Governance News

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

21 February 2024

Contents

Shareholder Activism

SOC steps up attack on the Starbucks boards' record on labour issues, calling for immediate disclosure of $240m in 'undisclosed costs and liabilities' ahead of the upcoming meeting

- Ahead of the Starbucks 13 March 2024 annual meeting, SOC Investment Group (SOC) has stepped up its critique of Starbucks' record on labour issues, submitting a letter to the US Securities and Change Commission (SEC) accusing the company of failing to accurately disclose an estimated $240 million in costs/liabilities relating to its anti-union efforts and urging it to do so ahead of the upcoming meeting.
- For clarity, these 'undisclosed costs and liabilities' refer to:

  'litigation costs and expenses, other categories of expenditures (including employee lost time, communications and internal Starbucks staffing) as well as liabilities associated with labour law violations sustained by National Labor Relations Board (the "NLRB") complaints and/or labour judge determinations'.
- SOC submits that this (alleged) lack of disclosure by the company exemplifies the need for a change in leadership and a change in strategy when it comes to labour-related issues.
- SOC also reiterated calls on Starbucks shareholders to back its own three board nominees, which it considers have the skills necessary to tackle the human capital management challenges at the company.
- For context, SOC's campaign follows a 52% vote in support of a 'freedom to unionise proposal' at the Starbucks 2023 shareholder meeting. For more on this see: Governance News 5 April 2023 at p8.
- It also follows a year in which shareholder proposals dealing with various issues around worker rights/welfare including the right to unionise emerged as an area of increasing focus for shareholder advocacy groups and an issue that investors showed themselves increasingly willing to support.

  [Note: Analysis from Diligent Market Intelligence found that 'freedom of association proposals' were among the best performing ESG proposals of the 2023 season. Read: https://corpgov.law.harvard.edu/2023/11/30/which-esg-proposals-won-the-favor-of-investors/]

  [Source: SOC media release (accessed through BusinessWire) 16/02/2024]

New York State Common Retirement Fund has announced divestments from eight oil and gas firms including Exxon on climate grounds

$26.8m in planned divestments

- The New York State Common Retirement Fund (Fund) has said that as part of its broader review into the transition-readiness of its energy sector investments, it plans to divest its corporate bonds and actively managed public equity holdings in eight integrated oil and gas companies. These companies are: Guanghui Energy Company Ltd., Echo Energy PLC, IOG PLC, Oil and Natural Gas Corporation Ltd, Delek Group Ltd., Dana Gas Co and Unit Corp. and Exxon Mobil Corp.
- The fund puts value of these holdings at approximately $26.8 million (as at the end of 2023).

Increase sustainable investments

- The fund has also set a new goal of investing $40 billion in sustainable investments including clean energy generation, energy storage, resource efficiency, and green infrastructure across all asset classes by 2035 (up from the $20bn already invested).
- As a step towards this goal, the fund plans to increase its climate index by 50% to over $10 billion over the next two years, with the longer-term goal of doubling it by 2035.
- The fund will also make **no new private market investments** in funds focused on the extraction or production of oil, gas and coal

'Major utilities' in the US is the next review focus

- The fund has said it will now review its investments in US-based major utilities.

Push for increased disclosure to continue

- The fund will update its proxy voting guidelines 'to push for public companies to increase disclosure of their climate transition plans, risks and opportunities'.

  [Source: New York State Comptroller Thomas P DiNapoli media release 15/02/2024]

Green Century withdraws proposal after NXP Semiconductors agreed to develop a climate transition plan

- Green Century has withdrawn a shareholder proposal calling on founding member of the Semiconductor Climate Consortium NXP Semiconductors (NXP) to develop and publish a climate transition plan after reaching agreement with the company.
- NXP has agreed to develop a plan outlining how it envisages reaching its targets to reduce greenhouse gas (GHG) emissions from its operations by 35% by 2027 and source 50% of its energy needs from renewable sources in the same timeframe.
- Announcing this, Green Century Shareholder Advocate Andrea Ranger called on other companies to follow the example set by NXP:

  'The semiconductor industry generates a lot of emissions due to its heavy energy consumption and the greenhouse gases used to create the tiny circuitry patterns in microchips…It's impressive that NXP has set an aggressive path to cut those emissions. Green Century would like all our portfolio companies to do the same, which is why our recent engagements have focused on ensuring corporate climate goals are backed up by strategy and action. Climate transition plans are an important way to do this – almost the equivalent of saying 'show us your homework.'

  [Source: Green Century media release 14/02/2024]

Activists targets Australian energy company chair 'vote no' campaign

- Ahead of the Santos 11 April 2024 AGM, the Australasian Centre for Corporate Responsibility (ACCR) has filed a members' statement with the company urging Santos shareholders to vote against the reelection of the board Chair, on climate-related grounds.
- Broadly, the ACCR asserts that the Chair bears responsibility for the companies' strategic direction, including the companies' transition strategy. In consequence, the ACCR considers that a vote against the Chair in this instance is appropriate given (what the ACCR describes as) the companies' 'poor performance and strategic failings'. The ACCR writes:

  'Under the direction of chair…the Santos board has failed to deliver a company strategy that maximises shareholder value. The Santos board has made a series of strategic decisions aimed at growth which have resulted in chronic share price underperformance. With shareholder frustration mounting, the primary strategy the board appears to be contemplating is to merge with or sell off assets to an industry peer. The board's options are decreasing, with the highly publicised merger talks with Woodside recently concluding without a deal. Santos operates in a "sunset industry" facing long-term structural demand decline and a challenging future operating environment. The company needs a high-calibre chair, with the requisite skill and judgement to properly weigh its strategic options in the face of the energy transition and to deliver satisfactory shareholder returns. As Chair since February 2018, Spence is ultimately responsible for the company's poor performance and strategic failings. A vote against him is warranted'.

