FILED-Chamber-v.-CARB-Complaint.pdf (uschamber.com)

The legal challenge comes ahead of the release of the Securities and Exchange Commission's (SEC) new climate disclosure rules (factsheet) which were released in draft form for consultation in 2022. SEC's 2023 Reg Flex Agenda suggests the rule ***may*** be released in April 2024 (though this is not certain). It's possible that SEC's reforms (when finalised) may face similar legal challenges.

[Source: US Chamber of Commerce media release 30/01/2024]

Greenwashing | Car makers directed by UK ASA to drop 'zero emissions' EV ads over greenwashing concerns

The Advertising Standards Authority (ASA) - the UK's independent regulator of advertising across all media – has directed BMW (UK) Ltd and separately, MG Motor UK Ltd to stop running certain advertisements for electric vehicles because it considers the 'zero emissions' claims in the ads were too broadly framed, and therefore potentially misleading for consumers.

BMW ad

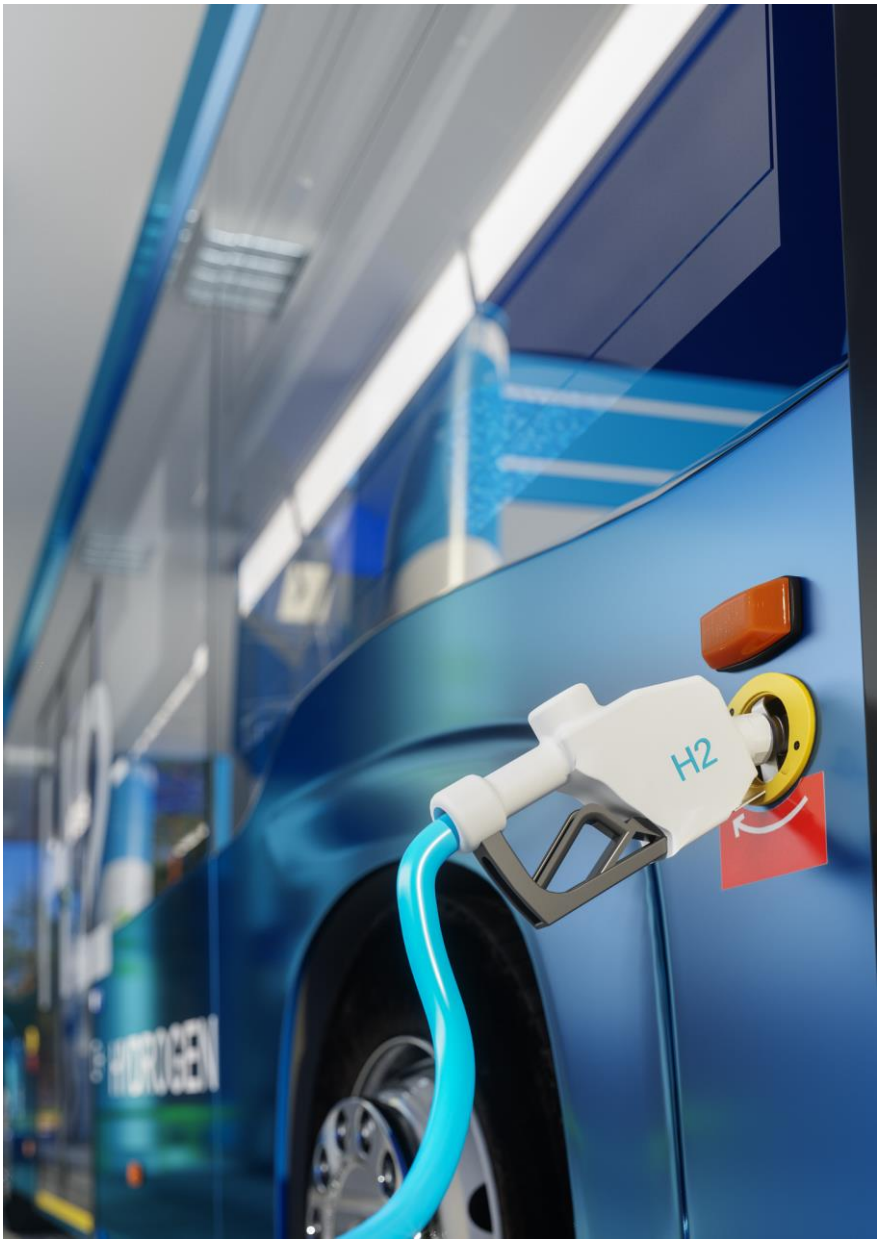
The ASA considered the claim – 'Zero Emissions Cars' – did not accurately represent the vehicle's environmental impact because it was not made clear that the claim only applied to emissions produced while driving the vehicle (and did not also cover the manufacture or charging of an electric vehicle using electricity from the national grid).

