Governance News

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

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Boards and Directors

Directors' Duties | UK Institute of Directors calls for overhaul of directors' duties ahead of upcoming general election

Ahead of the upcoming UK general election, the UK Institute of Directors (IoD) has issued a 'manifesto for business' – a 'wish list' of key policy reforms it would like to see the incoming government action.

Among other things, the IoD calls on the incoming government to:

- Overhaul directors' duties under s172: The IoD calls for section 172 of the Companies Act 2006 (UK) to be redrafted (as advocated by the Better Business Act campaign). The IoD writes that:

  > 'The duty of directors should be clearly stated as that of promoting the success of the company as a whole. In particular, section 172 should not suggest that directors have a legal obligation to prioritise the interests of shareholders over those of other key stakeholders'.
  >
  > [Note: For reference, the multi-year Better Business Act campaign has released a suggested draft wording and an indication of what a recast s172 might look like. See: The Better Business Act 2021.docx]

- Promote the adoption of a code of conduct for directors (currently under development by a Commission established by the IoD). The IoD submits that:

  > 'A Code of Conduct for Directors should be incorporated as a vital new component of the UK governance framework. In many aspects of business life, a code of ethical conduct is an essential component of the licence to operate and a meaningful source of professional accountability. The IoD has established a commission to develop such a code, which directors will be invited to sign up to on a voluntary basis. A future government should promote the adoption of this code by the business community'.

- Review the corporate reporting framework to reduce reporting burden on business. In light of the shifts in the operating environment/shifting expectations, the IoD has called for the incoming government to undertake a 'holistic review of the entire corporate reporting framework in order to ensure that it remains fit for the future'.

- Complete the transformation of the FRC into ARGA: The IoD also calls on the incoming government to implement 'key elements' of the 'post-Carillion governance and audit reforms' and in particular, to complete the transition of the Financial Reporting Council to the Audit Reporting and Governance Authority (ARGA). The IoD has also called for a re-evaluation of some elements of the proposed reforms such as 'those mandating managed shared audits and additional corporate declaration requirements'.

- Listing Rules reform: The manifesto underlines the need for the incoming government 'strike the right balance in listing rules reform'. The IoD writes:

  > 'It is important that the UK equity market maintains its competitiveness, especially with regard to innovative and high growth companies. It is equally important that this is not achieved through a regulatory race to the bottom which harms the UK's reputation for high corporate governance standards in the long run. A future government must seek to find the right balance. In terms of the listing rules, many of the recent reforms proposed by the FCA represent a step in the right direction. However, there is still a need to maintain elements of investor protection in the regime, such as a shareholder vote on related party transactions'.

- Increased focus on director education to bolster governance standards (as opposed to more regulation): The IoD cautions against an incoming government adding further regulatory requirements in response to 'high profile corporate failures' on the basis that this is 'often ineffective in changing outcomes and deflects boards from devoting sufficient attention to the underlying drivers of business performance, such as strategy and innovation'. Instead, the IoD calls for greater emphasis to be director education as a means of improving governance. The IoD suggests that:

  > 'pre-requisites in terms of director education and training should be defined for directors about to take up their first role on the board of a public interest entity'.
  >
  > [Source: IoD Policy Paper: Manifesto for Business March 2024]

Diversity

Board gender diversity | Report finds that representation of women on ASX 100 boards is nudging 40%, but women remain underrepresented in Chair roles

The Australian Institute of Company Directors (AICD) latest report tracking improvements in board gender diversity across the ASX 300 reveals that:

- Representation of women on the boards of Australia's largest listed companies now exceeds 40% (in aggregate) - women hold 43.6% of ASX 20 board seats and 41.7% of ASX 50 board seats
- Representation is nudging 40% on ASX 100 boards – 39.3% of seats are held by women
- Representation is over 36% on ASX 200 and 300 boards – women hold 37/4% of seats on ASX 200 boards, and 36.9% of seats on ASX 300 boards