  [Source: ACCR media release 15/02/2024]

ICCR members have filed 344 proposals on a range of ESG issues so far this year, human/worker rights and climate change are the top two proposal categories

- The Interfaith Center on Corporate Responsibility (ICCR) has released its 2024 Proxy Resolutions and Voting Guide listing the 344 proposals on a range of ESG issues filed by ICCR members at 215 companies ahead of 2024 annual meetings.
- A table listing proposals by company, together with the current status of each is included at p9 -14 of the report.

- Human/worker rights and climate change are the top two concerns with **75 human/worker rights** related proposals and **70 climate change proposals** filed so far this year.
- Notably **31 'environmental health' – proposals on a range of nature-related issues** – have also been filed this year.
- The report also flags Artificial Intelligence (AI) as an emerging as a growing investor concern

Worker Rights/Human Rights proposals

Looking more closely at the key themes in this proposal category:

- Fifteen 'respect for freedom of association' proposals have been filed either asking companies to adopt policies based on the International Labor Organisation's Declaration on Fundamental Principles and Rights at Work, or focusing on employer interference with workers' attempts to unionise workplaces.
- Seven proposals call on companies to pay their workers a living wage.
- Three proposals call for companies to implement paid sick leave policies as a standard employee benefit.
- This year eleven proposals cover a range of human-rights related concerns around the impacts of AI including: election integrity, job security, systemic discrimination, and bias in healthcare. Investors have also filed additional AI-related proposals with tech companies on topics including child online safety and the misuse of surveillance technology.

Climate risk proposals

Some of the key themes in the proposals in this category include the following.

- The largest subcategory of proposals within the climate change category (20 proposals) call on companies to develop climate transition plans with greenhouse gas (GHG) reduction goals.
- Five proposals call on leading banks to disclose whether their clients are aligned with a credible net zero pathway
- Five proposals call on companies to align their lobbying with their net zero ambitions
- New climate-related proposals this year include (among others):
  - A new proposal this year calls on asset manager BlackRock to use 'climate stewardship' rather than proxy voting, to 'help drive real-world decarbonisation'.
  - Proposals calling on oil and gas majors to accelerate the pace of their emission reductions in the medium term across Scopes 1, 2, and 3

Nature-related/'environmental health'-related proposals

As flagged above, the 31 'environmental health' or nature-related proposals call for action on a range of issues including (among others):

- Circular economy for packaging
- Reduced plastics use
- Plastics pollution – producer responsibility for cigarette butts
- Microfibre pollution
- Calls to conduct a biodiversity impact assessment
- Calls for disclosure of the risks of pesticide use in agricultural supply chains

[Sources: ICCR media release 15/02/2024; Full text report: ICCR's 2024 Proxy Resolutions & Voting Guide February 2024; Webinar slide deck]

In Brief | Global review of shareholder activist activity finds activity levels reached a four year high in 2023. Interestingly, the report flags that the success rate of campaigns in Australia fell significantly compared with 2022 – just 16.2% of campaigns were classified as wholly successful in 2023 vs 30.7% in 2022

[Source: Diligent Market Intelligence Report: The Shareholder Activism Annual Review 2024]

ESG

Response to anti-ESG backlash? Major asset managers retreat from Climate Action 100+

Reportedly (Bloomberg, FT, Reuters) JPMorgan Asset Management, and State Street Global Advisors have withdrawn from investor initiative Climate Action 100+, while BlackRock has (reportedly) wound back its engagement.

Responding to this, New York State Comptroller Ladner said it is an 'unacceptable' reaction to mounting anti-ESG pressure on the asset managers. Mr Lander writes:

> 'Climate risk is financial risk. Today BlackRock, JPMorgan, and State Street are choosing to ignore both. By caving into the demands of right-wing politicians funded by the fossil fuel industry and backing out of their commitment to Climate Action 100+, these enormous financial institutions are failing in their fiduciary duty and putting trillions of dollars of their clients' assets at risk'.

Mr Lander also flagged that:

> 'We have asset management holdings with all three of these firms; it is profoundly disappointing to see that that our asset managers and financial institutions are choosing to be a part of the problem and not the solution. We are in the process of reviewing how well our managers are aligned in that approach and will consider our options for the management of our public market investments.'

Similarly, Majority Action has condemned the asset managers' decision to step back from Climate Action 100+.

Asset managers under shareholder pressure to review their proxy voting records

Four similar proposals have been filed so far this year by Interfaith Centre on Corporate Responsibility (ICCR) members at asset managers – State Street (United Church Funds), 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.

The proposal 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' has been withdrawn.

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.