Not a conscious choice – claim automatically inserted by Google Ad feature

Interestingly, when contacted by the ASA about this issue, BMV advised that it was unaware (until the ASA queried it) that the 'zero emissions' claim was being made. This is because it was not a conscious decision on the part of the company to include the claim, but rather the result of an automated Google Ad feature which the company did not realise had been activated.

BMW had bid on terms including 'zero emissions cars' to target consumers searching for electric vehicles online. An automatic keyword feature in Google Ads – potentially this one: About keyword insertion for your ad text - Google Ads Help - then inserted the term 'zero emissions cars' into the ad where this search term was used. That is, the 'zero emissions' claim only appeared in a small selection (0.02%) of search results.

The company confirmed that the issue had been addressed and that steps to prevent it occurring in future had been implemented including: turning off the automatic keyword feature in Google Ads when bidding for 'zero emissions cars' keywords; adding manual copy to ads to 'ensure



greater control'; and committing to 'vet future activity with generic keywords before activation'.

ASA's concerns about the MG ad

The ASA's complaint concerned the following paid Google ad:

> 'Find A Dealer – Book A Test Drive. Save £1,000 On Your Next MG HS Plug-in Hybrid, MG ZS or MG5 EV Trophy Long Range Renewed with a modern design, increased range, and even more technology. Zero Emissions'

Again, the regulator was concerned that the 'zero emissions' claim was too broad and likely to mislead consumers about the environmental impact of the vehicle.

In this case, the ASA records that MG responded by confirming that all references to 'zero emissions' had been removed from their advertising – no further detail is given around whether the claim was included deliberately/whether it was added inadvertently or advertently as a result of the same Google Ads feature.

[Sources: ASA Ruling on MG Motor UK Ltd 07/02/2024; ASA Ruling on BMW (UK) Ltd 07/02/2024]

(Provisional) agreement to push back CSRD reporting announced, separately CSDDD vote delayed

- The new sustainability standards adopted on 31 July 2023 – the initial 12 European Sustainability Reporting Standards (ESRS) - and planned sector-specific standards, standards for SMEs and standards for certain third party countries were scheduled for 30 June 2024.
- The European Council and Parliament have provisionally agreed - the agreement still needs to be endorsed and formally adopted by both institutions - to push this back to **30 June 2026** to allow more time for companies to prepare.
- Separately, a decisive vote on the Corporate Sustainability Due Diligence Directive (CSDDD) - which would establish a corporate due diligence duty, mandating operational/supply chain oversight for in-scope entities - was also postponed. A number of 'green' groups – eg ShareAction, The Environmental Justice Foundation, World Wildlife Fund - have expressed their concern about the delay and the potential implications. Isabella Ritter, EU Policy Officer at ShareAction, commented:

> 'The decision to postpone the vote on CSDDD is outrageous. It is a game-changing piece of legislation with the power to uplift global human rights and environmental protection that has been stalled by member states, led by Germany. This delay is a leadership failure, jeopardising lives and the well-being of the planet. The stakes are too high, and we urge all EU Member States to move beyond self-interest, return to the table and ensure the passage of this crucial law as soon as possible. Looking ahead to the next vote in the COREPER meeting, ShareAction calls on the Belgian Presidency to swiftly address and overcome this block and get the green light from EU Member States as soon as possible. The CSDDD is more than a piece of legislation; it's about shaping the future of corporate accountability and sustainability practices in the EU and beyond'.

[Source: European Council media release 07/02/2024]

In Brief | The Independent Review of recent amendments to continuous disclosure laws under the Corporations Act 2001 (Cth) introduced by Schedule 2 to the Treasury Laws Amendment (2021 Measures No.1) Act 2021 (Cth) is due to deliver its report to the Treasurer 14 February 2024

> [Note: For context, the changes introduced mean that all civil penalty proceedings commenced under the continuous disclosure and misleading and deceptive conduct provisions must prove that an entity or officer acted with 'knowledge, recklessness or negligence' in respect of the alleged contravention. For more on the changes see: Changes to continuous disclosure laws are now permanent - Technical update - MinterEllison]
>
> [Sources: Assistant Treasurer and Minister for Financial Services Stephen Jones media release 19/09/2023; Continuous Disclosure: Review of liabilities for failure to meet obligations]

Institutional Investors and Stewardship

New investor initiative to push companies to halt and reverse global biodiversity loss by 2030: PRI names 40 'focus companies' to be targeted initially

- Principles for Responsible Investment (PRI) has launched a new investor engagement initiative – the Spring initiative – to push companies to halt and reverse global biodiversity loss by 2030. A full list of current 'endorses' of the initiative is here.
- The initial priority/focus will be on **forest loss and land degradation** as the 'first driver of biodiversity loss' with further drivers of biodiversity loss planned to be considered in the medium term.
- An initial list of 40 focus companies (full list of companies here) has been released with plans to release a list of further companies later in the year.
- The initiative is expected to run for a minimum of five years, until February 2029.