Commenting on this, AICD Managing Director and CEO Mark Rigotti describes the results as a 'milestone to be celebrated' and an indicator that boards are increasingly valuing the benefits of gender equality. Mr Rigotti attributed this progress to:

> 'the long-term efforts of the Australian business community to ensure continued stakeholder scrutiny of appointments to listed boards.'
>
> [Note: The ASX Corporate Governance Council is currently consulting on proposed changes to the ASX Corporate Governance Principles and Recommendations. The proposed changes include, among others, proposals to:
>
> - Amend Recommendation 2.3 to set the expectation that S&P/ASX300 entities set a goal for achieving gender balance on their board (ie at least 40% women, 40% men and the remaining 20% open) within a period to be specified by the entity (up from the existing 30% goal).
>
> - It's also proposed that entities disclose 'any other relevant diversity characteristics' (in addition to gender) which are being considered for the board's membership
>
> The due date for submissions to the consultation is 6 May 2024. It's envisaged that the updated Principles and Recommendations (once finalised) will be issued in early 2025 and would apply for financial years commencing on or after 1 July 2025. For more on the proposed changes to the ASX Corporate Governance Principles and Recommendations see: Governance News 6/03/2024 at p13]

On the downside…

The AICD report also highlights that:

All male boards persist: There are still six ASX 300 boards and one ASX 200 board with zero women

Where are the women Chairs? The AICD found that women remain underrepresented in Chair roles. According to the AICD's analysis:

- There is not a single ASX 20 company with a woman Chair
- Women hold just 12% of ASX 50 and ASX 100 Chair roles
- Women hold less than 10% (9.5%) of ASX 200 Chair Roles
- Women hold 11.6% of ASX 300 Chair Roles

Commenting on this, Chair of the 30% Club Australia Nicola Wakefield Evans said the data reveals there is still an imbalance in power.

> 'We now have hundreds of talented women sitting on the boards of Australia's top companies so why aren't those increasing numbers being reflected at a Chair level? There is clearly continued work needed to provide opportunities for women to thrive at all levels of leadership.'
>
> [Sources: AICD media release 08/03/2024]

Shareholder Activism

Board diversity (still) in focus | NYC Comptroller pushes GameStop, NextEra Energy to disclose board demographics in a continuation of a multi-year initiative pushing for increased board diversity

- New York City Comptroller Brad Lander (NYC Comptroller) and three of New York City's public pension funds - Teachers' Retirement System (TRS), New York City Employees' Retirement System (NYCERS); and Board of Education Retirement System (BERS)) have filed shareholder proposals at GameStop and NextEra requesting board members disclose their self-identified race, gender, and relevant skills and attributes in a matrix format. You find the full text of the Gamestop proposal here and NextEra proposal here.
- This is part of a multi-year initiative led by the NYC Comptroller - Boardroom Accountability Project 2.0 – pushing for a 'new standard for transparency, diversity and inclusion on corporate boards' through filing proposals, engaging with Pension Funds' portfolio companies and advocacy for corporate governance best practices.
- So far the initiative has secured agreement with several companies to disclose a board matric including: Hilton Worldwide Holdings, Marriott International, Blackrock, Goldman Sachs, PepsiCo, and Exelon.
- Importantly, the Comptroller's announcement underlines that investors consider focus on this issue to be central to good governance and as such key to long term value creation. The NYC Comptroller writes:

  > 'The shareholder proposals underscore that a diverse board enhances discussions and decision-making while championing transparency, accountability, and corporate diversity. Such diversity not only has the potential to boost corporate performance and safeguard long-term shareholder value but also contribute to improved governance. Precise disclosure of director-specific diversity in a useful Board Matrix promotes inclusive practices, shaping the corporate culture and setting a precedent for employees as part of a comprehensive human capital management strategy'
  >
  > [Source: NYC Comptroller Brad Lander media release 07/03/2024]

Plastic pollution | Green Century withdraws proposal at Hasbro in exchange for agreement with the company