> [Sources: NYC Comptroller Brad Lander media release 15/02/2024; Majority Action media release 15/02/2024; 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]

Sixty strong university coalition calls on banks to provide alternatives to fossil fuel financing as first step towards (potentially) shifting funds

Under the banner of the Banking Engagement Forum, a sixty-strong coalition of UK Higher Education institutions led by the University of Cambridge, have taken the first steps towards (potentially) shifting funds to 'financial products that do not contribute to fossil fuel expansion', with the issue of an initial Request for Proposals (RfP) to banks/fund managers, calling on them to nominate products that fit rigorous criteria.

The group writes that it is:

> 'exploring the possibility of shifting funds into a) deposit accounts and/or managed accounts that allocate across a number of deposit-taking institutions (both instant access and term deposits) and b) instant-access money market funds and/or short-dated cash-like debt fund products (eg, certificates of deposit/commercial paper/floating rate notes) provided by financial institutions (ie, asset managers and other financial institutions) whose primary market financing and engagement activities **align with the International Energy Agency's (IEA's) Net Zero Emissions (NZE) scenario'**. [emphasis added]

More specifically, the group is seeking products that meet the following criteria:

> **'For fund managers**: Alignment with the IEA's NZE, especially avoiding capital allocation to companies that are building new fossil fuel infrastructure (e.g., electrical utilities that are constructing new coal or gas plants or oil

and gas companies that are constructing new pipelines) and/or exploring for new fossil fuel reserves. This includes major financiers and facilitators of fossil fuel expansionist companies (e.g., large global banks and insurers). These exclusions could be included as part of a product with a broader set of ESG screens. NB: The avoidance of capital allocation to companies engaging in fossil fuel expansion is the primary objective of the RfP'.

'**For banks:** Alignment with the IEA's NZE in the bank's own financing and facilitation activities, including the avoidance of capital allocation to or facilitation of finance to companies that are building new fossil fuel infrastructure (e.g., electrical utilities that are constructing new coal or gas plants or oil and gas companies that are constructing new pipelines) and/or exploring for new fossil fuel reserves. NB: The avoidance of capital allocation to companies engaging in fossil fuel expansion is the primary objective of the RfP'.

Banks/fund managers are asked to disclose, as part of their response, their direct/indirect climate lobbying activity through trade/industry associations.

Summing up the rationale behind this move, University of Cambridge Head of Group Treasury Heather Davis said:

'The University treasurers in this group all share a common goal, which is to manage money in a way that doesn't contribute to the financing of fossil fuel expansion and to find something that aligns with the IEA Net Zero Emissions Scenario, and that is lacking in the cash space at present.'

[Source: University of Cambridge media release: Request for proposals: Cash and money market funds 15/02/2024]

Indirect climate lobbying as a form of 'greenwashing' - Companies urged to reassess their industry association memberships, and step up their disclosure

- Planet Tracker has released a report cautioning companies that misalignment between their actual climate position and the position of the industry lobby groups/trade associations to which they belong, could expose them to (avoidable) risks including accusations of 'greenwashing'/'greenwashing' enforcement action by regulators.
- The report puts forward suggested actions to assist companies to address instances of 'misalignment', which are summed up in the report as follows:

  'In our view, the path forward requires a vigilant audit of associations, decisive disassociation where misalignments persist, and a commitment to vocal and proactive climate leadership. The time for blurred stances on climate change has long gone and where it persists, greenwashing claims should be investigated'.
- The report also highlights a number of examples of what (Planet Tracker considers to be) better disclosure practices. In particular, the report singles out disclosures by Bayer and LyondellBasell as 'sensible examples of good practice in this area'.

  [Source: Planet Tracker media release 13/02/2024]

(In)direct climate lobbying in focus: AXA IM to vote against high emitters that lobby (directly or indirectly) against the goals of the Paris Agreement from this year

Ahead of the new 2024 voting season, AXA Investment Managers (AXA IM) has announced 'three main updates to its corporate governance and voting policy to further reinforce its ESG expectations'. Briefly these are as follows.

- **Tougher line on climate lobbying:** From this year, AXA IM will vote against 'relevant resolutions' at the highest emitting companies, if it assesses that they have failed to appropriately report on their climate lobbying activities (including disclosing alignment with trade/industry associations/withdrawing from associations where misalignment is identified).
- **Fair pay:** AXA IM will also consider 'the cost-of living crisis as well as the wider workforce will be further considered when voting on executive pay proposals particularly when the Board is proposing a pay increase to its lead executives'.
- **Oppose (wholly) virtual AGMs**: AXA IM will generally 'oppose bylaw amendments introducing virtual-only AGM formats (except in emergency situations) to ensure that all shareholders are able to effectively participate and engage with the Board of Directors'.

Nature/biodiversity loss: In addition, AXA IM expects 'companies with a material impact and reliance on biodiversity and natural capital more globally to put in place effective mitigation strategies within relevant timelines. For these companies, insufficient improvements in terms of disclosure of biodiversity-related strategy and risk management may lead to a dissenting vote cast against the Management (including by supporting biodiversity-related shareholder resolutions) or the Board'

Commitment to increased transparency: AXA IM will start to disclose the rationale for **all** votes against ESG shareholder proposals.

Key outcomes for 2023: Among the 'key outcomes' AXA IM highlights for 2023 is its support for 68% of ESG shareholder proposals.