[Source: PRI Spring Initiative website [accessed 12/02/2024]]

NBIM divested from 86 companies on ESG grounds in 2023, including eight on nature grounds

Norges Bank Investment Management (NBIM) divested from 86 companies on ESG grounds in 2023 according to its 10th annual report on its 'responsible investment' approach.

The two most common reasons for divestment were:

- 'human rights exposure to markets with significant risk of violations of human rights violations Insufficient risk management related to human rights' – 24 companies
- 'Other exposure to other significant ESG risks' – 19 companies

Notably, NBIM also divested from five companies (because of 'insufficient water management'), three companies (because of impacts on biodiversity and ecosystems').

The table at p54 of the Report provides a snapshot of the key reasons for divestment/number of (unnamed) companies under each.

Pilot 'TNFD-inspired' report released

Separately, NBIM released its first 'TNFD-inspired disclosure' to draw attention to

> 'nature-related aspects of our [NBIM's] responsible investment strategy, and to update our stakeholders on our progress'.

The report flags that:

> 'the majority of sectors in our portfolio include business processes with **high or very high direct impacts on the natural environment.** Industrials, energy, food and beverages, and utilities sectors appear to have high or very high impacts through water use and ecosystem conversion in particular. The majority of the sectors in our portfolio appear to have high impacts through greenhouse gas emissions and various forms of environmental pollution'.

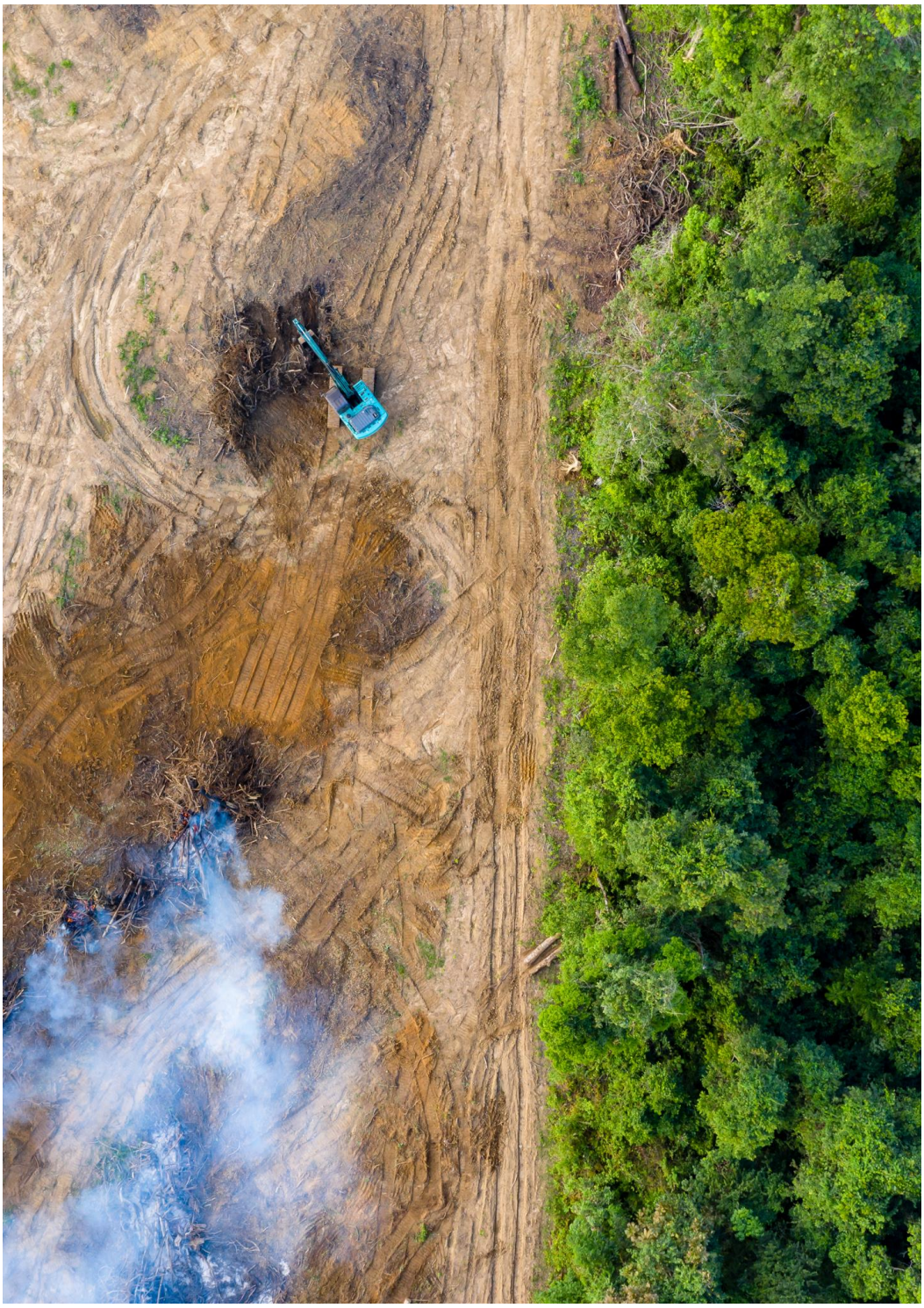
Nature-related risk is already being reflected in NBIM's approach