- Green Century has withdrawn a shareholder plastic use proposal filed at toy company Hasbro in exchange for agreement by the company to provide 'full disclosure of its plastic packaging use in 2024'.
- Green Century regards disclosure of data on plastic usage as a first step towards the company making stronger commitments to reduce 'non-essential single-use plastic'.
- The proposal is part of a broader campaign aiming to push companies to reduce their plastic use and waste. According to Green Century, the initiative has so far 'more than a dozen agreements' including agreements with Disney, Costco and Mattel.
- Green Century has filed a number of other shareholder plastics proposals this year on the issue including at:
  - three hotel operators - Hilton, Marriott, and Choice Hotels (now withdrawn) – asking them to measure, disclose and reduce their plastics use.
  - three toy companies – Disney (this appears to have been withdrawn in exchange for agreement with the company), Hasbro (withdrawn in exchange for agreement with the company) and Mattel – urging them to reduce use of single-use plastic packaging and disclose their plastic footprint.

  [Source: Green Century media release 28/02/2024; 06/03/2024]

Coca-Cola Company succeeds in blocking shareholder proposal pushing for the company to shift towards healthy products

The US Securities and Exchange Commission (SEC) has given the green light to an application from The Coca-Cola Company to block a shareholder proposal calling on it to adopt an enterprise-wide policy to move toward more healthy products, including an assessment of the current healthiness of its portfolio in reliance on the 'ordinary business exception'.

SEC accepted the company's submission that the proposal could properly be excluded because the subject matter of the demand directly concerns the company's ordinary business operations – the company submitted that:

> 'thrust and focus [of the proposal] concerns specific products the Company offers for sale and would require decisions and judgement on matters that are not appropriate subjects for shareowner action'.

The company also sought to exclude the proposal in reliance on Rule 14a-8(i)(3) - because the Proposal 'is inherently vague and indefinite, and subject to multiple interpretations'. SEC did not find it necessary to comment on this aspect of the company's application.

[Source: SEC no action letter 06/03/2024]

Maximus shareholders vote down shareholder freedom of association proposal

Maximus Inc shareholders have voted down a shareholder freedom of association proposal (Proposal 4 in the Notice filed by SOC Investment Management, together with Service Employees International Union Pension Plans Master Trust) at the technology company's 12 March 2024 annual shareholder meeting. The proposal looks to have secured approximately 26% support.

The proposal, which was opposed by the board, called on the board to commission and publicly release a third party assessment of the company's commitment to freedom of association and collective bargaining rights.

Looking at how (some) investors voted:

- Norges Bank Investment Management (NBIM) voted against stating that it:

  > 'will not support a shareholder proposal where the company does not appear to have significant gaps in their management or reporting of the relevant sustainability risk. We assess companies against our public expectations on environmental and social issues. We may consider direction of travel and pace of change as part of our assessments'.

- California State Teachers Retirement System (CalSTRS) voted in support
- California Public Employees Retirement System (CalPERS) voted in support
- NYC pension funds (New York City Board of Education Retirement System; New York City Employees' Retirement System; New York City Fire Pension Fund; New York City Police Pension Fund; and Teachers' Retirement System of the City of New York) voted in support

Over the past two years, SOC has filed similar proposals at other companies - Amazon, Apple, Starbucks, Wells Fargo, and CVS Health. Of these, the 2023 Starbucks proposal secured majority support.

