Governance News

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

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Contents

Shareholder Activism

Global report finds shareholder activism globally reached 'record' levels in 2023 driven by increases in activity in Europe and APAC

According to Lazard's analysis of levels of global activist activity for 2023:

- **The level of global activist activity globally reached 'record' levels** with 252 campaigns initiated in 2023 up from just 235 in 2022. For context, the previous high water mark for activist activity was 249 campaigns in 2018.
- **Lazard attributes the spike to increases in activity in Europe and APAC** – with the number of new campaigns initiated increasing from 32 in 2022 to 44 in Europe and from 60 to 69 in the APAC region.
- **Though still outstripping activity in any other region, activity was found to have slackened off in North America** – there were 142 new campaigns initiated in North America in 2022 vs 133 in 2023
- **There were more activists in 2023**: Lazard identified 180 different activists in 2023 (up from 151 in 2022). Interestingly, Lazard highlights that there was a **significant spike in 'first time' activists** – 42% were 'first time' activists vs 36% in 2022.
- **Uptick in successful board change campaign**s: 122 Board seats were won in 2023 of which 31% were secured through proxy contests (for context, Lazard puts the historical average at 17%). Looking more closely 83% of seats won in Europe were secured through proxy fights marking a significant shift – according to Lazard, prior to 2023, no activist had successfully won a European proxy fight since 2020.

[Source: Lazard Review of Shareholder Activism 2023]

Nature risk | Tesla, GM targeted with shareholder proposals calling for a moratorium on deep-sea mining

ShareAction has filed shareholder proposals at Tesla and General Motors (GM) focused on the company's sourcing/use of deep sea mined minerals citing the 'potential catastrophic impacts' of deep sea mining on the environment/nature.

The Tesla proposal calls on the company to commit to a moratorium on sourcing deep sea mined minerals for use in its products, consistent with the principles announced in the Business Statement Supporting a Moratorium on Deep sea Mining.

The GM proposal calls on the company to publicly disclose their policies on the use of deep sea mined minerals in their production and supply chains.

In addition to the risks posed to nature/the environment, ShareAction was prompted to file the proposals over concerns that the companies are not addressing the potential reputational and regulatory risks of deep sea mining. ShareAction also considers that the incorporation of deep sea sourced minerals into supply chains carries financial risk for companies given the expense and the technological uncertainty.

[Source: As You Sow media release 17/01/2024]

Nature risk | Granite Construction challenged on (alleged) lack of alignment between public nature commitments and choice of projects/lobbying stance

Granite Construction Inc has been targeted with a shareholder proposal (coordinated by As You Sow) calling on the company to account for what As You Sow considers to be a misalignment between its stated commitment to conserve 'natural resources and protecting water, air, land, and wildlife' and engaging with local communities on environmental/nature-related issues and its lobbying stance/choice of projects.

Specifically, the proposal calls on the board to:

> 'issue a report…assessing the risks posed by the Project's apparent misalignment with the company's disclosed environmental and community engagement commitments'.

For context, the project referred to is the I-80 South Quarry project in Utah which As You Sow states would:

> 'install a major industrial operation in a protected watershed area, expose nearby communities to toxic fugitive dust, excavate up to 634 acres of forest land, and displace the known presence of elk, moose, black bear, mountain lion, golden eagle, and other species'.

The project is described by As You Sow as a 'chief example' of the (alleged) misalignment between the company's stated commitments and actions. As You Sow writes:

> 'To the extent that Granite's actions related to the Project are representative of how the Company's disclosed environmental commitments to shareholders are applied in practice, there are reasons to conclude that these commitments do not actually translate to the projects Granite selects and the ways those projects are executed. Given the Company's own materiality assessment of these critical issues, shareholders appear to have cause to be concerned about Granite's practices more broadly and the I-80 South Quarry project in particular'.
>
> [Source: As You Sow resolution: Granite Construction Inc 03/01/2024]

Living wage | Companies to face pressure in 2024 to pay workers (including contractors and subcontractors) a 'living wage', Walgreens shareholders to vote on shareholder 'living wage' proposal at upcoming meeting

As part of a broader campaign to push companies to pay their workers, contractors and subcontractors a 'living wage', The Shareholder Commons (TSC), together with ShareAction, has filed a shareholder proposal (Proposal 7 in the Notice) at Walgreens Boots Alliance Inc calling on the company's board and management to:

> 'exercise their discretion to establish company wage policies that are reasonably designed to provide workers with the minimum earnings necessary to meet a family's basic needs, such policies to include reference to established living wage frameworks and timeframes for adoption and to comply with relevant legal obligations'.

TSC and ShareAction submit that the requested change (which is not supported by the Walgreens board) is needed to:

> 'protect Walgreens' shareholders from a practice [ie payment of less than a 'living wage' to its workforce] that focuses on Walgreens' enterprise value but ignores broader economic concerns, despite the correlation of broad economic performance and the portfolio values of the Company's diversified shareholders. Without the requested change, shareholders will continue to absorb the costs of Walgreens' underpayment of its workers in their portfolios'.

The proposal is one of five shareholder ESG proposals on a range of issues (all of which are opposed by the board) set to go to a vote at the 25 January 2024 meeting.

> [Source: The Shareholder commons media release (accessed) 17/01/2024]

Extended Producer Responsibility | As You Sow set to target companies with formal shareholder 'EPR' proposals calling on companies to take financial responsibility for collecting and recycling their packaging at its end-of-life

In a 17 January 2024 email to supporters, As You Sow flagged plans to escalate its engagement with companies on plastic waste, by targeting certain companies with shareholder 'EPR' proposals in 2024. As You Sow's first EPR proposal, filed with Constellation Brands in 2023, secured 25% support.

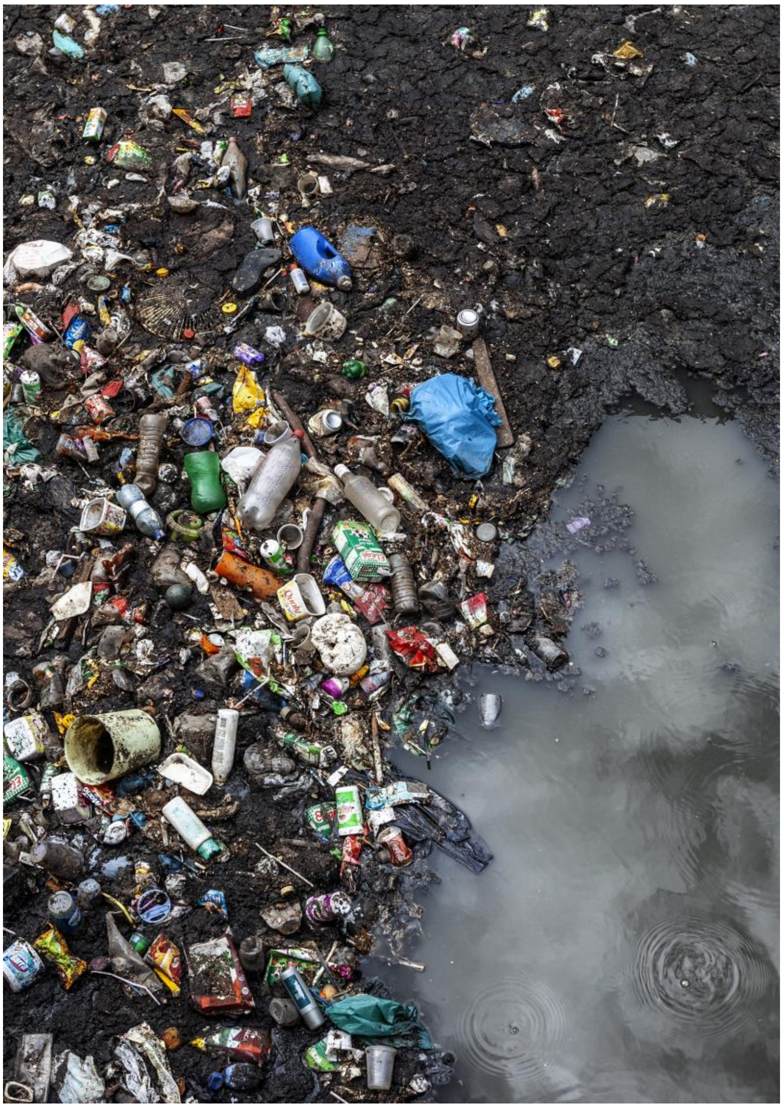
For context, As You Sow considers that the solution to plastic waste is 'Extended Producer Responsibility' (EPR) for companies. That is, for

> 'corporations to take financial responsibility for collecting and recycling their packaging at its end-of-life'.

As You Sow observes that regulators are increasingly moving to mandate EPR through legislation for example in Maine, Oregon, Colorado and California and that attempts to introduce EPR legislation at a Federal level have also been made.

EPR proposals filed by As You Sow so far…

In 2024, As You Sow has so far filed similar EPR proposals with three companies (in addition to other plastics/consumer packaging related proposals).



As You Sow has filed a proposal at US tobacco company Altria with the aim of pushing it to 'assess and take responsibility for the collection and clean up costs' of discarded plastic cigarette filters which, according to As You Sow (citing this study), are the 'most littered' form of plastic globally.

Specifically, the proposal calls on Altria to:

'issue a public report…assessing the benefits to the Company of extended producer responsibility laws for spent tobacco filters for tobacco companies operating in the US market'.

As You Sow submits that 'inaction' on the issue by Altria would leave it unprepared for/exposed to 'the growing and material risk of emerging regulations around the product itself (filters are single-use plastic products) and around the cost of cleanup – several countries outside the US have already implemented levies to cover cleanup fees.

Similar proposals have also been filed with two other companies:

- Hormel: The proposal calls on the board to:

'issue a report…describing opportunities for Hormel to support a circular economy for packaging'.

