Governance News

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

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Contents

Diversity 4

Pay transparency | WGEA publishes gender pay gap information at individual company level for the first time 4

Report finds women hold less than 30% of US public company board seats 4

Tracking progress towards increased board gender diversity: New report offers a global perspective 5

Shareholder Activism 6

Nature/biodiversity loss | Chemical company Chemours and paint company Sherwin-Williams successfully block shareholder nature proposals 6

Plastic pollution | Disney to increase disclosure of plastic usage from next year and set additional plastic reduction goals in 2026 following engagement with Green Century 6

AI board expertise in focus | Blackwells Capital pushes for board change at Disney 7

Activist retracts shareholder climate lobbying proposal ahead of SEC decision 7

Pfizer's bid to block shareholder human rights proposal rejected by the SEC 7

Bank of America gets green light to block a conservative shareholder proposal from proceeding to a vote on procedural grounds 8

Remuneration 9

Glass Lewis confirms 2023 was a record year for 'strikes' at ASX 300 AGMs 9

Disclosure and Reporting 10

In Brief | Reuters reports that the SEC has dropped Scope 3 emission disclosure requirements from the (yet to be released) climate disclosure rule 10

Greenwashing | UK regulator clears Ford SUV ad (despite it featuring a 'zero-emissions driving' claim) 10

Global report finds that sustainability reporting is now the norm for almost all companies 10

ISSB seeks 150 members for new sustainability reference group 11

Institutional Investors and Stewardship 12

UK FRC kicks off review of the Stewardship Code, announces new Code signatories 12

ESG 13

Financial Stability Board's 2024 workplan: A focus on nature-related risks and AI 13

In Brief | European Parliament adopts new nature restoration law which includes a target for EU countries to implement measures to restore 20% of EU's land and sea areas by 2030 and all ecosystems in need of restoration by 2050 13

'The direction of travel is clear' when it comes to expectations around managing nature-related risk: UK pensions regulator urges trustees to familiarise themselves with the TNFD, TPT and TSF 13

VBDO-led coalition calls for due diligence in EV nickel supply chains 14

Protecting marine biodiversity | Offshore Petroleum and Greenhouse Gas Storage Amendment (Stop PEP11 Forever and Protect Our Coastal Waters) Bill 2024 (Cth) introduced 15

Plugging a legislative gap? Submissions on the Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023 (Cth) appear generally supportive of the Bill's objective 15

In Brief | The Law Society of NSW has released new guidance for solicitors on climate change, emphasising that climate-related risks will affect all areas of legal practice. The guidance is based on similar guidance issued by the Law Society of England and Wales and applies the principles set out in the Law Council's Climate Change Policy 17

In Brief | The ASX Corporate Governance Council is consulting on a proposed fifth edition of the Corporate Governance Council Principles and Recommendations. Among other proposed changes is change to Recommendation 7.4 which (if adopted) would mean that entities would be expected to disclose their material risks (without specifying disclosure of specific risks/specific categories of risk). In the current version, Recommendation 7.4 focuses on disclosure of material environmental and social risks 17

Regulators 18

'It is obvious the twin peaks model has had its day': Liberal Senator Andrew Bragg calls for a Financial Systems Inquiry 18

In Brief | The UK Financial Conduct Authority is consulting on a proposed new approach to publicising its enforcement investigations as well as broader changes to its 'Enforcement Guide'. The regulator proposes to increase 'transparency' around when it commences investigations/the progress of investigation, to speed up the time taken to complete investigations as well as increase 'collaboration' with industry 19

Financial Services 20

Top Story | CPS 230: Your roadmap to compliance 20

Hayne implementation | CLSR to be in operation from 2 April 2024, inaugural Chair announced 20

ASIC calls on advisers, trustees and licensees to step up their oversight of Choice super performance: Key takeaways from ASIC report 779 20

Other News 21

In Brief | The Bill to enact the government's revised Stage 3 tax cuts - Treasury Laws Amendment (Cost of Living Tax Cuts) Bill 2024 (Cth) – passed both Houses without amendment on 27 February 2024. Treasury Laws Amendment (Cost of Living—Medicare Levy) Bill 2024 (Cth) has also passed both Houses without amendment 21

Diversity

Pay transparency | WGEA publishes gender pay gap information at individual company level for the first time

The Workplace Gender Equality Agency has released data about the 'gender pay gap' at Australian private sector businesses with 100 or more employees at individual employer level for the first time.

For clarity, the 'gender pay gap' in question is helpfully explained in this article as

> 'the difference between what men and women in each company earn overall, as opposed to the differences between what they are paid for doing the same job'.

WGEA data continues to highlight a persistent gender pay gap in favour of men

- Overall, the median total remuneration pay gap – the difference between the median of what men are paid and the median of what women are paid, expressed as a percentage of the median man's earnings – is 19% in favour of men.
- While, 30% of employers have a median gender pay gap between what the WGEA describes as the 'target range' of -5% and +5%, 62% have pay gaps outside of this range.
- Looking at it by sector, the WGEA found there is significant variation – the pay gap is widest in the Construction sector at 31.8% and narrowest in the Accommodation and Food Services sector at 1.9%.

Looking at the data, one key contributor to the difference in earnings is that men tend to occupy more senior (and highly paid positions) than women overall.

Transparency is expected to accelerate action

Announcing the release of the data, Minister for Women, Senator Katy Gallagher, said:

> 'The release of employer gender pay gaps marks a historic step towards transparency and accountability in addressing gender inequality…The gender pay gap is a persistent and complex problem that costs the Australian economy $51.8 billion every year…Transparency and accountability are critical for driving change. By shining a light on gender pay gaps at an employer level, we are arming individuals and organisations with the evidence they need to take meaningful action to accelerate closing the gender pay gap in Australian workplaces.'

However, though welcoming of the reform, some have queried how useful the information will be for individuals in practice. It's submitted that governments and employers need to follow through with meaningful action to close gap. For governments, this includes developing/implementing 'evidence-informed policy, such as increasing access to affordable child care and expanding paid parental leave, to close the gender pay gap for good'.