> [Note: A report from Majority Action assessing Majority Action assessing how the 18 largest asset managers and proxy advisors (Institutional Shareholder Services (ISS) and Glass Lewis) voted/recommended on key racial equity-related issues during the 2023 proxy season found (among other things) a divergence between the way the majority of asset managers voted and proxy advisers' recommendations on freedom of association and collective bargaining proposals. According to Majority Action's report, while Glass Lewis and ISS recommended supporting 100% and 86% of proposals in 2023, 14 of the 18 asset managers assessed voted in support of a lower percentage. BlackRock, Capital Group, Goldman Sachs, JPMorgan, T. Rowe Price and Vanguard supported 0% of freedom of association proposals.]
>
> [Sources: SOC Investment Group media release 02/02/2024; Maximus Notice of Meeting; Maximus Inc results of meeting 12/03/2024]

Disclosure and Reporting

SEC adopts long awaited (but scaled back) climate disclosure rule, Republican states file legal challenge

After a two year wait, the US Securities and Exchange Commission (SEC) has released its long-awaited and climate disclosure rule mandating disclosure of certain climate-related information by publicly listed companies in final form.

Some points to note

SEC's fact sheet sums up the key information required to be disclosed by publicly listed companies as follows:

> 'material climate-related risks; activities to mitigate or adapt to such risks; information about the registrant's board of directors' oversight of climate-related risks and management's role in managing material climate-related risks; and information on any climate-related targets or goals that are material to the registrant's business, results of operations, or financial condition'.

Safe harbour for forward looking climate disclosures

The Rule provides a 'safe harbour' for:

> 'climate-related disclosures pertaining to transition plans, scenario analysis, the use of an internal carbon price, and targets and goals, provided pursuant to Regulation S-K sections 229.1502(e), 229.1502(f),

229.1502(g), and 229.1504. The safe harbor **provides that all information required by the specified sections, except for historical facts, is considered a forward-looking statement for purposes of the Private Securities Litigation Reform Act** ("PSLRA") safe harbors for forward-looking statements provided in section 27A of the Securities Act84 and section 21E of the Exchange Act85 ("PSLRA safe harbors").'

Not intended to implement the ISSB standards

SEC makes clear that the final rule is not intended to/designed to implement the International Sustainability Standards Boards (ISSB) standards or the Taskforce on Climate-related Financial Disclosures (TCFD) recommendations (on which the ISSB standards are based).

On this point, SEC writes:

> 'While we acknowledge that there are similarities between the ISSB's climate-related disclosure standards and the final rules, and that registrants may operate or be listed in jurisdictions that will adopt or apply the ISSB standards in whole or in part, those jurisdictions have not yet integrated the ISSB standards into their climate-related disclosure rules. Accordingly, at this time **we decline to recognise the use of the ISSB standards as an alternative reporting regime**'. [emphasis added]

Less ambitious that the draft version

The final rule is less ambitious in scope than the draft version in several respects. Notably, the final version:

- Does **not** require all companies to report their Scope 1 and 2 emissions data - only large accelerated filers (LAFs) and accelerated filers (AFs) that are not otherwise exempted' are required to disclose their **material** (as determined by them) Scope 1 and 2 emissions, and this will be on a 'phased in' basis. SEC's fact sheet includes a table (p4) summarising the timeline for disclosure and assurance.
- Does **not** require companies to compile or report Scope 3 (value chain/supply chain) emissions.

Republican states have already mounted a legal challenge

The Attorney Generals of several Republican held states - West Virginia, Georgia, Alabama, Alaska, Indiana, New Hampshire, Oklahoma, South Carolina, and Wyoming, Virginia -– have filed a legal challenge seeking to have the rule struck down as 'unlawful'. The petition for review states:

> 'Petitioners will show that the final rule exceeds the agency's statutory authority and otherwise is arbitrary, capricious, an abuse of discretion, and not in accordance with law. Petitioners thus ask that this Court declare unlawful and vacate the Commission's final action'.

The SEC appears to have anticipated that the rule would face legal challenge. The final rule includes a section explaining why the SEC considers it has authority to make the rule (see p58 – 72).

That making the rule is in line with SEC's mandate was also a key theme running through SEC Chair Gary Gensler's statement announcing its adoption.