- Tyson: the proposal calls on the board to:

'issue a public report…assessing the benefits to the Company of extended producer responsibility laws for spent tobacco filters for tobacco companies operating in the U.S. market'.

[Source: As You Sow 2024 'Consumer Packaging' Proposals – accessed 23/01/2024; : As You Sow media release 12/12/2023]

Single-use plastics | Companies targeted with shareholder plastics proposals

Green Century has filed shareholder plastics proposals at:

- three toy companies - Disney, 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.

Green Century considers that continued use of single-use plastic packaging exposes the companies to a range of unnecessary risks with potential to impact shareholder value including:

- Reputational risk – Green Century comments that 'consumers are increasingly concerned by the single-use plastic crisis regulatory risk'
- Regulatory risk – Green Century observes that single-use plastic regulations have gone into effect in the EU, China, India, California and elsewhere around the world with a number of jurisdictions having implemented taxes on single-use plastic
- Litigation risk– Green Century observes that PepsiCo has recently been sued over river pollution.

Green Century also points to growing calls from investors for companies to cut their plastic use.

[Sources: Green Century media release 20/12/2023; 10/02/2024]

Shareholder 'right to repair' proposal successfully blocked by tractor company John Deere

The US Securities and Exchange Commission (SEC) has approved tractor company John Deere's (Deere) request to exclude a shareholder 'right to repair' proposal (coordinated by Green Century) from its proxy materials in reliance on Rule 14a-8(i)(7).

For context, the proposal calls on the company to:

> 'issue a public report, within a reasonable time, assessing the benefits and drawbacks of opposing Right to Repair regulation, as well as the financial and reputational risks associated with such opposition'.

SEC accepted the company's submission that the proposal could be properly excluded because it deals with matters relating to the company's ordinary business operations, 'specifically, the Company's litigation strategy and the conduct of ongoing litigation to which the Company is a party'.

Deere submitted that:

> 'the Proposal seeks a report that would publicly evaluate and critique the reasonableness of the Company's current business practices that are the subject of ongoing litigation involving the Company, in support of pre-determined adverse conclusions that (i) the Company opposes right to repair regulation and other efforts and (ii) the Company's business practices create risks to its financial stability and reputation'.

Deere is currently defending a class action lawsuit from farmers who assert that the company has unlawfully restricted their ability to identify and make repairs to their own Deere equipment because the company has

> 'deliberately designed its tractors so that both the diagnosis and the completion of a repair frequently requires [Deere] software tools and other Dealership-only resources'.

In a statement responding to SEC's decision, Green Century expressed disappointment noting that this is the second year that shareholders have been denied the chance to vote on a proposal dealing with the company's position on an issue that (Green Century considers) represents reputational risks to the Deere brand (which may impact value). Green Century also asserts that support is growing for the 'right to repair' on competition and environmental grounds, including from regulators in the US and in Europe.

Green Century has flagged plans to continue to advocate for the right to repair. Green Century's Douglass Guernsey stated:

> 'Access to repair not only benefits consumers and the economy, but it is a critical environmental issue. Extending the lifespan of our equipment is one of the largest environmental contributions someone can make as an individual.'

SEC denies Deere's attempt to block an anti-ESG shareholder proposal

Separately, the SEC has denied Deere's attempt to block a shareholder proposal coordinated by conservative group – the National Legal and Policy Center – calling on the company to report on the

> 'congruency of the Company's policies in support of greenhouse gas reduction and renewable energy use, with those priorities' effects on the ongoing viability of the industries that constitute the vast majority of the Company's revenue base - and therefore Deere's own future'.

SEC rejected Deere's submission that the proposal could properly be excluded either because: a) it deals with matters relating to the company's ordinary business operations (under Rule 14a-8(i)(7)); or because it has been substantially implemented (under Rule 14a-8(i)(10)).

On the second point, SEC states that:

> 'Although the Company’s prior disclosures discuss the effects of its policies on agricultural customers, in our view, the Company has not substantially implemented the Proposal.
>
> [Source: Green Century media release 12/01/2024]

Exxon applies to Texas Court in bid to block shareholder Scope 3 proposal

Scope 3 shareholder proposal filed (again) at Exxon

Ahead of ExxonMobil's upcoming shareholder meeting, Activist group Follow This and Arjuna capital have filed a shareholder Scope 3 (value chain/supply chain emission) proposal at Exxon Mobil calling on the company to:

> 'go beyond current plans, further accelerating the pace of emission reductions in the medium-term for its greenhouse gas (GHG) emissions across Scope 1, 2, and 3, and to summarise new plans, targets, and timetables'.

Follow This credits similar proposals filed at other majors in previous years with pushing them to act on the issue – even where the proposals did not secure majority support. A proposal filed by Follow This at Exxon in 2023 secured 11% support.

Exxon has filed a complaint in a Texas court in an attempt to block the proposal

According to media reports (eg The AFR, WSJ, The Guardian) Exxon has taken the unusual step of filing a complaint in a Texas Court seeking confirmation (in the form of a judicial declaration) that the proposal can be properly excluded. If granted, this would mean that Exxon could block the proposal from proceeding to a vote.

The more usual course is for companies to apply to the Securities and Exchange Commission (SEC) for approval to block a proposal in reliance on certain accepted criteria for exclusion including, as reportedly argued in the Texas complaint, that the proposal is excludable because the request amounts to micromanaging the company.

To be clear, media reports disagree on whether Exxon has applied to the SEC for approval to exclude the proposal (in addition to filing the complaint with a Texas court).

In a statement in response to this development, Follow This states that it only became aware of the Texas complaint via media reports and has not seen the court filing. Follow This Founder Mark Van Baal comments:

> 'We don't know why ExxonMobil took this remarkable step…In 2022 and 2023, ExxonMobil accepted the resolution on the ballot and consequently advised shareholders to vote against it, which a majority did. Maybe they see the writing on the wall. More and more institutional investors want to tackle the climate crisis and they realise Big Oil has a key role to play, like the 27 institutional investors who recently co-filed a similar climate resolution at Shell alongside Follow This.'

[Source: FollowThis media release 22/01/2024]

Greenwashing | Consumer group sues Starbucks over (allegedly) misleading claims, separately the company is facing calls for board change

Consumer group the National Consumers League (NCL) has announced it has launched legal action against Starbucks alleging that the company has engaged in greenwashing by marketing its coffee and tea products as '100% ethical' when the company is aware that this is not the case.

NCL alleges that Starbucks has knowingly engaged in 'deceptive advertising' because its marketing does not:

> 'convey the rampant sourcing from coffee and tea farms and cooperatives with a documented history of child labour, forced labour, sexual harassment and assault and other human rights abuses'.

NCL alleges that Starbucks should be aware that its supply chains are not free of these issues because:

> 'Over the last decade, a broad range of investigations by government agencies and journalists has uncovered a clear pattern of labour and human rights abuses at Starbucks' preferred farms and cooperatives — even those that have received the company's own "C.A.F.E. Practices" certification'.

NCL is seeking an order requiring the company to run a 'corrective' advertising campaign and make good on its representations.

Worker welfare concerns: SOC Investment Group is pushing for board change at Starbucks

Separately, SOC Investment Group is pushing for board change at the company citing (what the group considers to be) the current board's failure to effectively oversee the company's response to employee unionisation efforts and its human capital strategy which have exposed the company to 'reputational and potential financial damage over the long term'.

SOC Investment Group has nominated three new directors for election to the board to 'enhance human capital management practices' at the company.

For context, this 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: NCL media release 10/01/2024]

Meetings and Proxy Advisers

ISS to include its assessment of US companies' potential risk of experiencing a cyber incident in reports following the introduction of new SEC cyber rules

Institutional Shareholder services has announced that from the 2024 proxy season more companies – most constituent companies in the S&P 400, S&P 600 and Russell 3000 indices – will be assigned a Cyber Risk Score, based on ISS' assessment of each company's 'internet exposed assets'. ISS writes that the Cyber Risk Score

> 'supports investors by signalling the potential for a company experiencing a breach event in the next 12 months, based on an assessment of Internet-exposed assets'.

Importantly, ISS states that the 'scores will be provided for informational purposes only and will not impact ISS' policy application or voting recommendations'.

Up until now, only S&P 500 companies were covered.

Announcing this, ISS Global Head of Research Georgina Marshall said that the change was prompted by new Securities and Exchange Commission (SEC) cyber disclosure rules. Ms Marshall said:

> 'In light of the SEC's new cyber security risk management and incident disclosure rules [read: SEC.gov | Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure], the coverage extension of the ISS Cyber Risk Score in our U.S. Benchmark Research and Voting Reports is timely, and will help investors interested in this area to gauge the relative cyber risk of their portfolio companies and create meaningful opportunities for engagement with companies.'
>
> [Source: ISS media release 17/01/2024]

2023 AGM season: Shareholders 'strike' (again) on pay

Elders Ltd

Elders shareholders voted down the proposal to approve the company's remuneration report at the 14 December 2023 AGM with 62.71% voting against – a first 'strike'.

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

Separately, a proposal to approve $1.3 in 'service rights' to Managing Director Mark Allison if he stays in the role until 2025, was also not approved by shareholders with 63.55% voting against.