[Sources: WGEA media release 27/02/2024; WGEA Data Explorer]

Report finds women hold less than 30% of US public company board seats

Women on Boards' latest Gender Diversity Index for Q4 2023 tracks progress towards the organisation's own goal of reaching 50% women on US public company boards and 20% women on colour on US public company boards. According to the report, as at 31 December 2023:

- **Yet to crack 30% milestone:** Women hold 29.4% of board seats in the US (up 0.2% on Q3 2023)
- **Women tend to be appointed to newly created seats:** 82% of the seats gained by women were new seats (ie seats added to the board rather than replacing a retiring male director)
- **Some sectors are more gender-diverse than others** when it comes to board representation:
  - the Utilities sector leads with 33.6% women on boards and 14% gender balanced boards
  - the Energy sector is the least gender diverse with 26.5% women on boards and 9% gender balanced boards
- **Likewise, some states are considerably more gender diverse than others:**
  - California leads with 33.9% women on boards
  - Nevada and Utah are the least gender diverse with 24.6% and 25.1% women on boards respectively.

Ethnic diversity

Based on directors who self-identify their race/ethnicity the report found that:

- women and men of colour held 19.2% of board seats at the end of Q4 2023 (up from 18.1% in Q3 2023).
- women of colour 7.7% of board seats, while men of colour hold 11.5%

  [Source: WOB Gender Diversity Index Q4 2023]

Tracking progress towards increased board gender diversity: New report offers a global perspective

MSCI has released its latest annual report tracking global trends in board gender diversity. We've pulled out some of the headline findings below.

(Some) progress overall

- In 2023, women held 25.8% of board seats at large- and mid-cap companies (MSCI ACWI Index), marking a 1.3% increase from 2022. For context, the rate of increase is slightly slower than previously – the rate of increase was closer to 2% the previous year.

Higher representation in developed vs emerging markets and in some sectors vs others:

- The report highlights that women hold more directorships in developed markets than emerging markets — women hold 32.9% of board seats in mid/large cap companies in developed markets vs 17.1% in emerging markets.
- Certain sectors also exhibit greater gender diversity on boards than others.
  - Companies in the health care sector had the highest proportion of boards with 30% or more women – 29.5% of boards in this sector have reached this milestone. In contrast, 18.2% of boards in the information technology sector have done so.
  - Information technology companies had the highest proportion (15%) of companies with all-male boards, followed by companies in the utilities and materials sectors.
  - The only sector with less than 5% of companies with all-male boards was the consumer discretionary sector.

Women remain underrepresented in board leadership roles

- Representation of women in board leadership remains very low. In 2023, only 9.1% of Chair roles were held by women among the constituents of the MSCI ACWI Index.

Racial/ethnic diversity at executive management level (seems) to lag boards

- The report underlines that currently there is limited data available on the ethnic/racial diversity of boards and executive leadership teams.
- However, based on the limited data available, executive teams appear to be even less diverse than boards. For example, the report highlights that of the 23 UK listed companies sampled that had disclosed relevant data, 30.4% had all-white executive management teams in 2023. The report suggests that this is an indication that

  > 'as with female inclusion in the C-suite, ethnic inclusion at this level also lags board-level inclusion (none of the UK-domiciled companies in our sample had all-white boards)'.

  [Source: Full text report: Women on Boards and Beyond: 2023 - MSCI]

Shareholder Activism

Nature/biodiversity loss | Chemical company Chemours and paint company Sherwin-Williams successfully block shareholder nature proposals

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

  > 'While both companies have conveyed a lack of immediate plans to source titanium near the Okefenokee, each has stopped short of a permanent commitment. Sourcing titanium from the edge of the Okefenokee could expose Chemours and Sherwin-Williams to unnecessary climate, regulatory, legal and reputational risks…It's frankly hard to see a strong business case for supporting mining at the Okefenokee — which should dissuade any company from even thinking about it.'

- Both companies sought to exclude the proposals in reliance on the 'ordinary business exception' – they submitted that the proposals seek to micromanage the company. SEC agreed that the proposals could be excluded on this basis.

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

Plastic pollution | Disney to increase disclosure of plastic usage from next year and set additional plastic reduction goals in 2026 following engagement with Green Century

Green Century says it has reached agreement with The Walt Disney Company (Disney) that will see the company both:

- disclose how much plastic it's using in certain areas of its business (this disclosure to be released in 2025); and
- set 'an additional plastic reduction goal' (to be published in 2026).

These new commitments build on the steps already taken by Disney to reduce single-use plastic including committing to achieve zero waste to landfill for its wholly owned and operated parks and resorts by 2030.

For context, reduction of plastic waste/tackling plastic pollution is a key focus for Green Century this year. Green Century has also filed shareholder plastics proposals this year at:

- three toy companies – Disney (though it appears this proposal will not be considered at the upcoming shareholder meeting), Hasbro and Mattel – urging them to reduce use of single-use plastic packaging and disclose their plastic footprint.
- three hotel operators - Hilton, Marriott, and Choice Hotels – asking them to measure, disclose and reduce their plastics use.

  [Source: Green Century media release 21/02/2024]

AI board expertise in focus | Blackwells Capital pushes for board change at Disney

Walt Disney Company (Disney) is under pressure from two separate activist groups – Trian Asset Management and Blackwells Capital – both of which are pushing for board change at the company to address (what they each consider to be) the company's lacklustre financial performance.

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

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

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

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

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

Trian considers board change is necessary to increase the boards' overall effectiveness. Trian writes:

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

Ahead of the 3 April 2024 shareholder meeting, Disney's board has recommended shareholders reject the nominees put forward by both groups and strongly endorsed the performance of the current board and CEO.

> [Sources: Trian Partners letter to shareholders 14/02/2024; Blackwells Capital media releases 26/02/2024; 06/02/2024; website: thefutureofdisney.com]

Activist retracts shareholder climate lobbying proposal ahead of SEC decision

Zevin Asset Management has withdrawn a shareholder proposal, calling on Alphabet Inc to

> 'report publicly on its framework for identifying and addressing misalignment between Alphabet's lobbying and policy influence activities and positions, and its Net Zero (emissions) climate commitments (done at reasonable cost, omitting confidential/proprietary information)'.

Alphabet had sought approval from the Securities and Exchange Commission (SEC) to block the proposal from proceeding to a vote, but it was withdrawn ahead of the SEC making any decision. It is not clear why the proposal was withdrawn/whether Zevin was able to reach any agreement with Alphabet.