- **Disclosure:** NBIM writes that it is active in engaging with standard setters on the importance of disclosure of nature-related risk, responding to four public consultations on the issue in 2023. In doing so, NBIM writes that it

  > 'emphasised the relevance of nature-related risks as a financially material investment issue, and the importance of interoperability between the emerging frameworks and standards in this field'.

- **Engagement topic:** NBIM engaged with 229 companies on nature-related issues. To put this in perspective, the report states that this represents 16% of the market value of NBIM's equity portfolio. Biodiversity, water management, ocean sustainability, deforestation and the circular economy were the key issues discussed. Discussion of the circular economy was the most commonly discussed topic (discussed in 213 meetings).

- **Votes against directors on nature grounds:** NBIM voted against the re-election of board members at three companies that did not adequately report or manage nature-related risks. NBIM states that in each instance, this followed unsuccessful attempts to engage with the company prior to the vote.
- **Divestments:** From 2012 to 2023 NBIM divested from 75 companies where 'the primary motivation was linked to heightened risks related to impacts on biodiversity and valuable ecosystems, ocean sustainability, or insufficient water management'.



Elimination of deforestation is a key focus

Looking ahead, the report flags that NBIM's expectation is that portfolio companies:

> 'take action in the short term to eliminate deforestation and natural ecosystem conversion from their business activities and/or value chains – see our expectations on biodiversity and ecosystems for further details. Our expectations also call on companies to take into account the targets of the Kunming-Montreal Global Biodiversity Framework. We emphasise our expectations in our ongoing dialogue with companies'.

[Source: NBIM media release 07/02/2024; Full text report: Responsible investment 2023; Nature Risk Disclosures 2023]

Too slow | PFZW sells €2 billion stake in 310 oil and gas companies, including Shell BP and TotalEnergies over slow transition planning

- Dutch investor PFZW has announced that following a two year 'intensive engagement program' with fossil fuel companies in its portfolio focused on persuading them to produce 'verifiable' and Paris-aligned transition plans, it

has sold its holdings in 310 companies that (it considers) are not Paris-aligned/'have made insufficient steps in the transition to a cleaner energy mix'. These companies include: Shell, BP and TotalEnergies.

- PFZW has retained its holding in seven listed oil and gas companies - Cosan S.A., Galp Energia, Graanul Invest, Neste Oyj, OMV A.G., Raízen S.A. and Worley Limited - which it considers have 'compelling' climate transition strategies in place.
- Announcing this PFZW Chair Joanne Kellermann commented:

> 'The intensive shareholder dialogue over the past two years with the oil and gas sector on climate has made it clear to us that most fossil fuel companies are not prepared to adapt their business models to 'Paris'. While the largest companies in this sector do invest in sustainable forms of energy, the switch from fossil to low carbon is not nearly fast enough…The seven companies we will continue to invest in are the only ones that show a switch is possible. At the same time, it is disappointing that there are only seven. We encourage the biggest players in the oil and gas sector to also accelerate the switch to a cleaner energy mix'.

Looking ahead

- **Two billion euros to be allocated to companies with 'measurable impact on the climate and the energy transition' over the next two years:** Ms Kellerman said that PFZW intends to increase its investments in companies that 'contribute to improving the climate and the energy transition' in line with its 'ambition' of having 15% of its total assets invested in 'climate solutions' (PFZW describes these as 'solutions that contribute to the UN Sustainable Development Goals by 2030'. Two billion euros will be allocated over the next two years to investments in these companies.
- **Working towards climate-neutral investment portfolio by 2050**: PFZW plans to 50% absolute carbon reduction by 2030 for equities, liquid credit and real estate as a step towards achieving this aim.
- **PFZW also plans to sharpen its focus on large fossil fuel consumers**, eg power companies and producers of materials with a high carbon footprint. PFZW plans to encourage these companies to 'develop ambitious transition strategies to contribute to the goals of the Paris Climate Agreement'.

[Source: PFZW media release 08/02/2024]

NZOA reiterates expectations of asset managers on key issues including proxy voting, policy engagement, and lobbying activity

The UN-convened Net Zero Asset Owner Alliance (NZOA) has published a 'call to action' to the asset management industry reiterating its expectations around active engagement/stewardship.