Perhaps unsurprisingly given the results, a number of investors voted 'against' the proposals including for example:

- California Public Employees Retirement System (CalPERS) voted against both the proposal to approve the remuneration report and the proposal to approve service rights to Mr Allison. CalPERS supported all other proposals as did California State Teachers Retirement System (CalSTRS)
- NYC pension funds (new York City Board of Education Retirement, New York City Employees Retirement System, New York City Fire Pension Fund, New York City Police Pension Fund, Teachers Retirement System of the City of New York) voted against the proposal to approve the remuneration report and against two proposals to grant service rights and performance rights to Mr Allison.
- Legal and General Investment Management (LGIM) which voted against both the proposal to approve the remuneration report and the proposal to approve service rights to Mr Allison. Broadly, the chief reason given for voting against the proposals was that in the case of the remuneration report, the 'changes to salary would significantly increase total pay' without (LGIM considers) sufficient justification/rigour being applied, and against the proposal to approve service rights to Mr Allison over concerns that the payment is not justified because LGIM considers it to be 'inconsistent with good corporate governance in the local market and subject to time and service conditions only'.

Despite the 'strike' Norges Bank Investment Management (NBIM) voted in support of all management proposals

Broader context

The strike at Elders is a recent example in a recent string of 'strikes' against ASX companies. For example

- Tabcorp Holdings Ltd: 34.25% against (25 October 2023).
- APA Group: 25.79% against (26 October 2023)
- Whitehaven Coal Ltd: 40.61% against (26 October 2023).
- Woolworths Group Ltd: 28.04% against (26 October 2023).
- Qantas Airways Limited: 82.93% against (3 November 2023)
- Magellan Financial Group: 58.19% against (8 November 2023)
- Lendlease Group (Lendlease): 39.81% against (17 November 2023)
- Fortescue: 53.37% against (21 November 2023)
- Lovisa: 73.43% against (22 November 2023)
- Core Lithium: 25.4% against (24 November 2023)

Disclosure and Reporting

Top Story | Mandatory Climate Reporting in Australia: Draft Bill released for consultation

The government has released long-awaited draft legislation for consultation that proposes to establish a mandatory climate reporting regime in Australia. Here's what's in the Bill.

Key Takeouts

- The Australian government is progressing plans to phase in a new, internationally aligned, mandatory climate disclosure reporting regime for heavy emitters, large listed companies, large private companies and superannuation funds/asset managers, with the release of a draft Bill for consultation. If enacted, the draft Bill would establish the framework for the proposed new disclosure regime. The due date for submissions on the draft Bill is 9 February 2024.
- The new climate disclosure (and assurance) requirements are planned (subject to the passage of the legislation) to be phased in, starting with certain large entities from 1 July 2024 (though the government has called for feedback on whether this should be deferred to 1 January 2025).
- Interaction with the AASB and AUASB standards:
  - The specific content of the new disclosure requirements will be set out in new accounting standards, currently under development by Australian Accounting Standards Board (AASB). The AASB consultation on three initial draft standards, based on the ISSB standards: IFRS S1 and IFRS S2 is due to close on 1 March 2024 (read: Another step closer towards implementing mandatory climate disclosure in Australia).
  - New assurance standards, planned to be phased in from 1 July 2024, will be made and maintained by the Australian Auditing and Assurance Standards Board (AUASB).

Draft Bill released for consultation

Australia is following many other jurisdictions in progressing the introduction of ISSB-aligned mandatory sustainability disclosure standards with a focus initially on climate-related disclosure.

Following two rounds of consultation (read: Moving closer to introducing internationally-aligned climate reporting requirements in Australia: Initial consultation launched; and Introduction of mandatory climate reporting in Australia: Second round of consultation launched - Technical update - MinterEllison) the government has released draft legislation for consultation which, if enacted in its proposed form, would establish the framework for the new disclosure regime.

The due date for submissions is 9 February 2024.

Here's what's in the draft Bill.

Who will need to report when?

The Bill would require:

> 'entities that lodge financial reports under Chapter 2M of the Corporations Act, meet certain minimum size thresholds, and/or have emissions reporting obligations under the NGER scheme, to make disclosures relating to climate in accordance with sustainability standards made by the AASB'.

This includes listed and unlisted companies, NGER reporters and financial institutions as well as registrable superannuation entities and registered investment schemes.

The government proposes that the new mandatory disclosure requirements would be phased in over the 1 July 2024 to 30 June 2027 period, starting with certain large entities.

Larger companies (Group 1) would report from 2024/5 onwards

It's proposed that all entities required to report under Chapter 2M of the Corporations Act 2001 (Cth) (Corporations Act) that meet two of the three thresholds below, would be required to report against new climate-disclosure requirements (the specifics of which will be set out in Australian Sustainability Reporting Standards (ASRS)) from 1 July 2024:

- 'the consolidated revenue of the entity (and the entities it controls) is equal to or greater than $500 million;
- the value of the consolidated gross assets at the end of the financial year of the entity (and the entities it controls) is equal to or greater than $1 billion;
- the entity (and the entities it controls) have at the end of the financial year, 500 or more employees'

In addition, it's proposed that all entities required to report under Chapter 2M of the Corporations Act that are registered corporations under the National Greenhouse and Energy Reporting Act 2007 (Cth) (NGER Act) and that meet the NGER publication threshold, would also need to report against the new requirements from 1 July 2024.

From a timing perspective the government has said it

> 'welcomes stakeholder feedback on whether amending legislation to require a 1 Jan 2025 commencement date for Group 1 entities would improve the quality of reporting during the transition year'.

Group 2 entities

From 1 July 2026, it's proposed the requirements would extend to entities required to report under Chapter 2M of the Corporations Act that fulfill two of the three thresholds below:

- 'the consolidated revenue of the entity (and the entities it controls) is equal to or greater than $200 million;
- the value of the consolidated gross assets at the end of the financial year of the entity (and the entities it controls) is equal to or greater than $500 million;
- the entity (and the entities it controls) have at the end of the financial year, 250 or more employees'

In addition, it's proposed that the requirements would apply to NGER reporters not captured in Group 1 and to asset owners where the value of assets at the end of the financial year (including the entities it controls) is equal to $5 billion or more.

Other in-scope entities

From 1 July 2027, the requirements are proposed to extend to other entities required to report under Chapter 2M of the Corporations Act that fulfill two of the three thresholds below:

- 'the consolidated revenue of the entity (and the entities it controls) is equal to or greater than $50 million;
- the value of the consolidated gross assets at the end of the financial year of the entity (and the entities it controls) is equal to or greater than $25 million;
- the entity (and the entities it controls) have at the end of the financial year, 100 or more employees'.

Notably, it's proposed (in section 296B(1) of the Draft Bill) that entities in this third cohort only, that assess (in line with the AASB sustainability standards once finalised) that their business is not exposed to 'material' climate-related risks/opportunities during the financial reporting period, would only be required to disclose a statement to this effect (as opposed to having to disclose a full annual sustainability report).

Smaller entities and charities

The draft explanatory memorandum states that:

> 'where an entity is not covered by the criteria above (eg not generally required to report under Chapter 2M, or does not meet the above tests), they are not required to prepare a sustainability report for a financial year'.

For clarity, this means that ACNC registered charities and (most) SMEs are currently excluded.

What information is likely to be required to be reported initially?

The new requirements are intended to closely align with the requirements in IFRS S2 and are proposed to form a new part of existing annual financial reporting obligations and be contained in an entity's annual report.

From **commencement**, it's proposed that entities would need to disclose an annual sustainability report for the financial year consisting of:

- a **'climate statement'** to be prepared in accordance with the relevant (and not-yet-finalised) AASB standard. This is expected to include (among other things): 'material' climate-related financial risks/opportunities facing the entity; any metrics/targets including Scope 1 and 2 greenhouse gas (GHG) emissions targets; and details of any governance/risk management processes, controls and procedures related to these matters. It's envisioned that disclosure of Scope 3 (value chain) emissions would not be required for the first year an entity is required to prepare a climate statement, but that this information would be required from the second year of reporting.
- **notes to the climate statement** (if any);

- **any statements required a legislative instrument by the Minister** relating to matters concerning environmental sustainability; and
- **a 'directors' declaration'** about the statements and notes. This would be a

> 'declaration by the directors of their opinion on whether the statements are in accordance with the Corporations Act, including in compliance with the relevant sustainability standards (i.e. whether the climate statement is in compliance with the sustainability standards that relate to climate)'.

The declarations would need to be made with a resolution of the directors, dated, and signed.

New assurance requirements

It's proposed that climate disclosures would be subject to similar assurance requirements to those that apply to financial reports. It's envisioned that assurance requirements would be phased in over time commencing with the largest (Group 1) entities.

The draft explanatory memorandum makes clear that the precise

> 'extent and level of assurance required is proposed to be set out in Australian assurance standards for climate disclosures, developed by the AUASB'.

Notably, it's proposed that only 'limited assurance' of Scope 1 and 2 emissions would be required for sustainability reports prepared between 1 July 2024 and 30 June 2030.

The explanatory memorandum states that:

> 'The AUASB will also set out a pathway for phasing in requirements over time, which would commence with assurance of Scope 1 and 2 emissions disclosures [included in new Sustainability Reports] from 1 July 2024 onwards and end with assurance of all climate disclosures made from 1 July 2030 onwards'.

Liability: Proposed 'interim modified liability framework'

In order to alleviate concerns 'in relation to the most uncertain parts of a climate statement' [ie statements concerning scope 3 greenhouse gas emissions, and scenario analysis], it is proposed that an 'interim modified liability framework' would apply. These elements of mandatory disclosure would be afforded protection from claims for three years (sustainability reports prepared for financial years commencing between 1 July 2024 and 30 June 2027) (see: s1705B of the Draft Bill).

Broadly, it's proposed that for sustainability reports issued during this period, only the Australian Securities and Investments Commission (ASIC) would be able to bring civil proceedings (eg actions brought under the misleading and deceptive conduct provisions) in relation to statements concerning Scope 3 (value chain) emissions and/or scenario analysis. ASIC would also be limited in the remedies it could seek - the only remedy that could be sought would be an injunction or declaration.

This means that, companies and officers would be temporarily shielded from civil actions (eg misleading or deceptive conduct claims) brought by private litigants.