> [Source: SEC no action response letter 20/02/2024]

Pfizer's bid to block shareholder human rights proposal rejected by the SEC

SEC has rejected Pfizer's bid to block a shareholder human rights impact assessment proposal (filed by Mercy Investments Services Inc and others) calling on the Pfizer board to:

> 'oversee conduct of human rights due diligence ("HRDD") to produce a human rights impact assessment ("HRIA") covering Pfizer's operations, activities, business relationships, and products'.

Pfizer submitted that the proposal could be properly omitted from its proxy materials on the grounds that the demand had been substantially implemented already by the company.

The proposal now looks set to proceed to a vote at the company's upcoming shareholder meeting.

The proposal at Pfizer is one of a number of similar shareholder proposals filed by members of the Interfaith Centre on Corporate Responsibility (ICCR) this year, calling on companies to publish Human Rights Impact Assessments examining the 'actual and potential impacts of high-risk commodities or products and services in their supply chain and operations'. See: ICCR 2024 Proxy Resolutions and Voting Guide

[Source: SEC no action response letter]

Bank of America gets green light to block a conservative shareholder proposal from proceeding to a vote on procedural grounds

The Securities and Exchange Commission (SEC) has approved an application from the Bank of America to exclude a shareholder proposal (filed by the National Legal and Policy Center) calling for:

> 'the Board of Directors to oversee an audit that analyses the impacts, both adverse and beneficial, of BAC's climate transition policies regarding the economic and humanitarian effects on emerging nations, which rely heavily on — but have limited access to — fossil fuels and other non-"renewable" sources of power, such as nuclear. Perspectives from a full spectrum of respected economists, nongovernmental organizations, research firms, and public-interest groups could be considered. BAC should avoid one-sided political or viewpoint bias, with the auditor consulting specialists across a range of stances — including those who may rebut prevailing corporate media- and government-driven narratives on climate and energy. Among perspectives that may be considered include experts such as Alex Epstein, Michael Shellenberger, Bjorn Lomborg, Robert Bryce, Roy Spencer, John Christy, Roger Pielke, Jr., Richard Lindzen, and others'.

The bank submitted, and SEC accepted, that the proposal could be properly excluded from its proxy materials on technical grounds – the National Legal and Policy Center failed to establish its eligibility to submit the proposal, and despite being notified of the issue did not correct it.

The proposal was withdrawn ahead of the SEC making any decision.

[Source: SEC no action response letter]

Remuneration

Glass Lewis confirms 2023 was a record year for 'strikes' at ASX 300 AGMs

Glass Lewis' analysis of 'say on pay' results at 2023 ASX 300 AGMs reveals that:

- 2023 was a record year for the number of companies receiving 'strikes' on their remuneration reports with 40 companies receiving a strike (ie 25% or more votes 'against' their remuneration reports). For context, according to Glass Lewis, this was not only the highest number since the introduction of the two-strike rule in 2011, but a marked increase on the 22 strikes recorded in 2022.
- the number of companies receiving 'significant' strikes (ie votes of 40% or more against) also spiked in 2023 – 24 ASX 300 companies received a significant strike in 2023 (vs just five in 2022).

  [Note: For context, the 'two strikes rule' in Australia means that boards face the prospect of being 'spilled' if 25% or more of shareholders vote against the (advisory) resolution to approve the company's remuneration report at two consecutive AGMs – that is, if there are two consecutive 'strikes' (25% or more 'against' votes) against the company's remuneration report. For more on the operation of the two strikes rule see: Executive remuneration: a quick guide – Parliament of Australia (aph.gov.au).]

Glass Lewis attributes this to a range of factors including: a) a perceived mismatch between pay and performance; b) concerns over quantum; c) the perception that executives received 'preferential treatment' eg in the form of incentives or retention awards that were seen as overly generous (especially in the context of 'poor shareholder returns'); and d) 'poorly designed, underdeveloped or discretionary remuneration structures'.

In addition, Glass Lewis suggests that in some cases shareholder used the 'say on pay' vote to signal their dissatisfaction with 'the emergence of headline risk and the resulting damage to the company's reputation' or to signal concern that pay did not reflect safety outcomes/workforce fatalities.

Spike in protest votes against directors

Glass Lewis also identifies a trend towards shareholders signalling their 'dissatisfaction with subpar company performance' through voting 'against' individual directors.

According to Glass Lewis' analysis, 2023 saw 25 'substantial' protest votes against board-endorsed director nominees (up from just 12 in 2022) .

More broadly, Glass Lewis attributes the upswing in 'against' votes last year to shareholder concern over:

- poor shareprice performance/operational concerns
- remuneration practices/design
- lack of board gender diversity
- perceived lack of independence or director 'overboarding' (ie overcommitment) concerns
- 'controversy-driven protest votes'

  [Source: Glass Lewis 2023 Australian and New Zealand Proxy Season Review Executive Summary]

Disclosure and Reporting

In Brief | Reuters reports that the SEC has dropped Scope 3 emission disclosure requirements from the (yet to be released) climate disclosure rule

[Source: Reuters 24/02/2024]

Greenwashing | UK regulator clears Ford SUV ad (despite it featuring a 'zero-emissions driving' claim)

As part of tis broader examination of 'zero-emissions' claims in advertising, the UK Advertising Standards Board (ASA) has released a ruling on a paid Google advertisement for Ford that included the claim:

> 'New All-Electric Explorer – Redefining Adventure. The ultimate all-electric SUV is here. The Explorer. Redefine the meaning of adventure. The ultimate exploration vehicle – Find out more & discover the range of features. **Zero-emissions driving**. Fast charging. Driver Assistance Tech'. [emphasis added]

In this case, the ASA concluded that the claim 'zero-emissions driving' was unlikely to mislead consumers. The ASA explains that this is becuase:

> 'the claim "Zero-emissions driving"…was immediately followed by references to "Fast charging" and "Driver Assistance Tech". This further text placed the claim in the context of some of the specific features of the car, which included its emissions while being driven, its charging capability and technical function. The claim was unlikely, therefore, in that specific context to be understood as a comment on the vehicle's overall life-cycle (manufacture, use and disposal) emissions'.