> 'Over the last 90 years, the SEC has updated, from time to time, the disclosure requirements underlying that basic bargain and, when necessary, provided guidance with respect to those disclosure requirements…These final rules build on past requirements by mandating material climate risk disclosures by public companies and in public offerings'.
>
> [Sources: SEC media release 06/03/2024; SEC fact sheet; Final Rule: The Enhancement and Standardization of Climate-Related Disclosures for Investors]

ESG

What are the key physical climate-related risks facing Australia? Government releases first National Climate Risk Assessment Report, opens consultation on key design elements of planned National Climate Adaption Plan

'First pass' National Climate Risk Assessment report released

As a first step towards developing a national climate adaption plan – an overarching national framework/roadmap for adapting to the most significant physical climate risks facing Australia - the government has released the first of two planned National Climate Risk Assessment reports.

The report is described as providing 'an evidence-based national picture of the emerging risks climate change poses to Australia's community, assets and services'.

The report identifies 56 nationally significant climate-related risks facing Australia and singles out eleven of these as 'priority risks' for further analysis in the second report (due for completion by the end of 2024). These eleven 'priority risks' are:

- 'Defence and national security Risks to domestic disaster response and recovery assistance from the competing need to respond to multiple natural hazard events as well as national security contingencies, resulting in concurrency pressures and overwhelming the Government's capacity to respond effectively
- Natural environment Risks to aquatic and terrestrial ecosystem condition and function or landscape function and collapse including through species loss and extinction

- **Cross-system – Communities and settlements** Risks to communities from legacy-and-future planning and decision-making that increases the vulnerability of settlements
- **Cross-system – Supply chains** Risks to supply and service chains from climate change impacts that disrupt goods, services, labour, capital and trade
- **Health and social support** Risks to health and wellbeing from slow onset and extreme climate impacts
- **Primary industries and food** Risks to primary industries that decrease productivity, quality and profitability and increase biosecurity pressures
- **Cross-system – Economy, trade and finance Risks to the real economy from acute and chronic climate change impacts, including from climate-related financial system shocks or volatility** [emphasis added]
- **Infrastructure and built environment** Risks to critical infrastructure that impact access to essential services
- **Regional and remote communities** Risks to regional, remote and First Nations communities that are supported by natural environments and ecosystem services
- **Cross System – Governance Risk** to adaptation from maladaptation and inaction from governance structures not fit to address changing climate risks
- **Cross-system – Water security Risks** to water security that underpin community resilience, natural environments, water-dependant industries and cultural heritage'

The above risks were prioritised for further analysis based on: a) 'severity of impact'; b) 'actionability as part of a national adaptation response'; c) 'clarity of scope for further analysis in the second pass assessment'; and d) achieving coverage across all systems.

The 'second pass' analysis is set to build on the first report by examining the complex risk and cross-system dependencies identified, to develop a:

> 'detailed picture of the risks we are facing now, and may face in 2050 and 2090 under different scenarios of global warming. The output of the second pass will be tailored to inform potential adaptation responses and will include datasets, visualisations and maps'.

Together the two reports (once completed) will help inform the planned national climate adaption plan.

Issues paper released

The government has also released an Issues Paper seeking feedback on key design elements of the (planned) national adaption plan.

Among other things, the paper puts forward the following suggested principles as a potential framework for 'prioritising adaptation actions'. It's suggested that preference should be given to actions that:

- 'are "no regrets' actions". These could be because they are addressing impacts expected with high likelihood in the next decade or have co-benefits (such as reducing emissions or reducing inequality)
- are the first part of an effective adaptation pathway. That is, they manage the impacts expected in the short term, but are deployed in a way that makes it easier to respond to greater risks in the future
- are key enabling actions for others, for example the provision of next generation regional climate projections, or guidance to support effective climate risk management
- drive action to strengthen adaptation across multiple sectors or regions
- promote consistency across the country, while allowing for local differences, including contexts and priorities
- assist groups who are disproportionately affected by climate impacts and ensure that adaptation addresses equity and human rights, such as gender-responsive adaptation, intergenerational equity and equity for people with a disability'.