For context, ShareAction puts average support across the big four asset managers - BlackRock, Fidelity Investments, Vanguard and State Street - for environmental proposals at 14% in 2023 and 13% for social proposals.

[Sources: AXA media release 15/02/2024; AXA Investment Managers – Corporate Governance & Voting Policy February 2024]

Say on Climate | Ethos attacks Novartis over 'advisory' (as opposed to binding) 'Say on Climate' vote

Swiss health care products/services company Novartis is due to hold its annual shareholder meeting on 5 March 2024.

The company has indicated (Proposal 1.2) that shareholders at the meeting will have an opportunity to vote to approve the company's sustainability report – to vote on a management-proposed 'Say on Climate' proposal – at the meeting, as required under Swiss law. However, the company has also indicated that the proposal will be non-binding/advisory only.

Not in keeping with the 'spirit of the law' (and potentially unlawful?)

In a statement responding to this, Ethos Foundation CEO Vincent Kaufmann raises concerns that the decision is not 'in the spirit of the law' and is not in the interests of shareholders.

> 'A consultative vote does not carry the same weight or have the same significance as a binding vote...This decision is totally incomprehensible and goes against the spirit of the law, Novartis' articles of association and the interests of shareholders.'

Ethos also considers it may be unlawful.

> 'According to various legal opinions gathered by Ethos, there is little doubt that the sustainability report must be submitted to a binding vote, unlike, for example, the remuneration report, for which the law provides for an advisory vote. The new article 964 of the Swiss Code of Obligations stipulates that the report on non-financial matters must be approved by the same body responsible for approving the annual financial statements. In other words, the general meeting of shareholders. There is no reference to an advisory vote'.

Ethos further submits that the board's rejection of this argument – according to Ethos, Novartis maintains that the vote can only be advisory because the company's sustainability strategy is 'one of the inalienable duties of the board of directors that cannot be delegated to a shareholders meeting' – is 'wrong' because if that were the case, a binding vote on the company's annual report and financial statements would also not be lawful.

Call for a binding 'say on climate' vote

Ethos Foundation has called on Novartis to

> 'rectify this situation, if not for this year, then at least for next year, by submitting its sustainability report to a binding vote of its shareholders. It also urges all companies affected by the new provisions of the Swiss Code of Obligations to respect the spirit of the law'.

Ethos Foundation has also raised concerns about what it considers to be unreasonable/unjustifiable increases in remuneration. Ethos writes:

> 'For the year 2023 and taking into account the long-term plans that have vested for the period 2021-2023, the CEO's total remuneration now exceeds CHF 16 million. Unfortunately, this trend shows no signs of abating. In fact, the changes to the remuneration system will in fact allow the CEO to receive in the future a total variable remuneration of up to 11 times his base salary'.

[Source: Ethos media release 16/02/2024]

ISSB Implementation | Malaysia consults on proposed ISSB implementation approach

- Malaysia's Advisory Committee on Sustainability Reporting (ACSR) is seeking feedback on its proposed approach to implementation of the International Sustainability Standards Board standards (ISSB Standards) including which organisations should fall in scope of the new requirements, the appropriate timeframe for implementation, what transition relief is needed, and how/when assurance requirements should be introduced and what they should be.
- Broadly, the committee has proposed a phased approach to implementation starting with limited climate reporting under IFRS S2 (the ISSB climate standard) and climate-related disclosures under IFRS S1 (ISSB general sustainability standard) for large listed companies (Main Market listed issuers).
- It's proposed that the new requirements would apply for the financial year ending December 2025, ramping up to full disclosure under IFRS S2 and IFRS S2 for the financial year ending December 2027.
- It's proposed that transition relief from some aspects of reporting would be in place for this group for the first two years of reporting. For example, it's proposed that companies would not be required to disclose Scope 3

greenhouse gas emissions (except for Category 6 (business travel) and 7 (employee commuting) for the first two years.

- The 'potential timeline' is summarised in a table at page 13 of the consultation paper.
- The committee also seeks feedback on whether and when limited assurance should be mandated and what disclosures should be in scope.
- The public consultation period is from 15 February 2024 to 21 March 2024.

[Sources: Securities Commission Malaysia media release 15/02/2024; Consultation paper: Advisory Committee on Sustainability Reporting (ACSR) Public Consultation Paper No 1/2024 Proposed National Sustainability Reporting Framework]

Shipping pollution | European Parliament announces informal agreement on stricter measures

The European Council and Parliament have announced that they have reached an informal agreement to update existing rules aimed at preventing maritime pollution in European seas.

Broadly, they have agreed to:

- Ban more types of 'discharges' ships - they have agreed to extend an existing ban on discharge of oil spills by ships to also include discharge of sewage, garbage and 'residues from scrubbers'
- Increased communication about pollution incidents - they agreed that following alerts by the European satellite system for oil spill and vessel detection (CleanSeaNet) EU countries and the Commission would communicate more openly on pollution incidents, best practices to tackle pollution and follow up measures. It's also envisaged that the agreed text will include a goal for national authorities to check and verify 'at least 255% of' all high confidence CleanSeaNet alerts (to prevent illegal discharges from dispersing and becoming undetectable).
- 'Introduce effective and dissuasive fines for ships breaching these rules' – it's envisaged that EU countries would 'not set penalties at such a low level that would fail to ensure its dissuasive nature'.