Specifically, NZOA reminds asset managers that they are expected to:

- 'Focus on addressing the systemic risk of climate change: Moving to outcomes-focused corporate engagement while also embracing sector/value chain engagement and policy engagement;
- Support an improved proxy voting landscape (for public equity): Implementing consistent, ambitious, and merit-based proxy voting polices on climate topics with timely disclosure, thereby demonstrating alignment between policies and practices;
- Align lobbying activities with stated climate-related commitments: Driving alignment between their own climate commitments and the direct and indirect lobbying undertaken by both their firm and the portfolio companies in which they invest;
- Make climate engagement more systematic and transparent: Publishing clear information on processes, policies and relevant activities for climate engagement that acknowledge challenges and opportunities encountered'

NZOA refers asset managers to the following publications for more detail:

- The Future of Investor Engagement
- Best practice guides: proxy voting, policy-related dialogues, engagement practices, and private market asset managers

[Source: NZOA media release February 2024]

Financial Services

Top Story | What's needed to 'optimise the retirement phase of super'? Suggested key priorities for reform

Our submission to the government's Retirement Phase of Superannuation Discussion Paper

Consultation on the Retirement Phase of Superannuation Discussion Paper closed on 9 February 2024.

MinterEllison's submission is focused on legal issues and is based on our experience working with clients in developing retirement income products and solutions. Key points raised include:

- Simplifying disclosure requirements – a principal driver of complexity and poor consumer experience.
- Removing legal barriers (eg anti-hawking laws) to funds engaging more pro-actively with their members
- Rather than prescribe a standardised lifetime income product, we propose a requirement to offer more choice.

You can access the full text of our submission here: What's needed to 'optimise the retirement phase of super'? Suggested key priorities for reform - Insight - MinterEllison

Directors on notice | Predatory Lending a key focus for ASIC in 2024, ASIC says it stands ready to 'hold directors accountable'

In an article entitled ASIC to crack down on predatory lending, Australian Securities and Investments Commission (ASIC) Deputy Chair Sarah Court underlines ASIC's intention to:

> 'hold directors accountable in areas of emerging consumer harm'.

Ms Court highlighted the following as two areas of focus. Ms Court explained that he purpose in communicating these enforcement priorities is to:

> 'provide company directors with an opportunity to review their practices before they become the recipient of regulatory attention'

High-cost credit and predatory lending to consumers and small business (unlicensed credit activity): Ms Court pointed to ASIC's 'long-running litigation' against Cigno Pty Ltd and BHP Solutions Pty Ltd in illustration of ASIC's willingness to act, noting that ASIC is taking action against the directors involved as well as against the companies. Ms Court writes:

> 'The message here is that ASIC will pursue directors personally where significant corporate misconduct is alleged. The fact we continue to receive multiple complaints from consumer agencies about similar conduct by yet more related entities of these companies is symbolic of the regulatory and enforcement challenge we face in protecting consumers from what we consider to be unlawful lending practices'.

Compliance with financial hardship obligations: Ahead of the results of ASIC's review into how a sample of 10 large lenders' hardship practices in mid-2024, Ms Court underlined that:

> 'our message to boards is they should not wait to improve their practices if deficiencies are found'.

Ms Court pointed to ASIC's court action against a major bank over its alleged failure to respond to customer hardship notices within the required timeframe in illustration of the importance that ASIC places on providing appropriate support to customers experiencing financial hardship. Ms Court cautioned that ASIC

> 'will continue our focus in this area through 2024, and will not hesitate to act should similar issues with other lenders attract our attention'.

[Source: ASIC media release 08/02/2024]

When is a crypto-backed product a financial product?

Briefly, in Australian Securities and Investments Commission v Web3 Ventures Pty Ltd [2024] FCA 64 the Federal Court found that a crypto-backed product met the definition of a managed investment scheme and a facility for making a financial investment under the law and therefore was required to be licensed.

Announcing the decision, ASIC Deputy Chair Sarah Court said that it provides

> 'clarity as to when crypto-backed products should be considered financial products which require licencing under the law'.

Ms Court also urged firms offering products with crypto-assets to

> 'carefully consider whether their offerings are financial products under the existing regime. And, if they are, ensure that they are appropriately licenced and authorised before distributing them.'

[Sources: Australian Securities and Investments Commission v Web3 Ventures Pty Ltd [2024] FCA 64; ASIC media release 08/02/2024]

Risk Management

Top Story | Whistleblower reform: New report offers suggested blueprint for a central Whistleblower Protection Authority

A new report puts forward ten suggested design principles to underpin the establishment of a central, standalone Whistleblower Protection Authority (WPA). The report seeks to push the conversation forward from why we need a WPA to what a WPA should look like.

Transparency International, the Human Rights Law Centre and Griffith University have released a joint report outlining ten design principles to inform the establishment of a (proposed) new, Whistleblower Protection Authority (WPA). Here are our key takeaways.

What is the proposed WPA?

The WPA would be a new, independent statutory agency or office tasked with enforcing and monitoring compliance with the Commonwealth whistleblower regime. Importantly, the WPA would also help ensure whistleblowers receive the support they need to come forward – a 'gap' in the current regime.