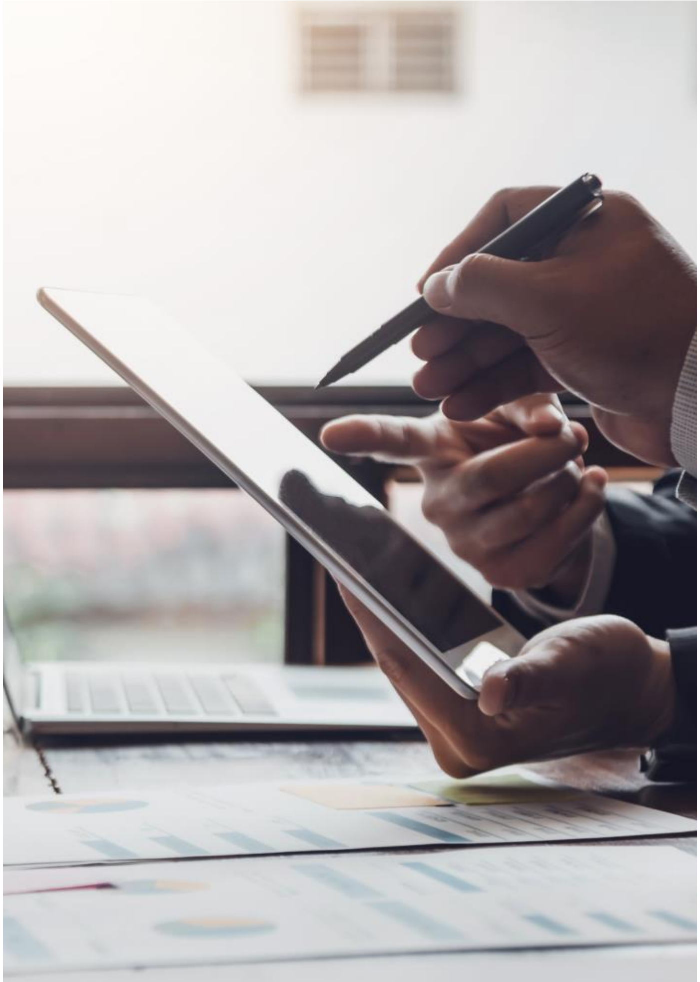
Despite this result, the ASA writes that Ford has indicated that future ads will include the claim 'net zero emissions while driving' (as opposed to 'zero emissions driving) to make the claim 'even more clear' for consumers.

[Source: ASA Ruling on Ford Motor Company Ltd t/a Ford 21/02/2024]

Global report finds that sustainability reporting is now the norm for almost all companies

The latest annual report tracking global trends in sustainability reporting from the International Federation of Accountants (IFAC), the American Institute of CPAs (AICPA) and The Chartered Institute of Management Accountants (CIMA) reveals that:

- **Sustainability reporting has become the norm for almost every company**:
  - 98% of companies sampled report some information on sustainability (up from 91% in 2019)
  - In Australia, 100% of the 50 companies in the sample report some sustainability information
- **Sustainability disclosure is increasingly included in annual reports**
  - The report highlights that globally, companies are increasingly incorporating sustainability disclosures into their annual or integrated reports as opposed to issuing standalone sustainability reports – the report found that only 30% of companies overall issued a standalone sustainability report in 2022 (down from 57% in 2019).
  - Consistent with this trend, in Australia the majority (72%) of companies report sustainability information in their annual reports.
  - However, this isn't the case in some other jurisdictions – over 70% of companies in the United States, Canada, China, and South Korea continue to use a stand-alone sustainability report.
- **The mix of reporting standards used by companies 'remains fragmented'**
  - Companies continue to use a range of reporting frameworks including: Taskforce on Climate Related Financial Disclosure (TCFD) recommendations, Sustainability Assurance Standards Board (SASB) Standards, Global Reporting Initiative, Sustainable Development Goals (SDGs)
  - In Australia, 92% of companies use multiple reporting frameworks. The TCFD (88%) and GRI and SDG (both 78%) are the most commonly used. Fewer companies (50%) use the SASB standards.
  - The report authors consider that these findings underline the need for companies worldwide to move toward a global system of sustainability disclosure requirements (such as the standards released by the



International Sustainability Standards Board (ISSB). IFAC director of sustainability, policy and regulatory affairs David Madon said:

'While we're moving toward commonly accepted global standards, some 87% of companies continued to use a mix of standards and frameworks for reporting…That leaves investors and lenders in a bind when it comes to having consistent, comparable and high-quality sustainability information at hand.

- **The majority of companies are obtaining assurance over at least some of their sustainability disclosures**

– According to the 69% of companies sampled obtain assurance over some of their sustainability disclosures (up 18% on 2019).
– Of these companies, almost all (98%) obtained assurance over their greenhouse gas (GHG) emissions disclosures. Interestingly, of these companies, most (60%) did so over all three Scopes - Scope 1, Scope 2, and Scope 3. Companies in the EU (67%) were the most likely to have all scopes assured. The rate was much lower elsewhere in the world - the Americas (56%), Asia-Pacific (57%), and other EMEA (59%) had similar rates of assurance.
– 22% of companies disclosed board-level oversight of sustainability assurance
– 82% of companies obtained limited assurance in 2022, in line with previous years

About the report: The report is based on analysis of reports from 1400 companies across 22 jurisdictions - 100 companies from each of the largest six economies, and 50 companies reviewed in the remaining 16 jurisdictions. The report includes data from 2019-2022.

[Sources: IFAC media release 22/02/2024; Full text report: The State of Play: Sustainability Disclosure and Assurance 2019-2022, Trends and Analysis]

ISSB seeks 150 members for new sustainability reference group

- The International Sustainability Standards Board (ISSB) is calling for applications to join a new 150-strong technical advisory group to provide insights/technical feedback on research and standard setting projects.
- To meet the SRG's objectives, applicants are expected to:
  - 'have professional competence and practical preparer or user or related experience of sustainability disclosures and/or general purpose financial reports'
  - 'be capable of providing technical expertise and practical knowledge of sustainability-related risks and opportunities that are useful to primary users of general purpose financial reports'
  - 'be able to consider different perspectives and have an ability to participate in a free exchange of ideas'
- The ISSB notes that not every applicant will be invited to join the group and not all members of the group will necessarily be appointed at once.
- Applicants will serve on the group in their personal capacity and unpaid basis.
- The application deadline is 20 April 2024.