It's proposed that after 30 June 2027, existing liability arrangements would apply.

To be clear, it is not proposed that:

- Entities/officers would be shielded from criminal actions;
- Any changes would be made to existing continuous disclosure requirements.

The draft explanatory memorandum states that the rationale for this approach is to 'ensure that reporting entities are allowed time to develop experience and practice to report to the required standards'.

Statutory Review

It's proposed that a Statutory Review of the operation of the reforms would be conducted 'as soon as practicable after 1 July 2028' with a copy of the Review's report to be tabled in each House (within 15 sitting days after the report is delivered to the Minister).

A step change in reporting

Even without the introduction of legislated (mandatory) requirements, companies are already under considerable pressure to manage and disclose how they are managing their climate-related financial risk and increasingly their broader sustainability-related risks. The release of the ISSB's initial sustainability standards (the first of what is expected to be a suite of standards) will reinforce, particularise and extend the existing requirements.

We expect the new Australian requirements (once legislated) to be a floor, rather than a ceiling, when it comes to meeting market expectations in this space.

There are a number of steps all boards can take now to prepare for the introduction of new ISSB-aligned requirements. These include:

- understanding when the new reporting/assurance regime is proposed to apply to your organisation
- understanding what information your organisation is likely to be required to disclose
- reviewing existing governance structures to identify responsibility and accountability
- reviewing existing strategy, transition plans, and sustainability disclosures to identify gaps in alignment with the proposed new requirements
- understanding from management what the gaps are between current and future resourcing, data and disclosure needs
- formulating a time-bound plan to address these gaps (including assigning responsibility for delivery/oversight)

[Source: Treasury Consultation: Climate-related financial disclosure: exposure draft legislation 12 January 2024 - 09 February 2024]

'Unnecessary': ACSI calls for repeal of 2021 changes to continuous disclosure laws

An independent review into the operation and impact of amendments to the continuous disclosure regime made by Treasury Laws Amendment (2021 Measures No.1) Act 2021 (Amending Act) is currently underway.

For context, these changes introduced a new requirement to prove that an entity or officer is at fault – ie that the entity or officer acted with 'knowledge, recklessness or negligence' - in order to establish a contravention of the continuous disclosure provisions in the Corporations Act 2001 (Cth).

You can find a detailed overview of the 2021 changes here: Changes to continuous disclosure laws are now permanent - Technical update - MinterEllison

Consultation seeking views on the operation of the 2021 changes closed on 1 December 2023. The reviewer is due to provide their report to the government by 14 February 2024.

ACSI has called for the changes to be wound back

In its submission to the consultation, the Australian Council of Superannuation Investors (ASCI) submits that the changes to 2021 changes to the continuous disclosure regime 'were not necessary' and should be wound back, or failing this, that there should be 'no further changes' to the requirements.

ACSI writes:

> 'The 2021 changes were not necessary because significant guidance was already available to company directors and officers on how to manage their disclosure obligations. As demonstrated by the ASX's Compliance Update issued on 31 March 2020, the Listing Rules were capable of addressing market uncertainty and there was detailed guidance already available that outlines the action a company should take to avoid a misinformed market. Therefore, the pandemic did not create any need to modify the continuous disclosure obligations, nor a need for them to be changed permanently…
>
> As we expressed in our 2021 submission, it is difficult to attribute challenges in the class actions system or in directors' and officers' insurance to the continuous disclosure requirements. Arguably the issues arose from a variety of factors.
>
> For the integrity and efficiency of Australia's market to be secured, the pre-pandemic objective test should be re-instated. At the very least, there should be no further changes to the requirements'.

[Source: Treasury Consultation: Continuous Disclosure: Review of liabilities for failure to meet obligations 01/11/2023-01/12/2023; ACSI submission]

Institutional Investors and Stewardship

Revised UK Corporate Governance Code released

On 22 January 2024, the UK Financial Reporting Council (FRC) released updates to the UK Corporate Governance Code (the Code) ahead of the planned released of accompanying guidance on 29 January 2024.

Announcing the release of the revised Code the FRC states that it intentionally 'kept changes to the Code to the minimum that are necessary' dropping a number of previously proposed revisions eg the role of audit committees on ESG issues, the proposed expansion of DEI expectations, overboarding provisions (among others).

The justification given for this is that the regulator:

> 'is conscious that the expectations for effective governance must be targeted and proportionate. This approach ensures the FRC balances underpinning trust and confidence in UK plc for investors and others whilst keeping burdens on businesses to the minimum necessary'.

Internal Controls: New board 'declaration' requirement

The FRC states that it has prioritised revisions concerning Internal Controls with the key change being a new requirement for boards to issue a declaration in their annual report explaining their assessment of their organisations' internal control framework and the reasons for that assessment.

On this point, the regulator comments:

> 'In relation to Internal Controls, the existing expectations in the Code will remain. Namely that the Board should monitor the company's risk management and internal control framework and, at least annually, carry out a review of its effectiveness. The existing Code also includes the provision that monitoring and review should cover all material controls, including financial, operational, reporting and compliance controls. The main substantive change the FRC is now making is asking Boards to explain through a

declaration in their Annual Reports how they have done this and their conclusions'.

Importantly, the Internal Controls provisions have been drafted to ensure flexibility. The FRC states:

> 'It is for a Board to determine what should comprise its material internal controls. The FRC is mindful that the needs for each business may vary and that the level of maturity of non-financial controls for some businesses may not be, or need to be, as mature as for their financial controls. It is for the Board to determine what level of maturity is right for its business and their own levels of required assurance in relation to the effectiveness of these controls'.

Other minor changes

The FRC flags that a 'small number of other more minor changes' have been made to Code provisions on malus and clawback and audit committee minimum standards. These changes 'aim to better streamline the expectations or clarify the language'.

The 'comply or explain' approach has been retained.

Timing

The new Code expectation for the Board declaration around their assessment of their company's internal controls has been pushed back to 1 January 2026.

The rest of the revised Code will come into effect one year earlier from 1 January 2025. That is, the 2024 Code (except the Board declaration expectation) will apply to financial years beginning on or after 1 January 2025. Until then, the 2018 Code continues to apply.

[Source: FRC media release 22/01/2024; Full text revised Code]

Asset managers targeted with shareholder proposals calling on them to review of their proxy voting records on shareholder ESG proposals

In light of the decline in asset managers' support for shareholder ESG proposals, especially those filed at US companies in 2023, the Interfaith Centre on Corporate Responsibility (ICCR) has announced that similar shareholder proposals (eg Proposal filed with JPMorgan) have been filed by ICCR members at four asset managers – BlackRock (coordinated by Mercy Investment Service), State Street (coordinated by United Church Funds (UCF)), 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) - calling on them to review their 2023 proxy voting record on climate and racial justice issues to identify any 'misalignment' with their public commentary/commitments.

Announcing this, ICCR cites two reports – the UK Asset Owner Stewardship Review and a separate study from Geogeson – in illustration of the decrease in asset managers' support in 2023.

Commenting on this, ICCR Senior Policy Advisor underlined investors' expectation that companies act on climate and racial justice. Mr Smith said:

> 'Investors don't come to these filings lightly. Both as clients and shareholders we have been engaging and encouraging asset managers to recognize their fiduciary duty, highlighting the economic costs of ignoring climate and racial justice and building the business case for responsible stewardship for years now. We want to see them acting on these commitments through their proxy voting not just talking about them.'

[Source: ICCR media release 14/12/2024]

French regulator flags plans to examine asset manager voting and shareholder engagement policies as part of its 2024 supervisory agenda

Announcing its 2024 supervisory priorities, French regulator - Autorite des Marches Financiers (AMF) – has flagged its intention to 'lead an ambitious transformation towards sustainable finance'.

Among other things, the AMF plans to 'step up its supervisory activities' including examining 'how investors' sustainability preferences are taken into account in the client pathway'.

This is planned to entail looking at asset managers' voting and shareholder engagement policies, which the AMF considers 'are playing an increasingly important role in asset managers environmental, social and governance (ESG) strategies and communications and can represent a strong commercial focus of their ESG approach'.

[Source: AMF media release 18/01/2024]

In Brief | ShareAction report flags steep decline in asset managers' support for shareholder ESG proposals in 2023 with only 3% of assessed resolutions securing majority support (vs 21% in 2021)

[Sources: ShareAction media release 11/01/2024; Full text report: Voting Matters 2023]

In Brief | IIGCC has released new net zero voting guidance to support asset owners and asset managers in developing their own net zero voting policies and practices. Among other things, the guidance 'encourages' asset owners to conduct annual reviews of manager voting behaviour following the AGM season to assess how 'managers' commitments (eg Climate Action 100+) align with their voting actions'

[Sources: IIGCC media release 16/01/2024; Full text guidance]

ESG

Nature-related risk | Over 300 companies and financial institutions commit to adopting TFND framework, Bank of America and NBIM among the early adopters

The Taskforce on Nature-related Financial Disclosures (TNFD) has released a list of 320 organisations – including major banks and investors - that have committed to start making nature-related disclosures based on the TNFD Recommendations/Framework as part of their annual corporate reporting in coming years for FY2023, FY2024 or FY2025.

For context, the TFND framework is a market-led, science-based framework that aims to assist businesses to integrate nature into their decision making. It's envisaged that the new TFND framework will enable businesses to identify, assess and disclose nature-related risk in much the same way as the existing Taskforce on Climate-Related Financial Disclosures (TCFD) supports businesses in managing and disclosing climate-related risk.

The TNFD has been developed to be consistent with the recently released International Sustainability Standards Board (ISSB) global sustainability standards and with the existing TCFD framework. (For more on the TFND framework read: Preparing your business for TNFD nature-related disclosure - Insight - MinterEllison)

Importantly, while the TFND is not binding on business as yet, there is an expectation (see: Why and how boards should be prioritising nature-related risk - POST - MinterEllison; Where to start with nature-related risk? Key takeaways from an expert panel discussion - Insight - MinterEllison) that it will become so in time.