This idea, is not new – the report flags that it was first recommended in 1994 by the Senate Select Committee on Public Interest Whistleblowing, Chaired by Liberal Senator Jocelyn Newman, and subsequently by the 2017 Parliamentary Joint Committee on Corporations and Financial Services, into federal whistleblower protections which recommended that 'a one-stop shop Whistleblower Protection Authority be established to cover both the public and private sectors.'

Why do we need a WPA?

The chief rationale given in the report for the establishment of a WPA is the need to provide effective central oversight of the existing Commonwealth regime, and to help address known weaknesses including the current barriers to whistleblowers coming forward/being protected from reprisals if/when they do.

On this, the report comments:

> 'We know there is a general problem with the inaccessibility of current legal protections for whistleblowers – in terms of time, cost, and legal expertise needed to secure remedies if or when a whistleblower suffers from a lack of support or from unfair treatment, for having done the right thing and raised their concerns about wrongdoing'.

More particularly, it's submitted that a WPA could improve the effectiveness of the existing regime by plugging various 'gaps' in regulatory oversight that contribute to the weaknesses flagged above. For example it's proposed that the WPA would be able to provide prospective whistleblowers with access to free legal advice/other support – which is not available currently.

The various 'gaps' in current regulatory oversight which the report suggests the proposed new WPA would help to address are summarised in Figure 1 at p14 of the Report.

It's further suggested that the proposed WPA would play a vital role in ensuring the effectiveness of future, planned whistleblower reforms. The report opines that:

> 'A wide range of federal whistleblowing reform across the public, private and non-profit sectors is anticipated in the immediate months and years ahead. Without a whistleblower protection authority, these reforms will be incomplete – but by taking this critical step to ensure these laws work in practice, not just on paper, we can make sure the previously unfulfilled democratic promise of all our federal whistleblowing laws finally becomes a reality'.

Finally, it's submitted that there is already 'strong consensus' on the need for a central oversight body – as evidenced by recommendations for the establishment of such a body going back to 1994 – as well as a need for Australia to 'catch up' with other jurisdictions when it comes to whistleblower protections.

What would the WPA look like and what would it do? 10 proposed design principles

As a basis for discussion on what the new WPA should look like, the report puts forward the following ten draft design principles.

1 The WPA should have a 'pro-protection purpose': It's submitted that the WPA should be a Commonwealth statutory agency which would have three main areas of focus. To:

- 'enforce public interest whistleblower protections in federal laws [it would not enforce State laws]
- provide support, information and assistance to current, former, and prospective public interest whistleblowers, as well as general assistance to organisations
- investigate, and ensure remedies in response to, alleged detrimental treatment of whistleblowers, and d. support other federal integrity and regulatory agencies, and relevant state-based authorities, in the receipt, assessment, referral and response to whistleblowing disclosures'

On the first point, while it's not proposed that the WPA would enforce State laws, it is submitted that the new body would nevertheless

> 'provide an important new precedent to help inform the strengthening of State institutional arrangements. A federal whistleblower protection authority could also play a significant role in cooperating with State bodies in the future to foster nationally consistent support and guidance, or even provide support to state and territory whistleblowers under intergovernmental agreements'.

2 The WPA should provide support to prospective whistleblowers

It's envisaged that the WPA should:

> 'provide information and advice to prospective whistleblowers, and case worker-style advice and support to actual whistleblowers, on both legal and non-legal aspects of whistleblowing – including referrals to and funding for relevant legal, career, health and other personal support services'.

3 The WPA should have a role in preventing adverse outcomes: It's suggested that the WPA should help prevent adverse outcomes for public interest whistleblowers and their organisations in three key ways:

- 'support and leadership of a 'no wrong doors' intake and referral approach among integrity and regulatory agencies and organisations, including secure information channels for ongoing communication with whistleblowers
- monitoring powers in relation to handling of referred cases, helping ensure agencies and organisations fulfil their positive duties to support and protect whistleblowers
- provision of general information, guidance and training on best practice whistleblower support and protection approaches for agencies and organisations, along with relevant continuing professional development for legal practitioners and tribunal members'. [emphasis added]

4 The WPA should have a 'remedies focus': Ensuring 'remedial action in response to prima facie cases of detrimental treatment of whistleblowers' is proposed to be the WPA's 'central responsibility'. It's submitted that the WPA's powers should include the following:

- 'preventative action (e.g. injunctions) in relation to anticipated detrimental acts, omissions, failures to support, or agency non-compliance with disclosure-handling obligations
- investigation, reporting, recommendations and enforcement action in respect of past detrimental treatment, including but not limited to direct or knowing reprisal'.

On this last point, the report clarifies that:

> 'The WPA would not investigate primary allegations of wrongdoing, except to the extent necessary to assess and/or refer cases for response or action by other agencies, or ensure appropriate investigations occur and that disclosures are resolved'.