[Source: IFRS media release 24/02/2024]

Institutional Investors and Stewardship

UK FRC kicks off review of the Stewardship Code, announces new Code signatories

Review of the 2020 Stewardship Code

The Financial Reporting Council (FRC) has launched what it describes as a 'fundamental review of the UK Stewardship Code 2020' (the Code). The review will focus on the extent to which the Code:

- 'supports long term value creation through appropriate investor-issuer engagement that drives issuers' prospects and performance
- creates reporting burdens on issuers as well as Code signatories and
- has led to any unintended consequences, such as short-termism in targets and outlook for issuers'.

Two phase review: The review is planned to be undertaken in two phases with a view to the revised Code being published in **'early 2025'.**

- Phase one will be 'targeted outreach' (discussions) with issuers, asset managers, asset owners and service providers, on the topics outlined above. These discussions will inform the consultation phase.
- Phase two will be a public consultation. It is envisaged that this will occur 'after the 2024 AGM voting season during the summer months'

Transition arrangements: It's envisaged that the current code will continue to operate as normal through the review process. Existing signatories are expected to submit their applications for renewal as normal, in order to remain signatories. Once the revised Code is finalised, the regulator plans to outline an 'implementation pathway and ensure the effective date allows current signatories sufficient time to respond to any changes'.

New Code Signatories announced

- The FRC reports that there are now 273 signatories to the UK Stewardship Code – 188 asset managers, 66 asset owners and 19 service providers.
- Of this number, 81 organisations successfully renewed their signatory status in this round of applications and one organisation was added. The total number of signatories includes the current signatories (191) from the previous update to the list on 30 August 2023.
- In addition, ahead of the planned review of the Stewardship Code this year, the FRC announced the release of a new paper 'collating previously published guidance' on implementation of the Code to assist signatories/applicants to prepare quality stewardship reports in 2024.

[Source: FRC media release 21/02/2024]

ESG

Financial Stability Board's 2024 workplan: A focus on nature-related risks and AI

The Financial Stability Board has released its workplan for 2024. The workplan aims to 'identify and address financial system vulnerabilities in key areas'. These include (among others):

- **Climate-related risk**: The FSB plans to focus on:

  > 'deepening our analysis of climate-related financial risks to financial stability and examining the **relevance of transition plans for financial stability**. We will also report in November on further progress on **implementation of disclosures and reporting in line with international standards**, in coordination with the ISSB, IOSCO and others'. [emphasis added]

- **Nature-related risk:** (Planned) delivery in July 2024 of a

  > 'stocktake on current or planned regulatory and supervisory initiatives related to the identification and assessment of nature-related financial risks'

- **AI:** (Planned) delivery in November 2024 of a report on the financial stability implications of artificial intelligence (AI).

- **Cyber incident reporting:** (Planned) consultation in October 2024 on a proposed standard format for cyber incident reporting exchange (FIRE) to 'standardise common information requirements and reduce fragmentation in incident reporting requirements' and enable 'financial institutions to report incidents to multiple authorities in a timely manner'.

[Sources: FSB media release 26/02/2024; FSB Chair's letter to G20 Finance Ministers and Central Bank Governors 20/02/2024]

In Brief | European Parliament adopts new nature restoration law which includes a target for EU countries to implement measures to restore 20% of EU's land and sea areas by 2030 and all ecosystems in need of restoration by 2050

[Source: European Parliament media release 27/02/2024]

'The direction of travel is clear' when it comes to expectations around managing nature-related risk: UK pensions regulator urges trustees to familiarise themselves with the TNFD, TPT and TSF

The UK Pensions Regulator (TPR) has urged trustees to think about how they can enhance their approach to managing wider environmental, social and governance (ESG) risks/opportunities observing that:

> 'ESG and related reporting is a significant challenge for trustees, but failure to account for climate-related risks and opportunities and, **where material, nature and social factors, puts savers at risk**. It's time schemes integrated ESG reporting into core governance operations to ensure they are fit for the future'. [emphasis added]

Specifically, the TPR has called on trustees to 'familiarise themselves' with the recommendations from the UK Transition Plan Taskforce (TPT), Taskforce for Nature-related Financial Disclosures (TNFD) or Taskforce for Social Factors (TSF).

In the regulator's view:

> 'The direction of travel is clear. The case for becoming familiar with TNFD and arguably requirements of the TPT and TSF will only become stronger'.

In light of this, the TPR suggests that trustees consider:

- Becoming early adopters of TNFD reporting
- Leveraging their knowledge/skills/experience from TCFD reporting 'particularly on steps that can be implemented relatively easily and have "immediate" impact'.

In addition, the TPR suggests that trustees:

- **Eat the elephant one bite at a time**, by selecting/focusing on individual 'themes of sub-themes' rather than risk being overwhelmed by the scale of the task – the TPT observes that:

  > 'consideration of the full range of nature-related risks and opportunities is complex, but by selecting and focusing on individual themes or sub-themes, such as, eliminating commodity driven deforestation from investment portfolios, trustees can build knowledge, extend engagement with their investment and service providers and drive progress'.

- **Avail themselves of opportunities for collaboration/knowledge sharing** eg through groups such as Decision Useful Climate Scenarios (DUCS), the Climate Financial Risk Forum (CFRF) and the Network of Central Banks and Supervisors for Greening the Financial System (NGFS).

  [Source: TPR blog post 21/02/2024]

VBDO-led coalition calls for due diligence in EV nickel supply chains

A 29 strong investor coalition (led by Dutch Association of Investors for Sustainable Development (VBDO)) has released a statement directed at companies (and their brands) in the downstream electric vehicle sector calling for 'enhanced social and environmental due diligence in nickel supply chains of the electric vehicle (EV) industry'.

A non-exhaustive list of electric vehicle (EV) manufacturers and EV battery producers is included in Appendix 1.