[Source: European Parliament media release 15/02/2024]

In Brief | EU Directive targets misleading 'green' practices/claims: The new rules are intended to 'enhance consumers' rights by amending the unfair commercial practices directive (UCPD) and the consumer rights directive (CRD) and adapting them for the green transition and the circular economy'. Among other things, the measures are intended to protect consumers against misleading 'green' claims, including about unfair claims about carbon offsetting

[Source: European Council media release 20/02/2024; Full text of Directive]

In Brief | Friends of the Earth, ClientEarth and Good Law Project plan to take the UK government to the High Court (again) over what they consider to be a deficient climate action plan

[Source: Good Law Project media release 20/02/2024]

Regulators

Top Story | Property, software and the ACCC's fight for merger reform

MinterEllison has released an article discussing the Australian Competition and Consumer Commission's (ACCC) continued push for substantial changes to Australia's merger control regime and offering insights into the implications for business.

You can access the full text here: Property, software and the ACCC's fight for merger reform - Insight - MinterEllison

Consumer protection | ACCC proposed to get 'designated complaints function' from July 2024

The Competition and Consumer Amendment (Fair Go for Consumers and Small Business) Bill 2024 (Cth) was introduced into the House of Representatives on 15 February 2024.

Broadly if enacted in its current form, the Bill would establish a new 'designated complaints function' within the ACCC. This would enable designated consumer and small business groups to make 'designated complaints' – complaints about significant and systemic market issues impacting consumers or small businesses - to the regulator.

In a statement welcoming the reform, ACCC Chair Gina Cass-Gottlieb said that this would:

> 'reinforce the importance of key issues impacting consumers and small business to the ACCC's work, as well as the role of advocate organisations in detecting and highlighting emerging issues'.

Announcing the reform, the government said it envisages that the first 'designated complaints' will be able to be lodged with the ACCC from July 2024.

[Source: Competition and Consumer Amendment (Fair Go for Consumers and Small Business) Bill 2024 (Cth)]

Financial Services

Top Story | Superannuation trustees and FAR: Who are your significant related entities?

With the financial accountability regime (FAR) set to apply to superannuation trustees and their accountable persons from 15 March 2025 (see our publication FAR status update: FAR Bills now law), most superannuation trustees will have already begun to prepare for its commencement.

An important issue for superannuation trustees to consider is whether they have any 'significant related entities' (SREs). This is because the trustee must take reasonable steps to ensure that any such entities comply with the trustee's own obligations under FAR and identify any accountable persons of any such entities.

In a new article, MinterEllison offers insight into the practical implications for trustees and how the factors relevant for them in tackling the issue. You can access the article here: Superannuation trustees and FAR: Who are your significant related entities? - Technical update - MinterEllison

Super Consumers Australia has urged the government to introduce a superannuation industry anti-scam code

- The submissions window on the government's consultation paper – Scams - Mandatory Industry Codes – which sets out a potential framework for the introduction of planned new industry anti-scam codes closed on 29 January 2024. For more on the proposed framework see: Governance News 06/12/2024 at p23.
- Super Consumers Australia has expressed support for the introduction of a super sector anti-scam code - especially as it considers super fund members are at increased risk of phishing scams following 'known super fund data breaches' - and has called on the government to prioritise this.
- Super Consumers Policy Manager Rebekah Sarkoezy commented:

  'A super anti-scam code would give the industry the clarity and incentives it needs to lift its game on scam prevention…We commend those within the industry who take the risk of super scams and fraud seriously, and work hard to stop this criminal activity wherever possible. But we're concerned this isn't happening across the board. There are some super funds who refuse to take up even the most basic account security controls like multi-factor authentication…Consistency and vigilance are essential to stopping scams. A super industry anti-scam code will help guide industry members' responses to scam risks – for example, by requiring the adoption of scam monitoring systems – and reduce the cost on consumers, industry members and the Federal Government.'

  [Source: Super Consumers Australia media release 12/02/2024]

Consumer group CHOICE says health insurers are using 'sneaky tactics' to increase gold cover premiums at a much higher rate than government figures indicate

- Consumer group CHOICE says its own analysis of increases in average health insurance premiums for top-level hospital cover (gold cover) over the last three years shows that premiums are increasing at a much higher rate than government figures indicate. According to CHOICE, premiums have increased by over 30% over the period, where in contrast, government figures show premiums for gold cover increased by just 8.6%.
- CHOICE attributes this to deliberate tactics by insurers to circumvent existing brakes on increases – currently Health insurers can only increase premiums once a year (with the approval from the Minister for Health and Aged Care).
- According to CHOICE, these tactics include:
  - Closing existing policies to new members and opening new policies that offer 'essentially the same cover but with a slightly different name and a much higher price tag'

- Only advertising the more expensive policies to new customers (even where cheaper Gold policies are available – though to be clear, customers who contact the insurer and specifically ask for the cheaper option should still be able to access it)

[Source: CHOICE media release 15/02/2024]

ASIC Chair stands by ASIC's 'strong' enforcement record

- In his 15 February 2024 opening address at the Additional Estimates 2023/2024 hearing, Australian Securities and Investments Commission (ASIC) Chair Joe Longo emphasised the regulator's 'strong' enforcement record across its 'broad remit' – highlighting several examples of ASIC's actions over the last quarter including commencing 80+ investigations, and securing $60 million in penalties through the courts.
- Mr Longo said that ASIC expects to issue an enforcement and regulatory update for the last quarter 'soon'.