Importantly, it's proposed that the WPA should be empowered to act either 'in response to complaints, referrals, monitoring or on its own initiative'.

5 The WPA should have 'power to conduct early intervention' in the form of conciliation or mediation of alleged or 'apparent' detrimental treatment of whistleblowers and to recommend

> 'informal and administrative remedies to resolve cases, where the whistleblower and organisation consent and where it is not contrary to the public interest to do so'.

6 Discretion to bring civil proceedings for remedies/intervene in criminal or civil cases: It's suggested that the WPA should:

> 'have a discretion to bring civil (including employment) proceedings for remedies, in the public interest, including on behalf of individual whistleblowers (with their consent). It would also have power to intervene in criminal or civil cases raising public interest whistleblower protection issues, and would be required to be consulted by any

federal public agency proposing to take legal action against a whistleblower as to the reasonableness of that action'.

7 Remedies and Rewards: It's suggested that the WPA should be empowered to:

- 'seek financial remedies on behalf of whistleblowers
- **administer redress and reward schemes** based on a proportion of penalties, financial savings or other income derived by the Commonwealth as a result of whistleblower disclosures, and
- seek legal costs protection for whistleblowers, including on a full indemnity basis, in appropriate cases'. [emphasis added]

On the second point, the report does not go into detail around what 'redress and reward schemes' might look like. It is an idea that the Attorney General recently sought feedback on as part of the consultation of a second phase of proposed whistleblower reforms.

8 'Comprehensive, seamless jurisdiction': It's suggested that the WPA should:

'have jurisdiction to enforce protected disclosures under any and all Commonwealth laws (public sector, corporate, not-for-profit, union and sector-specific) – including to ensure whistleblowers do not 'fall through cracks' in protection, whether they are public servants, contractors, consultants, corporate or NGO employees or any other person working in a federally-regulated industry or sector who speaks up about wrongdoing in or by their own or a related organisation'.

9 'Adequate' funding and powers: It's suggested that the WPA's powers should include the following powers:

- compel evidence and information;
- issue guidance and recommendations;
- monitor progress on outcomes arising from disclosures;
- maintain confidential communications with whistleblowers and organisations; conduct reviews of the effectiveness of organisational policies, regulations and legislation; and
- report publicly on specific cases or general issues.

It's also submitted that the WPA should be 'appropriately funded' with a 'multi-party parliamentary committee' to have oversight of these arrangements.

10 Whistleblower Protection Commissioner, standalone budget: In the interests of ensuring the WPA's independence, it's submitted that the WPA should:

- Be headed by a 'suitably-qualified, specialised statutory officer' – the Whistleblower Protection Commissioner. It's suggested that the Commissioner should have 'security of tenure equivalent to a judicial officer'
- Have a 'stand-alone budget and dedicated body of staff' (including 'those with personal experience of having blown the whistle')
- Supported by 'statutory coordination and advisory committees, including advice from civil society, employer, union and former whistleblower representatives'.

Outlook

The submissions window for the Attorney General's consultation on a 'second phase' of potential whistleblower reforms concluded in December 2023. That consultation specifically sought views on the need for/scope and design of an independent body to protect public sector whistleblowers – a WPA (see: questions 14-19 of the Consultation Paper).

As flagged in the report, there appears to be a level of support - including from some current MPs and Senators – for the establishment of a WPA. Several submissions to the Attorney General's consultation also express support for the establishment of an independent body, including the Australian Law Reform Commission.

However, the government's current position on the establishment of a WPA is not yet known – no concrete steps towards establishing such a body (eg consultation on draft legislation, introduction of legislation) have been taken.

[Source: Human Rights Law Centre media release 13/02/2024; Full text report: Making Australian Whistleblowing Laws Work]

Modern Slavery | Status update on Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023 (Cth)

The Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023 (Cth) (Bill) has progressed to Senate reading in the Senate, having passed the House of Representatives without amendment.

Broadly the Bill would (if enacted) amend the Modern Slavery Act 2018 (Cth) (MSA) to establish and legislate the core functions of a Modern Slavery Commissioner as an independent statutory officer holder within the Attorney General's portfolio. For more on the Bill read: Modern Slavery | Update on recent moves to strengthen Australia's modern slavery regime - POST - MinterEllison

The Senate Legal and Constitutional Affairs Legislation Committee is due to hand down its report on the Bill on: 21 February 2024.

[Source: Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023]

Overboarding | How many board roles is too many? AICD suggests five relevant factors for directors to consider when determining what's right for them

What is 'overboarding' and why is it a concern for directors at the moment?

Overboarding refers to the situation in which one person sits on too many boards and in consequence may be unable to devote the time/attention needed to discharge their duties effectively. Where the person also holds a full time executive role in addition to holding external directorships, holding an excessive number of board roles may also compromise the person's ability to serve their own organisation.