Key asks

More particularly, investors are asking that companies:

1. Introduce responsible sourcing requirements in their nickel supply chains including:

- committing to 'implement and respect the Free, Prior, and Informed Consent (FPIC) of Indigenous Peoples and local communities, including the right to withhold consent'
- 'the inclusion of third-party, independent auditing using transparent standards as well as multi-stakeholder consultations during social and environmental impact and risk assessments of mining and refining sites'.
- 'adherence to the mitigation hierarchy of avoiding, minimising, restoring, and offsetting any negative impacts on natural ecosystems with no net loss as a core guideline'
- 'fair compensation to affected rightsholders and an effective grievance redress mechanism that can offer fair and equitable remediation'
- 'a time bound commitment for net-zero smelting and refining processes, prioritising the phase out of fossil fuel energies'
- 'a commitment to publicly report and disclose on the implementation of the above policies'

2. Enhanced social and environmental due diligence, with increased disclosure: The expectation is that companies conduct

> 'enhanced due diligence for biodiversity, pollution, climate change and Indigenous Peoples and local communities' rights risks in nickel supply chains. We also expect companies to have increased disclosure on the environmental and social impacts embedded in their nickel supply chains'.

3. Adopt a time bound commitment to have deforestation-free nickel supply chains by 2025 (at the latest)

Investors issued the statement in response to what they describe as the:

> 'rising number of reports on the negative environmental and social impacts of nickel mining activities in Southeast Asian countries, including Indonesia and the Philippines, have worried investors. Common issues include deforestation, water and air pollution, conflicts with and biodiversity loss'.

Tørris Jæger, Executive Director, Rainforest Foundation Norway (RFN) said that it's hoped that by setting clear expectations, investors can accelerate change through engagement.

> 'By setting clear expectations, financial institutions can push companies to adopt responsible practices. Through collaborative engagement, investors can drive positive change, mitigate risks, and contribute to achieving climate and nature goals. We welcome and congratulate all investors joining this initiative.'

[Sources: VBDO Statement: Investor Expectations Statement on nickel supply chains 20/02/2024; VBDO media release 20/02/2024]

Protecting marine biodiversity | Offshore Petroleum and Greenhouse Gas Storage Amendment (Stop PEP11 Forever and Protect Our Coastal Waters) Bill 2024 (Cth) introduced

Independent Zali Steggall has introduced a Bill into the House of Representatives - Offshore Petroleum and Greenhouse Gas Storage Amendment (Stop PEP11 Forever and Protect Our Coastal Waters) Bill 2024 (Cth) - that (if enacted) would cancel Petroleum Exploration Permit 11 (PEP11) and prohibit any further petroleum exploration or exploitation in the PEP11 area.

More particularly, the explanatory memorandum states that the Bill would ensure that:

- 'PEP11 ceases to be in force two months after royal assent to this Bill;
- the Joint Authority cannot consider or continue to consider a PEP11 application, including the two applications for suspension of conditions and extension of the PEP that are currently before the Joint Authority;
- the Joint Authority cannot invite applications for the grant of petroleum exploration permit or petroleum exploration license over a PEP11 block; and
- the Joint Authority or Titles Administrator cannot grant petroleum retention leases, petroleum exploration permits, petroleum special prospecting authorities, petroleum access authorities, petroleum production licenses, infrastructure licenses, pipeline licenses, and petroleum scientific investigation consents'.

In her second reading speech, Ms Steggall noted that:

- The Prime Minister has previously indicated that 'PEP 11 ought to be consigned to the annals of history'
- The NSW has already acted to introduce legislation to ban offshore oil/gas exploration in state waters with other states (eg Victoria) likely to follow
- There is widespread community opposition to PEP11 in light of the known risks to marine wildlife, including whales.

[Source: Offshore Petroleum and Greenhouse Gas Storage Amendment (Stop PEP11 Forever and Protect Our Coastal Waters) Bill 2024 (Cth)]

Plugging a legislative gap? Submissions on the Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023 (Cth) appear generally supportive of the Bill's objective

What is the Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023 (Cth)?

On 3 August 2023, ACT Independent Senator David Pocock introduced a Bill into the Senate - the Climate Change Amendment (Duty of Care and Intergenerational Equity) Bill 2023 (Cth) – which, if legislated, would require decision-makers to consider the impact of climate harm on young people and future generations when making certain administrative decisions that are likely to contribute to climate change (ie decisions that facilitate the financing/development of projects that could significantly increase greenhouse gas emissions (GHG)).

Specifically, decision makers would have a responsibility both to:

- 'consider the health and wellbeing of current and future children in Australia when making certain administrative decisions contributing to climate change (called significant decisions)'
- 'not to make a significant decision in relation to the exploration or extraction of coal, oil or natural gas if the likely emission of greenhouse gases as a result of the decision poses a material risk of harm to the health and wellbeing of current and future children in Australia'.

The new requirements would apply to decisions made under the following six existing pieces of legislation:

- Environmental Protection and Biodiversity Conservation Act 1999 (Cth)
- Export Finance and Insurance Corporation Act 1991 (Cth)
- Infrastructure Australia Act 2008 (Cth)
- National Reconstruction Fund Corporation Act 2023 (Cth)
- Northern Australia Infrastructure Facility Act 2016 (Cth)

- Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth),
- It seeks to add two conditions to decisions made including the Environmental Protection and Biodiversity Conservation Act 1999

The Bill is not proposed to operate retrospectively.

Why is this change considered necessary?

Senator Pocock considers that

> 'The bill would plug a dangerous gap in the legislative framework exposed by the case [Sharma and others v Minister for the Environment] which highlighted the need to embed in legislation the principle that governments should care about the health and wellbeing of children…,
>
> Politicians and policy makers should have a duty of care to protect the health and wellbeing of young people and future generations…We need a legislative tool that can be used in government decision making, and this bill will deliver that'.

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

Current status of the Bill?

The Bill is yet to pass either House and is currently before the Senate.

The Bill has been referred to the Labor Chaired Senate Environment and Communications Legislation Committee for report. The reporting date has been extended several times from 1 February 2024 to 27 March 2024.

Submissions from a number of groups are supportive of the proposed reforms (with some calling for the changes to go further)

Submissions from a number of groups offer strong support for the Bill on health-related grounds eg Climate Action Nurses and Australian Primary Health Care Nurses Association, Asthma Australia, Australian Association of Psychologists Inc, Consumers Health Forum of Australia and the Lung Foundation Australia (among other groups).