[Source: ASIC Chair Joe Longo, Opening statement at the Additional Estimates 2023/2024 15/02/2024]

APRA consults on proposed amendments to the operational risk financial requirement for superannuation

Following earlier consultation, the Australian Prudential Regulation Authority (APRA) is consulting on proposed amendments to Prudential Standard SPS 114 operational risk financial requirement (ORFR) and its associated guidance see: [draft] SPS 114 and [draft] SPG 114.

Importantly, APRA writes that

> 'having considered industry feedback [on the November 2022 consultation], APRA is proposing a simpler approach that will be easier to implement than the model previously consulted on. APRA will not progress the proposal to introduce separate components to the ORFR. Instead, APRA's simpler approach is focused on integration with CPS 230 and better enabling use of the ORFR when needed'.

[Note: CPS 230 Operation Risk Management (CPS 230) is a cross-industry prudential standard that aims to 'strengthen the management of operational risk across APRA's regulated population'. CPS 230 will apply from 1 July 2025. For more read: APRA's new operational risk standard finalised - POST - MinterEllison and CPS 230: The Practical Playbook - Insight - MinterEllison]

APRA sums up the proposed changes as follows:

- 'clarify the purpose of the ORFR;
- introduce a clear and direct relationship with CPS 230;
- widen the range of uses for the ORFR; and
- amend the notification requirements to facilitate use of the ORFR'.

No change to the existing guideline target amount for ORFR

APRA writes that:

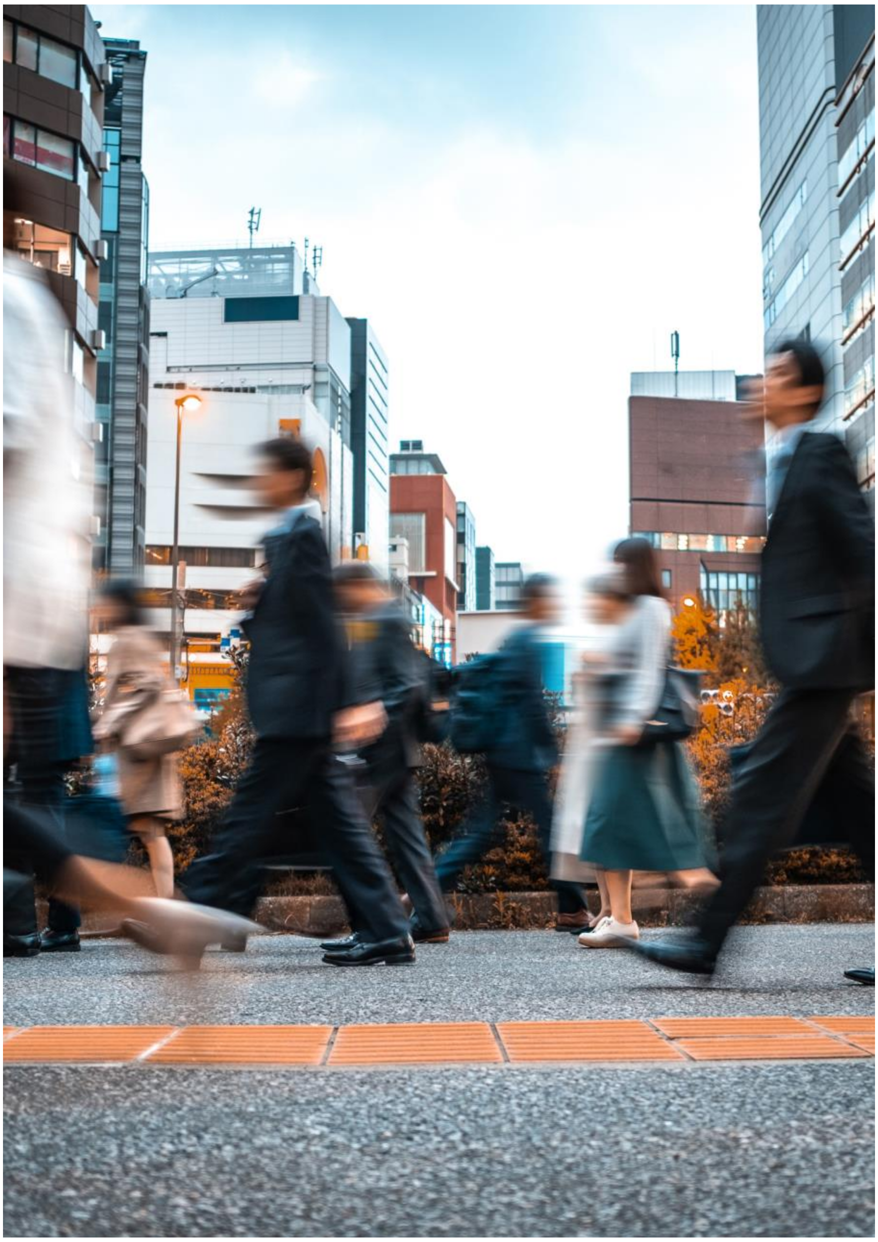
> 'at this time, it is prudent to maintain the existing guideline target amount for the ORFR of 25 basis points of FUM. This standard industry benchmark provides confidence that financial resources would be available to respond to a material operational risk incident if needed, minimising the risk that members are exposed to disruption and unplanned costs.
>
> The proposed changes to SPG 114 recognise that, in exceptional cases, an RSE licensee may seek to adopt a lower target amount. APRA's expectation is that, in such exceptional cases, the entity would typically be a significant financial institution and would provide a clear, compelling and evidence-based rationale for a different amount'.