The paper seeks feedback (among other things) on:

- Which areas within the eleven priority risks identified in the first pass' National Climate Risk Assessment report should be the Commonwealth's priority (in the planned National Climate Adaption Plan.
- The suggested principles for guiding prioritisation outlined above
- What policies could be strengthened or added as the highest priorities
- How adaption success should be measured
- What measurement and evaluative tools and processes should be implemented to track adaptation progress for each system
- What time horizon the National Adaption Plan should cover

The due date for submissions on the Issues Paper **11 April 2024**.

IGCC has welcomed the release of 'first pass' National Climate Risk Assessment report

In a statement, the Investor Group on Climate Change (IGCC) welcomed the release of the National Climate Risk Assessment Report and in particular, welcomed the inclusion in the eleven priority risks of climate-related risks to Australia's financial stability as a welcome first step. IGCC Managing Director, Policy Erwin Jackson commented:

> 'Investors have been asking for a national risk assessment for a decade. Without credible physical risk assessments and effective adaptation, the financial damage from climate change will be much higher, and there is risk of capital flight from Australia's many areas that are vulnerable to the physical impacts of climate change. This Assessment is an essential first step to ensure that a range of stakeholders, including governments and investors, have a shared understanding of physical climate risks and can work together on adaptation priorities…Governments have a role to play and so do business and investors across our entire economy. Investors look forward to building on this first pass assessment and working with the Australian Government on initiatives that can incentivise and remove barriers for private sector investment in adaptation across the economy.'

[Sources: Department of Climate Change, Energy, the Environment and Water Consultation: Climate adaptation in Australia - National Adaptation Plan Issues Paper 12/03/2024 – 11 April 2024; National Climate Risk Assessment first pass report; Assistant Minister for Climate Change and Energy Jenny McAllister media release 12/03/2024]

UK to push ahead with regulation of ESG ratings providers

- The UK Spring Budget 2024 statement confirms the UK government's intention to move forward with regulating ESG rating providers. Specifically, the budget paper states that:

  > 'The government will regulate providers of Environmental, Social and Governance (ESG) ratings to users within the UK. ESG ratings providers will be brought into the regulatory perimeter of the Financial Conduct Authority'

- **Timing?** HM Treasury consulted on 'a potential regulatory regime' for ESG rating providers between 30 March 2023 30 June 2023. HM Treasury has said it expects to release its consultation response and legislative timeline later in 2024.

The EU also looks set to regulate ESG ratings providers, Australia is considering the case for doing so

- On 14 February 2024, The Council and European Parliament announced that provisional agreement had been reached on a proposal for regulation of ESG rating activities. Under the new rules, ESG rating providers would need to be 'authorised and supervised by the European Securities and Markets Authority (ESMA) and comply with transparency requirements, in particular with regard to their methodology and sources of information'. The provisional agreement is subject to approval by the Council and the Parliament before going through the formal adoption procedure. Assuming this occurs, the regulation will start applying 18 months after its entry into force.
- At the end of 2023, the Australian government sought feedback on its sustainable finance strategy, including feedback on whether 'there is a case for regulating ESG ratings as financial services'.

[Source: HM Treasury media release Future regulatory regime for Environmental, Social, and Governance (ESG) ratings providers: update 06/03/2024; Spring Budget 2024]

Markets and Exchanges

ASIC fines ASX $1m+ following an investigation into its compliance with Market Integrity Rules

- The Australian Securities and Investments Commission (ASIC) has announced that ASX Limited has paid a $1,050,000 fine, after an ASIC investigation into its compliance with the Market Integrity Rules concluded that there were reasonable grounds to conclude that:

  'ASX breached the rule requiring pre-trade transparency on 8,417 occasions between 4 April 2019 and 22 December 2022'.