[Source: TFND media release 16/01/2024]

Mining peak body releases five new commitments to conserve nature

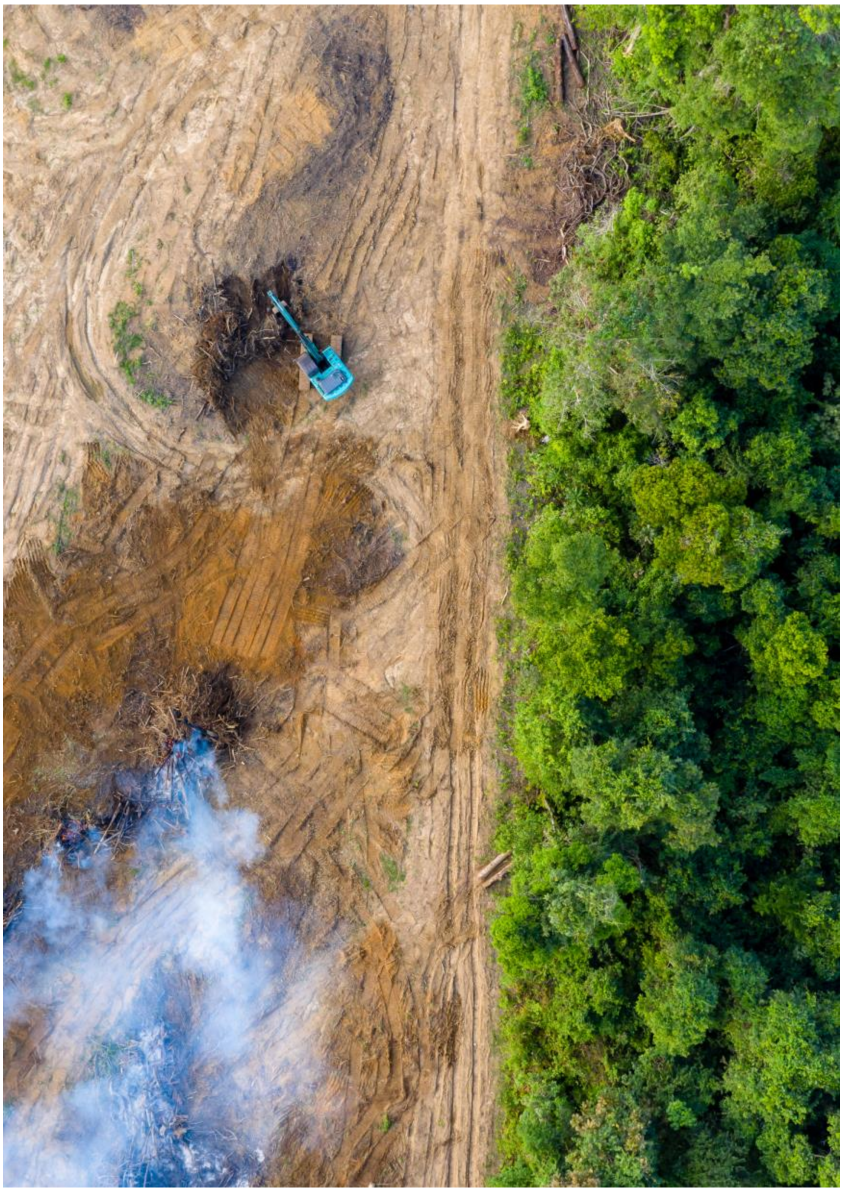
The International Council of Mining and Metals (ICMM) – an industry body purporting to represent a third of the world's mining and metals companies including Glencore, BHP, Rio Tinto and Alcoa among others (list of ICMM member organisations – has released a position statement setting out five new commitments to contributing to a 'nature-positive future'.

The five commitments included in the statement are as follows:

- 'Protect and conserve pristine areas of our natural environment: **No mining or exploration in World Heritage Sites** and respect all legally designated protected areas.

- Halt biodiversity loss at our operations: Achieve at least **no net loss of biodiversity** at all mine sites by closure against a 2020 baseline.
- Collaborate across value chains: Develop initiatives and partnerships that **halt and reverse nature loss throughout supply and distribution chains**.
- **Restore and enhance landscapes**: Around operations through local partnerships, including with Indigenous Peoples, land-connected peoples and local communities.
- **Catalyse wider change**: Acting to change the fundamental systems that contribute to nature loss and fostering opportunities for nature's recovery'.

[Emphasis added]



The ICMM states that these commitments are 'guided' by the 2030 targets in the Kunming-Montreal Global Biodiversity Framework.

Which ICMM member companies does this apply to?

ICMM states that the new

> 'commitments on direct operations, value chain and governance and transparency apply to all members, and individual members will select at least one of three commitment options relating to wider landscapes and systems transformation, in order to maximise their positive contribution'.

[Source: ICMM media release 17/01/2024]

In Brief | Plastic pollution: The Australia Institute suggests that the introduction of an EU-style levy on plastic package waste that is not recycled could generate $1.5bn per year for the Australian economy and serve as a powerful disincentive for the continued production and consumption of plastic waste

[Source: The Australia Institute media release 12/01/2024]

In Brief | The Network for Greening the Financial System has released technical guidance to central banks and financial markets supervisors on developing scenarios to assess nature-related financial risks

[Source: Network for Greening the Financial System: Recommendations toward the development of scenarios for assessing nature-related economic and financial risks December 2023]

Financial Services

Top Story | Reframing financial services regulation | ALRC Final Report released

The Australian Law Commission has completed its three stage review of the legislative framework for corporations and financial services regulation. Here's our overview of the Final Report.

Key Takeouts

- As part of the government's response to the Hayne Commission, the Australian Law Reform Commission (ALRC) undertook a review into the potential simplification of laws regulating financial services in Australia.
- The Final Report includes 58 recommendations to streamline, simplify and improve the navigability and the comprehensibility of existing laws.
- Some of the recommendations are not new: 23 of which were included in Interim Reports A, B and C. Of these, 13 have already been fully or partially implemented.
- The 35 'new' recommendations in the Final Report, many of which formalise proposals included in the three Interim Reports, include:
  - recommendations to establish a new, simplified legislative structure for the financial services regime comprising of a new Financial Services Law (to be housed in a new Schedule to the Corporations Act), a Scoping Order and Rulebooks.
  - enacting single, simplified definitions of 'financial product' and 'financial services' into the Corporations Act (which would supersede existing definitions)
  - consolidating, simplifying and reframing existing consumer protection, disclosure, penalty/offence provisions
- The report also puts forward a suggested multi-year implementation roadmap
- A key message in the report is that any new legislative changes should not replicate the issues highlighted through the review process. As such, it's submitted that new legislation should be designed and implemented in line with the approach put forward in the Final Report (Recommendations 24-25, 27-28 and 30)./li>
- At this stage, the government is yet to issue a formal response to the Final Report recommendations.

The Australian Law Reform Commission (ALRC) has completed its review of the legislative framework for corporations and financial services regulation. The Final Report - Confronting Complexity: Reforming Corporations and Financial Services Legislation – was tabled in parliament and publicly released on 18 January 2024.

'No longer fit for purpose'

The standout conclusion in the Final Report is that:

> 'the legislative framework for corporations and financial services regulation is no longer fit for purpose… The existing legislative framework is unnecessarily complex, and the tools used to build and maintain the framework — such as notional amendments, conditional exemptions, and proliferating legislative instruments — often create more problems than they aim to solve. Much legislation is unclear and incoherent, and the objective of an adaptive, efficient, and navigable legislative framework remains unrealised.
>
> These problems also combine significantly to undermine the substantive content and quality of the law. The ALRC's findings underscore those of the Financial Services Royal Commission: fundamental norms of behaviour are unclear, and the law should be simplified so that its intent can be met'.

Another important finding is that the complexity of existing laws serves to increase costs for all stakeholders (see: Figure 2.4 in the Final Report) as well as contributing to 'legislative inflexibility'.

58 Recommendations for reform

To address these issues, the Final Report includes 58 recommendations to streamline and simplify financial services regulation, including several recommendations aimed at ensuring laws are easier to update and maintain.

- **Recommendations 1-23** which were included in the Review's three interim reports – Interim Report A (read: Reforging financial services law - Technical update - MinterEllison); Interim Report B (read: Unwinding the 'byzantine complexity' of corporations and financial services laws: Submission on ALRC Interim Report B - Post - MinterEllison) and Interim Report C (read: Creating a separate financial services law - Technical update - MinterEllison) - are described as concerning 'issues of technical simplification that do not have significant policy implementations and were not subject to divergent views among stakeholders'. To date, 13 of these recommendations have been implemented in full or in part. See: Table 1.1 in the Final Report.
- **Recommendations 24-58** are new recommendations included in the Final Report. These primarily concern the proposed overhaul of the structure of existing legislation regulating financial products and services contained in Chapter 7 of the Corporations Act 2001 (Cth) (Corporations Act) and Part 2, Division 2 of the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act) and how these proposed changes could be implemented and maintained.

For clarity, there is no suggestion at this stage that the reforms will extend to the following (other than possibly consequential amendments):

- Chapter 5C of the Corporations Act
- Insurance Act 1973 (Cth)
- Life Insurance Act 1995 (Cth)
- Banking Act 1953 (Cth)
- Superannuation Industry (Supervision Act) 1993 (Cth)

A full list of recommendations is included a p16-25 of the Final Report. Appendix C to the Report maps the recommendations against proposals included in the three Interim Reports.