A number of submissions also call for the proposed amendments to go further. For example:

- The Queensland University of Technology (QUT) Environmental and Social Governance Research Group submission calls for the government to support the Bill and for:
  - 'principles of intergenerational equity' to be incorporated into all legislation where a 'decision made under the Act could affect the rights of future generations'; and
  - for the government to develop policies to 'facilitate strong adherence to the Convention on the Rights of the Child, considering the new interpretation of States' roles in protecting children from climate change, provided by General Comment No. 26'.
- The Australian National University (ANU) Institute of Climate, Energy and Disaster Solutions (ICEDS) also expresses its support for the Bill and offers suggestions around how it could be strengthened including (among other things) broadening the scope of the duty of care in the Climate Change Act 2022 (Cth).
- The Melbourne Climate Futures (MCF) initiative (Melbourne University academics) submission puts forward two 'non-mutually exclusive options'. Namely that consideration should be given to:
  - broadening the proposed duties of care in the Climate Change Act 2022 (Cth) and/or
  - adopting 'a broader rights-based approach enacted through, inter-alia, a Federal Human Rights Act'.

A public hearing on the Bill was held on 22 February 2024. A running theme in the (Labor) Committee Chair's line of questioning was how the Bill would operate in practice (as it is presently drafted) and whether it would achieve its stated objective.

> 'my concerns with this bill are with the bill, not the intent. I'm not yet convinced that the bill will actually deliver on what it purports to do, and I have deep concerns that, where we have whole-of-economy targets in the Climate Change Act and various aspects of that are rolled out by the CEFC, ARENA et cetera, we're placing an obligation on those administrative decision-makers to assess health impacts, and I'm not sure

that's going to work. I don't know that that's going to give you the outcome that you want. I'm deeply concerned about how that rolls out.'

Protecting the Spirit of the Sea Country Bill 2023 (Cth) introduced

Separately, the Protecting the Spirit of the Sea Country Bill (2023) (Cth) was introduced as a private Bill was also introduced into the Senate on 8 August 2023 (and is still before the Senate).

Broadly, the Bill seeks to remedy to three flaws in the current legislative framework identified in Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2) [2022] FCA 1121 and the appeal heard by the Full Court of the Federal Court (Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193).

> [Note: For more on the case see: Australian and Pacific Climate Change Litigation (unimelb.edu.au); and Dennis Murphy Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority & Anor - Climate Change Litigation (climatecasechart.com).]

Broadly the changes would:

- Expressly include Traditional Owners and knowledge holders in First Nations communities in the definition of 'relevant person' in the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009
- Mandate minimum requirements for consultation with traditional owners and knowledge holders
- Expressly include a requirement to identify 'underwater cultural heritage' in offshore project proposals and environmental plans, together with an evaluation of the impact/risks that the project may pose (and any alternative options).

The Bill has been referred to Committee for report by 28 June 2024. The due date for submissions on the Bill has been extended to 4 March 2024.

In Brief | The Law Society of NSW has released new guidance for solicitors on climate change, emphasising that climate-related risks will affect all areas of legal practice. The guidance is based on similar guidance issued by the Law Society of England and Wales and applies the principles set out in the Law Council's Climate Change Policy

> [Source: Law Society of NSW: Climate Change Practitioner Guidance February 2024]

In Brief | The ASX Corporate Governance Council is consulting on a proposed fifth edition of the Corporate Governance Council Principles and Recommendations. Among other proposed changes is change to Recommendation 7.4 which (if adopted) would mean that entities would be expected to disclose their material risks (without specifying disclosure of specific risks/specific categories of risk). In the current version, Recommendation 7.4 focuses on disclosure of material environmental and social risks

> [Source: Consultation: Corporate Governance Principles and Recommendations 27/02/2024]

Regulators

'It is obvious the twin peaks model has had its day': Liberal Senator Andrew Bragg calls for a Financial Systems Inquiry

In a 22 February 2024 speech to the Financial Services Council (FSC), Liberal Senator and Chair of the current Senate Economics Committee Inquiry into the Australian Securities and Investments Commission (ASIC) Andrew Bragg outlined (what he considers to be) serious deficiencies in both ASIC and the Australian Prudential Regulation Authority's (APRA) respective approaches to enforcement. Briefly, in Senator Bragg's view neither regulator is sufficiently focused on enforcing existing laws and neither is fulfilling its remit.

To address these issues:

- Mr Bragg flagged that (in the case of ASIC), he expects that the Senate Economics Committee Inquiry into the regulator's enforcement approach will make a number of 'incredibly strong' recommendations to address the issues identified, that will be 'crafted in a way that any party, not just the Liberal Party could adopt'. The Committee is due to deliver its report on ASIC by the last sitting day in June 2024 (which according to the current Parliamentary calendar is 27 June 2024).
- Mr Bragg also called for a new Financial System Inquiry to 'recalibrate' the existing 'twin peaks' model, which in his view, 'has had its day'. Mr Bragg writes:

  'It is obvious that the twin peaks model has had its day. Peter

Costello's structure has served the country well but the Government has missed so many strategic opportunities. A recalibration is needed.

In the past, this has been achieved through a Financial System Inquiry ('FSI')'.

[Note: For context, APRA describes the 'twin peaks' model in the following terms:

'APRA is the financial safety regulator, with a focus on the financial soundness and stability of authorised deposit-taking institutions (banks, credit unions and building societies, insurers and superannuation funds). As the conduct regulator, ASIC focuses on preserving market integrity, conduct and investor protection'.

Commissioner Hayne discussed the 'twin peaks' model in some detail in his Final Report (see: Hayne Commission Final Report (Volume 1) p415-431). Ultimately, Hayne recommended (recommendation 6.1) that the model be maintained, but did suggest that consideration should be given to the (potential) establishment of 'a specialist civil enforcement agency' if 'over the coming years, it becomes apparent that ASIC is not sufficiently enforcing the laws within its remit, or if the size of its remit comes at the expense of its litigation capability'. See: Hayne Commission Final Report (Volume 1) at p431]

In addition, Senator Bragg considers that the FSI (if established) should also 'at a minimum':

- 'Undertake a proper review of payments which looks at economic and geostrategic matters collectively;
- Examine the tax points in the sector to ensure competitiveness and efficiency;
- Specifically look to how the financial sector arrangements may be recalibrated to help solve our great national challenge of housing younger Australians;
- Consider the influence of superannuation over the economy;
- Look for opportunities for deregulation such as duplication which exists in prudential standards and legislation - including responsible lending;
- Consider the value of standardised terms and consumer disclosures; and
- Consider the overall regulatory architecture, the "regulator of regulators" and the role of the Council of Financial Regulators.'