Given the increasing number of risks and challenges facing directors in the current environment, the AICD has released a short article offering insights to help directors to navigate this issue.

How many boards is too many (for me)?

The AICD suggests there is no 'one size fits all' answer to this question because:

> 'Every director differs in the number of duties and the amount of stress he or she can handle before reaching a tipping point'.

As a general rule of thumb, six boards is suggested as the maximum number, with the number lower for directors with full time jobs (eg CEO) at (probably closer to) two-three.

Five tips to assist directors in determining how many boards is right for them:

When considering the best number for them, the AICD suggests directors bear in mind the following:

- 'The maximum recommended number of boards a director should sit on is four to six.
- Sitting on more than two boards outside your full-time position may lead to ineffectiveness and feeling overwhelmed.
- Consulting outside your board work may lead to conflicts of interest.
- Do your homework on organisations to ensure they don't expect more of your time than you're willing to give.
- Use AI to save time for compliance tasks such as collating board papers'

[Source: AICD media release 02/02/2024]

Other News

Top Story | Closing Loopholes No 2 Bill passes both houses

Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023 (Cth) enacts significant reforms to the Fair Work Act 2009 (Cth) including changes in relation to: the definition of employee and employer; the definition of casual employee and right to convert to permanent employment; minimum standards and dispute resolution for employee-like workers performing digital platform work and regulated road transport industry contractors; independent contractor protections; right of entry for suspected underpayments and increased maximum penalties for underpayments; and a number of other changes. Closing Loopholes No. 2 Bill also includes a new Greens' sponsored statutory right to disconnect outside of work hours.

You can find MinterEllison's overview and discussion of the reforms here: Closing Loopholes No. 2 Bill passes both Houses - Insight - MinterEllison

Top Story | Top 5 predictions for healthcare in 2024

MinterEllison has released an article offerings insights into the five key trends expected to most impact on the sector this year. You can access the article here: Top 5 predictions for healthcare in 2024 - Insight - MinterEllison

Status update on Bill to give the Federal Court jurisdiction over corporations matters

In enacted in its current form, the Attorney-General's Portfolio Miscellaneous Measures Bill 2023 (Cth) would (among other things):

> 'confer jurisdiction on the Federal Court of Australia (Federal Court) to hear and determine a range of summary and indictable offences relating to conduct within the regulatory remit of the Australian Securities and Investments Commission (ASIC)'.

This new jurisdiction would operate concurrently with the existing jurisdiction of State and Territory courts in relation to these offences.

Proposed timing: It's proposed that these changes would commence on the day after the Bill receives Assent.

Current Status

The Labor Chaired Senate Legal and Constitutional Affairs Committee report into the Bill recommended that the Bill be passed. In addition, the Committee recommends that:

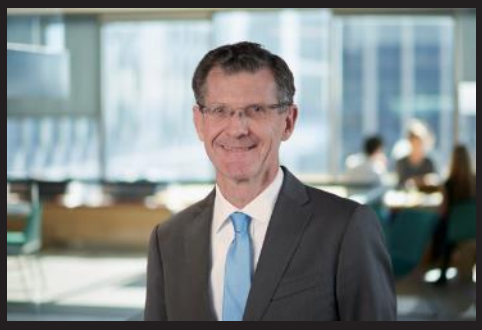
> 'the Attorney-General's Department update the Explanatory Memorandum to the Attorney-General's Portfolio Miscellaneous Measures Bill 2023 to include further guidance and information to clarify how the proposed reforms to the Federal Court of Australia in Schedule 1 and 2 of the Bill will result in more efficient prosecution of corporate crimes and increased procedural fairness'.

The Bill has progressed to second reading stage in the Senate, having passed the House of Representatives without amendment.

> [Source: Attorney-General's Portfolio Miscellaneous Measures Bill 2023 (Cth)]

Has this newsletter been forwarded to you? You can subscribe to our weekly wrap up of key governance, risk, regulatory and ESG developments here.

Contacts



Mark Standen
Consultant

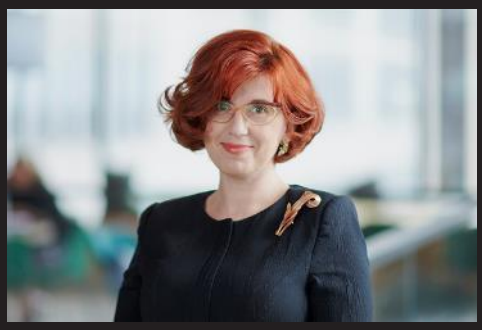
—

mark.standen@minterellison.com
T +61 2 9921 4902 | **M** +61 412 104 902

Siobhan Doherty
Partner

—

siobhan.doherty@minterellison.com
T +61 2 9921 4339 | **M** +61 413 187 544



Kate Hilder
Consultant

—

kate.hilder@minterellison.com
T +61 2 9921 8785