Key recommendations

A (proposed) new regulatory framework

Among the key reforms recommended in the Final Report is the proposed restructure and consolidation of the existing legislative framework for financial services regulation into a new (and more easily navigable) three part structure.

This is proposed to comprise:

- **A new Financial Services Law** (proposed to be housed in a new Schedule to the Corporations Act – the FSL Schedule) which would 'set the regulatory perimeter and the policy objectives of regulation'. It's envisaged that the new Financial Services Law would contain the primary restructured/reframed provisions - eg 'core obligations, offence provisions, rights, remedies and definitions' - relating to financial services/products and house them in a single location. It's suggested that, like the Australian Consumer Law, this approach would 'help to give the Financial Services Law a clear legislative identity'. These recommendations (Recommendations 41 and 42) formalise proposals C9 and C10 included in Interim Report C. Read: Creating a separate financial services law - Technical update - MinterEllison
- **A Scoping Order** which is described in the Final Report as 'a single legislative instrument…which would contain matters that would adjust the scope of the regulatory regime, including exemptions and exclusions'. Appendix F to the Final Report is a table giving an overview of the types of provisions that the ALRC envisages may appear in the Scoping Order (as part of the ALRC's recommended legislative model) and examples of equivalent existing provisions.

  It's proposed that the power to make scoping orders would be vested in either the Minister or ASIC (or both) in accordance with existing policy settings under Chapter 7 of the Corporations Act and Part 2 Div 2 of the ASIC Act.
- **Rulebooks.** These are described in the Final Report as 'thematic, consolidated rulebooks, which would contain prescriptive detail that would tailor the regulatory regime for particular products, services, persons, or circumstances'.

Figure 3.3 in the Final Report is a diagram illustrating how the proposed new framework is proposed to improve navigation and make information easier for users to locate.

ASIC would retain power to grant individual relief

Notably, it's recommended (Recommendation 45) that under the proposed new structure outlined above, ASIC would 'retain its power to grant individual relief' (through making a notifiable instrument). However, the report makes clear that it's envisaged that this power

> 'would need to be exercised in limited circumstances to address atypical circumstances or unintended consequences of the regulatory regime, and would not need to be exercised to the same extent as under the current legislation for the reason that rules could be more easily tailored to deal with specific circumstances'.

The report suggests that this revised structure would provide a 'clear path through the law' by reducing the number of places that users of the legislation need to look to ensure that they are compliant with the legislation.

Consolidating existing provisions

A number of recommendations in the Final Report, formalise previous ALRC proposals to simplify and consolidate existing provisions to improve clarity and navigability.

These include the following.

Single, simplified definitions of 'financial product' and 'financial services': Recommendation 31 recommends (as per proposals A3-A6 in Interim Report A) that there should be a single, simplified definition of 'financial product' and 'financial service' included in the Corporations Act which should be cross-referenced in other legislation (Recommendation 31). For clarity, these new definitions are proposed to replace and supersede other existing definitions.

Recommendation 32 recommends:

> 'To implement Recommendation 31:
>
> a. specific inclusions within the definitions of 'financial product' and 'financial service' should, so far as possible, be located in primary legislation; and
>
> b. application provisions, exclusions, and exemptions (where relevant) should be used to limit the application of provisions to specific products, services, persons, and circumstances'.

The ALRC writes that these changes would significantly simply the legislative framework by enabling users to look in one place (the Corporations Act) to determine the meaning of both terms, and (assuming the recommended legislative restructure is implemented), enabling users to look in one place (the Scoping Order) to identify all exclusions from these definitions as well as any inclusions that may be in force.

Consolidating consumer protection provisions: As per Proposal C1 in Interim Report C, Final Report Recommendation 33 recommends that the Corporations Act be amended to create a new legislative chapter which would consolidate existing consumer protection provisions into a single location.

Specifically, Recommendation 33 recommends that the Corporations Act be amended to:

> 'restructure and reframe provisions of general application relating to consumer protection, including by grouping and (where relevant) consolidating:
>
> a. Part 2 Div 2 of the Australian Securities and Investments Commission Act 2001 (Cth);
>
> b. Part 7.6 Div 11 of the Corporations Act 2001 (Cth);
>
> c. sections 991A, 1041E, 1041F, and 1041H of the Corporations Act2001 (Cth);
>
> d. Part 7.8A of the Corporations Act 2001 (Cth); and e. sections 1023P and 1023Q of the Corporations Act 2001 (Cth).'

Unconscionable and misleading or deceptive conduct: As per Proposal C2 and C3 in Interim Report C, Final Report Recommendations 34 and 35 recommend that:

> 'Section 991A of the Corporations Act 2001 (Cth) and s 12CA of the Australian Securities and Investments Commission Act 2001 (Cth) should be repealed, and s 12CB of the Australian Securities and Investments Commission Act 2001 (Cth) should be amended to expressly provide that it encompasses unconscionability within the meaning of the unwritten law' [Recommendation 34]

Recommendation 35 recommends that:

> 'Proscriptions concerning false or misleading representations and misleading or deceptive conduct in the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth) should be replaced by a single, consolidated proscription'.

Consolidating existing disclosure provisions: As per proposal C4 in Interim Report C, Final Report Recommendation 36 recommends that:

> 'The Corporations Act 2001 (Cth) should be amended to restructure and reframe provisions relating to relating to disclosure for financial products and financial services, including by grouping and (where relevant) consolidating:
>
> a. Part 7.7 Divs 1, 2, 3A, 6, and 7;
>
> b. section 949B; and
>
> c. Part 7.9 Divs 1, 2, 3 (excluding ss 1017E, 1017F, and 1017G), 5A, 5B, and 5C.

Consolidating provisions relating to financial advice: As per Proposal C6 from Interim Report C, Final Report Recommendation 38 recommends that

> 'The Corporations Act 2001 (Cth) should be amended to restructure and reframe provisions relating to financial advice, including by
>
> grouping and (where relevant) consolidating:
>
> a. sections 912EA and 912EB;
>
> b. Part 7.6 Divs 8A, 8B, and 8C;
>
> c. Part 7.6 Div 9 Subdivs B and C;
>
> d. Part 7.7 Div 3;
>
> e. section 949A;
>
> f. Part 7.7A Divs 2, 3, 4 (excluding s 963K), Div 5 Subdiv B, and Div 6; and
>
> g. sections 1012A and 1020AI'.

Consolidating offence and civil penalty provisions: In line with Proposal B15 from Interim Report B, Recommendation 56 recommends that

> 'existing offence and penalty provisions in corporations and financial services legislation should be consolidated into a smaller number of provisions covering the same conduct'.

Reforming general regulatory obligations and provisions comprising the AFSL regime: Recommendations 39 recommends that:

> 'The Corporations Act 2001 (Cth) should be amended to restructure and reframe provisions of general application relating to financial services providers, including by grouping and (where relevant) consolidating:
>
> a. Part 7.6 Divs 2, 3, and 10;
>
> b. section 963K;
>
> c. Part 7.7A Div 5 Subdiv A, and Div 6;
>
> d. Part 7.8 Divs 2, 3, 4, 4A, 5, 6, and 9; and
>
> e. sections 991B, 991E, 991F, 992A, and 992AA'. [Recommendation 39]

Recommendation 40 recommends that:

> 'The Corporations Act 2001 (Cth) should be amended to restructure and reframe provisions of general application relating to administrative or procedural matters concerning financial services licensees, including by grouping and (where relevant) consolidating Part 7.6 Divs 4, 5, 6, and 8'

Implementation and maintenance of the reformed legislative framework

The Final Report also includes a number of recommendations focused on facilitating the delivery and ongoing maintenance of the reforms.

In line with Proposal B9 from Interim Report B, Recommendation 49 recommends that:

'The provisions of Chapter 7 of the Corporations Act 2001 (Cth) relating to the regulation of financial products and financial services should be amended to:

a. establish an independent 'Rules Advisory Committee'; and

b. require the Minister and the Australian Securities and Investments Commission to consult the Rules Advisory Committee and the public before making or amending any provisions of the Scoping Order or rules'.

In line with Proposal C12 from Interim Report C, Final Report Recommendation 54 recommends that the government 'should establish a specifically resourced taskforce (or taskforces) dedicated to implementing reforms to financial services legislation'.

In line with Proposal C13 from Interim Report C Recommendation 55 recommends that

'As part of implementing Recommendation 41 (the Financial Services Law), the Corporations Act 2001 (Cth) should be amended to require that the Financial Services Law and delegated legislation made under it be periodically reviewed by an independent reviewer'.

The Final Report stops short of recommending that CAMAC be reinstated

On this point, the Final Report notes that a number of stakeholders have suggested that the Corporations and Markets Advisory Committee CAMAC, or a similar body, should be reinstated as this body could perform the functions recommended in Recommendations 49, 54 and 55 as well as (potentially) other broader functions.

The Final Report comments:

'The ALRC is of the view that the establishment of a body, such as CAMAC, that focused on supporting the Australian Government in policy development would complement the ALRC's reforms. However, given CAMAC's role as a policy-oriented body, and the focus of this Inquiry on reforms within existing policy settings, the ALRC has not consulted on or recommended the reinstatement of CAMAC'.

Suggested approach to implementation

The report includes a suggested implementation roadmap to guide implementation of the recommended reforms, commencing with the following (suggested) initial steps:

- Enacting a 'skeletal FSL Schedule in Sch 1 to the Corporations Act' ie (assuming acceptance and implementation of Recommendation 42), it's suggests that the government should 'lay the groundwork' for the progressive implementation of the proposed FSL (Recommendation 41) by enacting a 'skeletal' version of the new FSL – ie placeholder chapters, 'which could contain simplified outlines that explain where provisions are presently located in the pre-reform legislative framework' – to provide a 'navigability tool for users of the legislation'. It's suggested that these placeholder chapters could then be replaced as recommended reforms are implemented.
- 'establishing the legislative architecture for scoping order and rule-making powers'
- 'updating guidance relating to legislative design to operationalise the working.'