[Source: Liberal Senator Andrew Bragg, Address to the Financial Services Council on the Direction of Financial Services Policy in Australia 22/02/2024]

In Brief | The UK Financial Conduct Authority is consulting on a proposed new approach to publicising its enforcement investigations as well as broader changes to its 'Enforcement Guide'. The regulator proposes to increase 'transparency' around when it commences investigations/the progress of investigation, to speed up the time taken to complete investigations as well as increase 'collaboration' with industry

[Sources: FCA consultation: CP24/2: Our Enforcement Guide and publicising enforcement investigations - a new approach; Speech by Therese Chambers, joint executive director of enforcement and market oversight, delivered at The Market Abuse and Market Manipulation Summit 27/02/2024]

Financial Services

Top Story | CPS 230: Your roadmap to compliance

From 1 July 2025, APRA-regulated entities must comply with CPS 230 – a new standard requiring entities to better manage operational risks and respond to business disruptions.

- APRA expects all entities to adopt a 'proactive' approach in preparing for the new requirements, flagging that the regulators expect to engage with entities during the implementation period to 'assess progress'.
- APRA-regulated entities must begin to assess their existing practices against the updated regulatory requirements and plan a roadmap to compliance.

To assist in this, MinterEllison has released an article outlining the new requirements and offering practical insights into the steps entities may wish to consider implementing now to prepare. You can access the full text here: CPS 230: Your roadmap to compliance - Insight - MinterEllison

Hayne implementation | CLSR to be in operation from 2 April 2024, inaugural Chair announced

- The government has announced that consumers will be able to lodge claims for compensation under the Compensation Scheme of last Resort from 2 April 2024.
- The government has also announced the appointment of Jo-Anne Block as the inaugural independent Chair of the Board of Compensation Scheme of Last Resort Limited (CSLR Limited) – the body which will operate the scheme - for an initial three year term.
- The CSLR will provide compensation of up to $150,000 to eligible consumers who have an unpaid determination from the Australian Financial Complaints Authority (AFCA) relating to the provision of personal financial advice, credit intermediation, securities dealing and credit provision.

Planned changes to clarify the scope of the scheme

- To 'provide further certainty to consumers about the scope of the CSLR' the government has flagged plans to amend the legislation 'in due course' to clarify that the CSLR will provide compensation where the misconduct is by a financial services firm that was licensed to provide the relevant product or service.
- As an interim step, the government has said that amendments have been made to AFCA's authorisation

> 'so that, to the extent possible, complaints that may be eligible under the CSLR are progressed only if the financial services firm was licensed to provide the relevant product or service. Consequential changes to AFCA's Rules will be required to implement the amendment to AFCA's authorisation'.
>
> [Source: Assistant Treasurer and Minister for Financial Services Stephen Jones media release 26/02/2024]

ASIC calls on advisers, trustees and licensees to step up their oversight of Choice super performance: Key takeaways from ASIC report 779

- What did ASIC review? The Australian Securities and Investments Commission (ASIC) conducted a review into the role of superannuation trustees, financial advisers, and Australian financial services licensees in 'influencing the investment options that make up member superannuation portfolios as part of a choice superannuation product'. The findings are summarised in ASIC report 779: Superannuation choice products: What focus is there on performance?
- What did ASIC find? In broad terms, ASIC found often 'there was insufficient emphasis on and a lack of transparency about Choice investment options that failed to meet performance expectations' and instances where underperformance was not communicated clearly to members. This is of particular concern, ASIC writes, because:

> 'our review showed that members may not have been aware that their investment option was not performing as anticipated. While trustees communicate a lot of performance information to members, we saw little evidence of targeted communication about underperformance or highlighting how an investment option had performed relative to its return objective in the PDS. Similarly, we saw many advice files where advisers had

not identified or communicated underperformance to their clients. Without this information, members cannot make informed decisions about their investments. They may not take action under the mistaken belief that their investment is performing as anticipated'.

- **ASIC's expectations:** A key message is that ASIC expects performance to be a 'primary consideration'. In light of this, ASIC expects trustees, advisers and licensees to:
  - 'prioritise investment performance throughout the product lifecycle;
  - have systems in place to detect and address persistent underperformance;
  - regularly monitor investment option performance against return objectives and benchmarks;
  - ensure they have sufficient capacity to manage investment options, including clear and comprehensive policies, resources, and data reporting arrangements;
  - effectively communicate with members about performance, which could include targeted communications and comparisons of actual returns to return objectives; and
  - act in response to sustained underperformance to minimise member risks'.

  The report makes clear that 'for many trustees, advisers and advice licensees this will require improvements to their practices'. Tables 1-3 in the report (p8-11) summarise the actions ASIC would like to see implemented for each of these groups.

- **Possible regulatory action**: ASIC flags that it is considering 'a range of regulatory responses where there was an indication clients were at risk of detriment as a result of personal advice' including ' 11 files where ASIC identified advice deficiencies revolving around failure to undertake reasonable assessment of the underperforming option nor explain why retention was appropriate'.

[Sources: ASIC media release 21/02/2024; ASIC report 779: Superannuation choice products: What focus is there on performance?]

Other News

In Brief | The Bill to enact the government's revised Stage 3 tax cuts - Treasury Laws Amendment (Cost of Living Tax Cuts) Bill 2024 (Cth) – passed both Houses without amendment on 27 February 2024. Treasury Laws Amendment (Cost of Living—Medicare Levy) Bill 2024 (Cth) has also passed both Houses without amendment

[Source: Treasury Laws Amendment (Cost of Living Tax Cuts) Bill 2024; Treasury Laws Amendment (Cost of Living—Medicare Levy) Bill 2024]

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