Indicative timing

- The due date for submissions on the proposed changes to SPS 114 is19 February 2024 and 13 May 2024 for the proposed changes to SPG 114.
- Subject to the outcomes of consultation, APRA intends to finalise the updates to SPS 114 later this year, with a view to the updated standard commencing in 2025 (to align with or follow CPS 230).

[Source: APRA media release 19/02/2024]

Financial Advice | AFCA publishes 'lead decision' to assist in determining 'Dixon' complaints



- The Australian Financial Complaints Authority (AFCA) has published a 'lead decision' – ie a 'decision considering core issues and principles that can be applied to a batch of similar case's - to 'help guide decision making and assist efficient process' in the significant number of Dixon Advisory and Superannuation Services (Dixon) related complaints received by AFCA to date.
- AFCA underlines that though the decision marks 'an important milestone', individual cases will need to be determined on their individual merits and this will still take time.
- AFCA writes that it has received more complaints against Dixon than about any other firm in its five years of operation with over 1900 complaints received to date.

[Source: AFCA media release 15/02/2024]

Competition in the banking sector | Australian Competition Tribunal green lights ANZ's proposed acquisition of Suncorp Bank

- The Australian Competition Tribunal (ACT) has determined that the acquisition of Suncorp Bank by ANZ Group Holdings Ltd meets the criteria of the Competition and Consumer Act 2010 (Cth), overturning the Australian Competition and Consumer Commission's (ACCC) 2023 decision.
- The ACCC did not authorise the proposed acquisition because it was in essence 'concerned that the proposed acquisition of Suncorp Bank by ANZ would further entrench an oligopoly market structure that is dominated by the four major banks'.
- The Tribunal's decision is reviewable (upon application) by the Federal Court.
- Before ANZ can proceed with the acquisition, approval under the Financial Sector (Shareholdings) Act 1998 (Cth) is required.
- In a statement the Treasurer has not indicated whether he expects to approve the acquisition – saying merely that he will 'carefully and methodically consider whether the proposed acquisition is in the national interest under the FSSA and then announce a decision' after he has received ANZ's application and Treasury advice.

[Source: Treasurer Jim Chalmers media release 20/02/2024; ACCC media release 20/02/2024]

Accounting and Audit

Chartered Governance Institute urges the UK government to prioritise completion of much-needed (but currently stalled) audit reform

In an open letter, the Chartered Governance Institute UK and Ireland (CGIUKI) called on the UK government to prioritise implementation of promised audit reforms which CGIUKI considers necessary to rebuild trust in audit and corporate reporting, and put an end to damaging uncertainty.

CGIUKI writes:

> 'Nearly two years have passed since your predecessor published a 197 page White Paper [Full text of the whitepaper here, for our summary read: Governance News 08/06/2022 at p28] setting out the Government's plans for audit reform…In the White Paper, the Government pledged: "we will ensure that all of the main parties who play a role in financial reporting can be, and are, held to account if they fail to fulfil their responsibilities". This pledge remains undelivered. In the interim, evidence shows that audit quality has deteriorated, with FRC fines for audit failures reaching a record high in 2022 of £33.3m. The failure to complete reform has undoubtedly contributed to the persistence of the delisting problem which plagues the London markets'.

The letter identifies the following six reforms as the most urgent.

Requested changes to company law:

- 'The clarification of directors' duties regarding disclosure of information.
- Disclosure of distributable reserves of in scope companies and groups.
- An expansion of the scope of regulation to include all large private companies (using the formula 750:750).
- S271 of Companies Act 2006 (employment of a professionally qualified company secretary) should be extended to apply to all large private companies'.

Requested changes to the Financial Reporting Council's (it's successor) powers:

- 'New powers to direct changes to the entire contents of the annual report and accounts, rather than having to seek a court order.

- New powers to investigate and sanction directors (including directors of large private companies) for breaches of their corporate reporting and audit-related duties and responsibilities'

[Source: Chartered Governance Institute UK and Ireland media release 12/02/2024]

Risk Management

Modern Slavery | AU$11.9 trillion investor coalition calls on the Australian government to prioritise the establishment of a national compensation scheme for victims of modern slavery

Investors Against Slavery and Trafficking Asia Pacific (IAST APAC) – a coalition of 47 investors with AU11.9 trillion in assets under management - has released an open letter to the Attorney General calling for the government to prioritise the establishment of a National Compensation Scheme to support victims of modern slavery, under the National Action Plan to Combat Modern Slavery 2020-2025.