Following this, the report suggests that implementation could be approached through implementing the following six 'pillars' (broad reform areas). The report states that each 'pillar' has been designed to 'ensure that it could be implemented within a single term of parliament' with the first four pillars – consumer protection, disclosure, financial advice and licensing/other regulatory obligations – covering what the ALRC describes as 'the most significant, complex, and policy sensitive financial services provisions in Chapter 7 of the Corporations Act and Part 2 Div 2 of the ASIC Act'.

Under the ALRC's roadmap, the proposed six 'pillars' for reform are:

- 1. Consumer protection (Recommendation 33) is flagged as a suggested starting point. The report also suggests that this would be 'an opportunity to implement recommendations related to the definitions of 'financial product' and 'financial service', which would be helpful for later reforms'.
- 2. Disclosure (Recommendation 36). The report states that this is the second priority because 'the relevant provisions are among the most complex in the existing legislative framework. Reform to disclosure provisions could bring significant benefits for regulated persons, consumers, and investors'.
- 3. Financial Advice (Recommendation 38). The report states that this should be prioritised because 'A simplified legislative framework would be an important step to reducing the costs of advice, supporting advisers to understand their obligations, and promoting higher quality advice'.
- 4. Other regulatory obligations and licensing (Recommendation 39 and 40).

- 5. Miscellaneous
- 6. Policy Evolving provisions. The report envisions that:

  'Pillar Six would be implemented on an ongoing basis as and when policy reforms are adopted. It would therefore proceed in parallel with other pillars'.

Integration with other reforms?

A key message for government in the Final Report is the need to 'avoid the perpetuation of complex law-making approaches' when designing/implementing any new legislative measures. It's submitted that:

> 'it would be desirable to begin implementing the ALRC's recommendations as part of any new legislative measures and what the ALRC refers to as 'policy-evolving provisions'…New legislation should avoid the perpetuation of complex law-making approaches, such as notional amendments, conditional exemptions, and highly particularised regulation-making powers. Instead, new measures should be designed according to the principles recommended in Chapter 4 of this Report [Chapter 4 sets out seven recommendations – legislative design principles - aimed at improving the quality and consistency of corporations and financial services legislation]'. .

It's further suggested that implementation of the Final Report recommendations in line with the approach envisaged in the roadmap in the Final Report, could help facilitate other policy reforms including, for example reforms to financial advice and buy now, pay later regulation.

For example, the Final Report opines that:

> 'the restructured and reframed [financial advice-related] provisions would make it easier to identify the key objectives and norms of behaviour relating to financial advice. This would make the legislation more amenable to implementing recommendations concerning the provision of good advice, for example, as contemplated by the Quality of Advice Review'.

In addition, it's suggested that

> 'Restructuring and reframing financial advice provisions may also make them more adaptive to changes in technology and business practices'.

Likewise, the report suggests that implementation of the Final Report recommendations could (potentially) assist in regulating buy now, pay later (BNPL) as a credit product. It's suggested that:

> 'the ALRC's recommendations may be applied to credit legislation to make it more adaptive and therefore amenable to policy change. For example, BNPL arrangements are a diverse and evolving area, so it may prove challenging to insert a definition of BNPL arrangements to bring them within the scope of the NCCP Act. A definition that is too narrow and detailed may be unsuitable, causing evolving BNPL service providers to fall outside of the NCCP Act. A wide definition would allow flexibility, but if exclusions and exemptions were to be introduced without a coherent legislative hierarchy, then unnecessary complexity may accrue over time. This is where the ALRC's recommended legislative model could provide the requisite flexibility while minimising unnecessary legislative complexity'.

Outlook

At this stage it is not clear whether or to what extent the government will implement the Final Report recommendations (Recommendations 24-58) or what the timeframe may be.

The government has flagged it is 'carefully considering the report and recommendations'.

> [Sources: ALRC Report 141: Confronting Complexity: Reforming Corporations and Financial Services Legislation; Summary Report; Attorney General Mark Dreyfus media release 18/01/2024]

'Technical' nature of offending does not lessen the seriousness of the offence: Australian Bank fined $800K for giving customers incorrect information about their interest rates as a result of a 'technical' error

An Australian bank has been fined $820,000 by the Federal Court for giving customers incorrect information about their interest rates.

For clarity, the bank pleaded guilty to (historical) charges of:

- making false and misleading representations in letters to its home loan customers, in contravention of sections 12DB(1)(g) and 12GB(1) of the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act); and
- failing to provide written notice about annual interest rate and repayment amount changes, in contravention of ss 64(1) and 65(1) of the National Credit Code.

The case was the first criminal prosecution under section 12DB of the ASIC Act.

The 'technical nature of the offending conduct' does 'not really assist' in determining the seriousness of the offending

An interesting aspect of the case - Walker v Members Equity Pty Ltd (formerly Members Equity Bank Ltd) [2024] FCA 15 - is the court's consideration of the bank's submission that the objective seriousness of the offending was low, rather than moderate as submitted by the Commonwealth Department of Public Prosecutions (CDPP) which was prosecuting the case, because (among other factors – refer to [38] in the judgment) - the offending was caused by a 'technical issue without any criminal intention or purpose'.

On this point Bromwich J comments:

> [43] 'This is the nub of the present case. It does not really assist…[the bank] to point to the technical nature of the offending conduct as to any of the charges. The offending was only technical because…[the bank] (legitimately) chose to use automated systems. Whatever goes wrong in such a system will inevitably be technical in nature, with different levels of human input always being a feature. But when such systems are used, very high levels of diligence are required and are to be encouraged and, correspondingly, inadequate diligence deterred.
>
> [44] The question to be asked at all times is not whether there are any defects in such systems, which is an inherently complacent approach or standard, but rather what and where are the inevitable defects in such complex systems, and what is being done to find them and eliminate them, noting that changes in software are likely to create new defects from time to time. It is almost counsel of perfection, because that is what is required. **Prevention is everything, and the sanctioning response must reflect this in order to ensure this is what takes place**. Temptation in favour of any lesser response must be deterred'. [emphasis added]

Announcing the outcome of the case, ASIC Executive Director for Enforcement & Compliance, Tim Mullaly underlined the importance of banks providing accurate information about changes to loans, cautioning that 'where banks fail to meet these requirements, they can face criminal convictions.'

[Sources: ASIC media release 18/01/2024; Walker v Members Equity Pty Ltd (formerly Members Equity Bank Ltd) [2024] FCA 15]

Financial advice | UK regulator convenes new industry-led, sustainability working group for financial advisers

UK financial regulator the Financial Conduct Authority (FCA) is set to establish a new, industry-led working group aimed at 'building capability in sustainable finance across the financial advice sector', to support advisers in advising consumers on 'sustainable' products.

Daniel Godfrey (Senior Adviser to Moneybox and ShareAction) has been appointed Chair and Julia Dreblow (founding director of SRI Services and the Fund EcoMarket) has been appointed as Vice-Chair. The Chair has been tasked with appointing the group's membership from across the advice sector, including both small and larger industry participants. It's also envisaged that the new working group will engage with broader stakeholders.

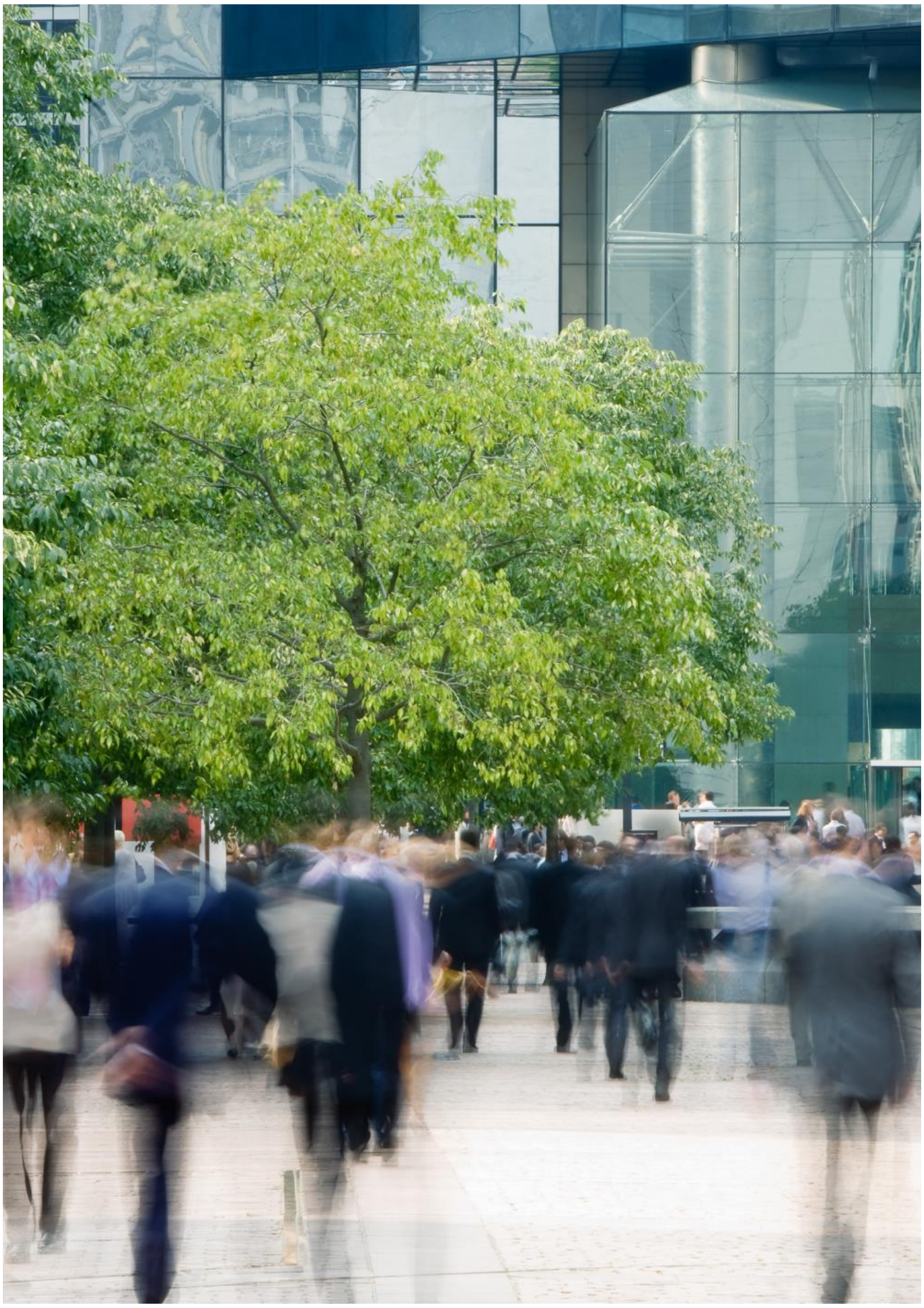
The FCA will also sit as an active observer of the group.