Broadly, IAST APAC submits that a national compensation scheme is needed in order to simplify the existing 'fragmented' system of state based compensation to improve access to effective/timely remedies for victims, as well as to align with Australia's commitments under the ILO Forced Labor Protocol 2014.

It's also suggested that a national compensation scheme

> 'could also provide an example of remedy that investors, such as IAST APAC members, could use in company engagement activities (under the company engagement work stream)'.

IAST APAC has expressed willingness to engage on how the compensation scheme should be structured – including the model submitted by Anti-Slavery Australia.

> [Source: IAST APAC media release 31/01/2024]

Modern slavery | Proposed EU Forced Labour Regulation should have a remediation focus, lower threshold for initiating investigations says Anti-Slavery coalition

The European Council recently announced its position on the regulation prohibiting products made with forced labour on the EU market.

Following this, 33 civil society organisations and trade unions have released an open letter to trialogue negotiators highlighting (what they consider to be) the key issues that should be addressed in upcoming discussions to ensure the proposed EU Forced Labour Regulation operates effectively.

These issues include, that the new regulation should:

- 'be worker-centred and include remediation for workers who have experienced forced labour'
- include a 'clear pathway for tackling state-imposed forced labour with a strong role for the Commission is essential to ensure strong enforcement and provide clear guidance for national-level regulators as well as companies'. It's also suggested that the regulation

  > should enable decisions to prohibit not only single products, but groups of products from entire entities where forced labour is widespread or state imposed, such as at a specific site of production. Allowing decisions to ban defined groups of products would simultaneously provide a stronger deterrent against the use of forced labour at that entity and ease the administrative burden for competent authorities.

- (as proposed) include a 'single-window EU-wide complaints mechanism'. The groups underline that

  > 'At a minimum, regulators should ensure that any workers experiencing forced labour and their representatives outside the EU are able to participate in, and access information from, proceedings to ensure they can effectively participate throughout the investigation process'.

- ensure transparency and the right to equal/informed participation – with a focus on ensuring

  > 'a better balance between commercial confidentiality, due process for companies under investigation, the right to information of complainants, the need to safeguard the victims and survivors from retaliation and public interest'.

- lower the evidence threshold required to initiate investigations to 'take into consideration the evidentiary struggles experienced by victims of forced labour who do not have access to all relevant documentation and evidence that may be required during the proceedings'.

[Source: Anti-Slavery International Open letter, February 2024]

Government convenes new Artificial Intelligence Expert Group to advice on 'options for AI guardrails'

Following the release of the government's interim response to the Safe and Responsible AI in Australia consultation (see: Mandatory safety guardrails foreshadowed for high-risk AI - Insight - MinterEllison) the government has convened a new 12 member Artificial Intelligence Expert Group to advise the Department of Industry, Science and Resources on:

'immediate work on transparency, testing and accountability, including options for AI guardrails in high-risk settings, to help ensure AI systems are safe'.

The twelve appointees are listed in the government's announcement here.

It's envisaged that the group will remain in place until 30 June 2024 – according to the government's announcement, the government is 'considering longer-term arrangements as part of its work implementing the interim response to the safe and responsible AI consultation'.

[Source: Minister for Industry and Science Ed Husic media release 14/02/2024]

Other News

Replacement of the AAT with new Administrative Review Tribunal: Bills referred to committee

Two new Bills - Administrative Review Tribunal Bill 2023 (Cth) and Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) – were introduced into the House of Representatives on 7 December 2023. On 8 February 2024 the Bills were referred to the Senate Legal and Constitutional Affairs Committee (for report by 24 July 2024). The deadline for submissions is 7 March 2024.

The Senate Standing Committee for the Scrutiny of Bills has raised several concerns about various aspects of the Bills.

Key Points

Broadly, the Bills would abolish the existing Administrative Appeals Tribunal and replace it with a new Administrative Review Tribunal.

The primary Bill - Administrative Review Tribunal Bill 2023 (Cth) - would establish a new Administrative Review Tribunal and the Administrative Review Council.

The Administrative Review Tribunal (Consequential and Transitional Provisions No.1) (Consequential and Transitional Bill) 2023 (Cth) would abolish the AAT and make consequential amendments to138 Commonwealth Acts, and transition AAT staff, operations, and matters across to the new tribunal.

In his second reading speech, Attorney General Mark Dreyfus flagged the government's intention to introduce a third Bill early in 2024, which is planned to include further 'minor and technical updates to a range of Commonwealth Acts, which collectively represent approximately seven per cent of the AAT's caseload, and will include amendments requiring consultation with states and territories'.

Proposed timing: The Primary Bill would commence on a day to be fixed by Proclamation. Or, if the provisions do not commence within 12 months of Assent being given, on the first day of the first calendar month to start after the end of 12 months after Assent.

[Source: Administrative Review Tribunal Bill 2023 (Cth), Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth)]

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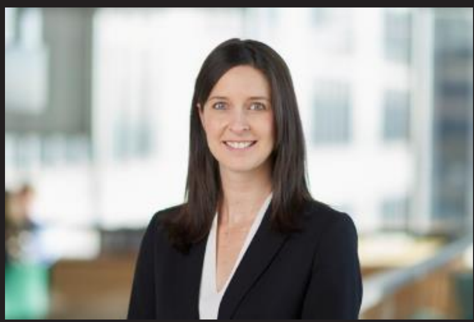

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