In terms of timing, the regulator has asked that the group be 'ready to report on how the advice sector can be supported in delivering good practice in the second half of 2024'.

The establishment of the group is part of a broader package of measures aimed at improving the trust and transparency of sustainable investment products.

[Source: FCA media release 16/01/2024]

Predatory lending | ASIC extends product intervention orders for short term credit and continuing credit contracts



On 13 July 2022, ASIC made two product intervention orders:

- ASIC Corporations (Product Intervention Order—Short Term Credit) Instrument 2022/647 (2022 short term credit order); and
- ASIC Corporations (Product Intervention Order—Continuing Credit Contracts) Instrument 2022/648 (2022 continuing credit contracts order).

The orders target two lending models deployed previously by Cigno Australia Pty Ltd (Cigno Australia) and its associates.

Broadly, the two orders prohibit the provision of short term credit and continuing credit contracts that involve charging retail clients unreasonably high fees, in excess of the cost caps in the relevant exemptions in subsections 6(1) and 6(5) of the National Credit Code (Code).

For a detailed overview of the two existing product intervention orders see: Targeting predatory lending: Two new product intervention orders now in force - Post - MinterEllison

On 10 August 2023, ASIC released Consultation Paper 371 Product intervention orders: Short term credit facilities and continuing credit contracts (CP 371) seeking feedback on proposals to extend the two orders (which were set to expire, if not extended on 15 January 2024). Submissions received in response to the consultation were supportive (see: ASIC Corporations (Product Intervention Order Extension – Short Term Credit) Instrument 2023/956 Explanatory Statement, and ASIC Corporations (Product Intervention Order Extension – Continuing Credit Contracts) Instrument 2023/957 Explanatory Statement) of the proposed extension of the orders.

The two orders will now remain in force until 1 October 2032, unless revoked earlier.

Announcing this, ASIC deputy Chair Sarah Court underlined ASIC's continued focus on predatory lending and commitment to taking action on the issue. Ms Court stated:

> 'Extending these product intervention orders ensures continued protection in the market against these high-cost lending products. Predatory lending practices targeting vulnerable consumers is an ongoing priority of ASIC, and we will continue to intervene to address this type of conduct.'

[Sources: ASIC media release 05/01/2024]

APRA retires prudential practice guides on the risk management framework for life and general insurers

The Australian Prudential Regulation Authority (APRA) has announced the 'retirement' of two outdated prudential standards: Prudential Practice Guide GPG 250 Balance Sheet and Market Risk (GPG 250) and Prudential Practice Guide LPG 250 Asset and Liability Management Risk (LPG 250) which APRA considers have been superseded by Prudential Standard CPS 220 Risk Management and Prudential Practice Guide CPG 220 Risk Management.

APRA states:

> 'GPG 250 and LPG 250 were created in 2006 and 2007, respectively. Both PPGs provide high level guidance on elements that would typically be included in a risk management framework. APRA considers that these PPGs have served their initial purpose of explaining basic concepts to help uplift industry practice but are now no longer needed.
>
> APRA's expectations regarding risk management, including those risks considered in GPG 250 and LPG 250, are set out in Prudential Standard CPS 220 Risk Management (CPS 220)'

The move is part of APRA's broader project to modernise and simplify the prudential architecture which includes retiring standards/guidance that are 'no longer considered to add meaningful value in understanding the current prudential requirements'.

[Source: APRA letter to industry 15/01/2024]

In Brief | Financial Advice: ASIC has urged AFS licensees to register their 'relevant providers' by 16 February 2024 cautioning that 'advisers who provide personal advice to retail clients without being registered after 16 February, together with their authorising AFS licensee(s), will be in breach of the law and face potential regulatory action'.

[Source: ASIC media release 18/01/2024]

Risk Management

Top Story | ACCC spot check of contracts reveals UCT concerns

From 9 November 2023, businesses have been prohibited under recent reforms to the unfair contract regime (UCT) in the Australian Consumer Law (ACL), businesses have been prohibited from proposing, using and/or relying on UCTs in standard form contracts with consumers and small businesses.

Following a targeted compliance review, the Australian Competition and Consumer Commission (ACCC) has called on franchisors to 'urgently review and amend their standard form franchise agreements' to ensure that contract terms are not broader than reasonably necessary to protect the franchisor's legitimate business interests' or be prepared for potential enforcement action'.

MinterEllison has released an article discussing this development in more detail and the implications for franchisors (and other businesses). You can find the full text here: ACCC spot check of contracts reveals UCT concerns - Insight - MinterEllison

Top Story | Making waves – unfair terms regime extends beyond Australia

MinterEllison has released an article discussing the implications of a recent High Court decision - High Court of Australia in Karpik v Carnival Plc [2023] HCA 39 - on the application of the unfair contract terms (UCT) regime to contracts entered into outside Australia and how the regime view 'class action waiver' clauses.

You can find the full text of the article here: Making waves – unfair terms regime extends beyond Australia - Insight - MinterEllison

Top Story | New AHRC regulatory powers and WGEA reporting changes

MinterEllison has released an article providing an overview and explanation of the Respect@Work reforms that commenced in December 2023 – the Australian Human Rights Commission's (AHRC) new regulatory powers as well as Workplace Gender Equality Agency (WGEA) reporting changes.

You can find the full text here: New AHRC regulatory powers and WGEA reporting changes - Insight - MinterEllison

Top Story | Mandatory safety guardrails foreshadowed for high-risk AI

On 17 January 2024, Australian Government published its interim response to the safe and responsible AI consultation held in 2023. The interim response outlines how the government plans to ensure AI is 'designed, developed and deployed safely and responsibly'.

MinterEllison has released an article exploring the implications. You can find the full text here: Mandatory safety guardrails foreshadowed for high-risk AI - Insight - MinterEllison

Top Story | Australia's roadmap to global cyber leadership

The Commonwealth Government's much-anticipated 2023-2030 Australian Cyber Security Strategy (the Strategy) provides a holistic assessment of Australia's cyber security and technology horizon out to 2030, and commits to extending a range of Government capabilities so that Australia remains safe and secure and is positioned to take full advantage of the many opportunities national investment in cyber security will bring.

MinterEllison has released an article reflecting on the strategy/implications here: Australia's roadmap to global cyber leadership - Insight - MinterEllison

Cybersecurity | SEC X account (formerly Twitter) hacked, Chair acknowledges the incident may have shaken confidence in the security of the regulator's social media accounts

Unauthorised access to SEC social media account: On 12 January 2024, US Securities and Exchange Commissioner Gary Gensler issued a statement confirming that an unauthorised party had gained access to the @SECGov X.com account (ie SEC's Twitter/X account) by 'obtaining control over the phone number associated with the account'. The unauthorised party issued a post purporting to announce SEC's approval of spot bitcoin exchange-traded funds, issued a second post (which they deleted) and 'liked' two posts by non-SEC accounts.

Impact? According to Mr Gensler's statement, though the scope of the incident is not yet known, 'there is currently no evidence that the unauthorized party gained access to SEC systems, data, devices, or other social media accounts'.

Mr Gensler acknowledged the incident raises 'concerns' about the security of SEC social media accounts. Mr Gensler said that SEC staff are coordinating with appropriate law enforcement and federal oversight entities, including the SEC's Office of Inspector General, the Federal Bureau of Investigation, and the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency, amongst others, in their investigations into the incident. Staff are also assessing whether 'additional remedial measures are warranted'.

Mr Gensler emphasised that SEC 'does not use social media channels to make its actions public; social media posts only amplify announcements that are made on our website'.

[Source: SEC media release 12/01/2024]

In Brief | The ACSC has released updated guidance for boards around planning for critical vulnerabilities and major cybersecurity incidents including suggested questions for directors to put to senior management/outsourced service providers

[Source: ACSC Guidance: Planning for Critical Vulnerabilities and Major Cyber Security Incidents – What boards need to Know 14/12/2023]

In Brief | The NSW Anti-slavery Commissioner has published a new modern slavery due diligence and reporting framework to assist entities that participate in the NSW Procurement Policy Framework and other entities that have due diligence or reporting obligations – eg certain universities, Local Aboriginal Land Councils - to discharge their due diligence and reporting obligations under the Modern Slavery Act 2018 (NSW)

[Source: Due Diligence and Reporting Framework]

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. The Labor Chaired House of Representatives Standing Committee on Social Policy and Legal Affairs adopted an inquiry into the Bills on 14 December 2023. The deadline for written submissions was 18 January 2024.

What's in the Bills?

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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