- More specifically, ASIC concluded that there were reasonable grounds to conclude that:

  'due to incorrect system configuration, the consideration for block trade exemptions was set to $0 instead of $200,000 for some Tier 3 equity products. As a result, 8,417 orders placed between 4 April 2019 and 22 December 2022 were not pre-trade transparent when they should have been. Further, 165 trades occurred in purported reliance on the exception between 11 July 2022 and 22 December 2022'.

- This marks the first time ASIC has issued an infringement notice to a market operator.
- Commenting on this, ASIC Chair Joe Longo said

  'Confidence in Australia's market operators is fundamental to fair and efficient markets. This action demonstrates that ASIC will hold market operators to the highest standards…ASIC considers ASX's conduct was serious. The incorrect system configuration went undetected until drawn to ASX's attention by a market participant. On at least two occasions before 22 December 2022, ASX could have, but did not, identify the issue'.

- Compliance with the infringement notice is not an admission of guilt or liability and by doing so, ASX is not taken to have contravened subsection 798H(1) of the Corporations Act 2001 (Cth)

  [Source: ASIC media release 07/03/2024]

Regulators

ACCC enforcement priorities: Competition, consumer and product safety issues in sustainability and the net zero transition to remain a priority for the regulator

The Australian Competition and Consumer Commission released its ten 2024-25 Compliance Enforcement Policy and Priorities on 7 March 2024.

Of these priorities, the following are unchanged from 2023-24:

- 'Consumer, product safety, fair trading and competition concerns in relation to environmental claims and sustainability'
- 'Unfair contract terms in consumer and small business contracts'.

In addition, the ACCC has identified a three new priorities for 2024-25:

- 'Competition and consumer issues in the aviation sector'
- 'Improving compliance by NDIS providers with their obligations under Australian Consumer Law'
- 'Competition, consumer, fair trading and pricing concerns in the supermarket sector, with a focus on food and groceries'

The remaining five 2024-25 priorities appear (broadly speaking) to represent a sharpening of the regulator's focus on certain conduct/particular products or services highlighted as compliance/enforcement focus areas in 2023-24. The table below provides a snapshot.

2024-25 PRIORITIES	2023-24 PRIORITIES
'Promoting competition in essential services with a focus on telecommunications, electricity, gas and financial services'.	These two 2024-25 priority appear to build on two priorities identified in 2023-24: ▪ 'Consumer and fair trading issues arising from the pricing and selling of essential services, with a focus on energy and telecommunications'. ▪ 'Competition and pricing issues in gas markets, including compliance with the price cap order and other legal obligations for wholesale gas markets'
'Misleading pricing and claims in relation to essential services, with a particular focus on energy and telecommunications'	
'Consumer and fair trading issues in the digital economy, with a focus on misleading or deceptive advertising within influencer marketing, online reviews, in-app purchases and price comparison websites'.	The 2024-25 priority appears to build on the 2023-24 priority: ▪ 'Consumer and fair trading issues relating to manipulative or deceptive advertising and marketing practices in the digital economy'
'Improving industry compliance with consumer guarantees, with a focus on consumer electronics, and also targeting misconduct by retailers in connection with delivery timeframes'.	The focus in 2024-25 appears to have shifted, though the focus on industry compliance with consumer guarantees remains. The 2023-24 priority was: ▪ Empowering consumers and improving industry compliance with consumer guarantees, with a focus on high value goods including motor vehicles and caravans
'Consumer product safety issues for young children, with a focus on the safety of nursery products including furniture, infant self-feeding and infant sleep products'.	The focus on consumer product safety issues for young children remains, with a sharper focus in 2024-25 on the safety of certain products, where in 2023-24 the regulator was less specific: ▪ 'Consumer product safety issues for young children, with a focus on compliance, enforcement and education initiatives'

Scam prevention now included as an enduring priority

The ACCC's 2023-24 priorities included scam detection/disruption as a priority. This is now included as an enduring priority for the regulator:

> 'The ACCC will continue to support the National Anti-Scam Centre in its mission to detect and disrupt the harm caused by scams'
>
> [Source: ACCC 2024-25 compliance and enforcement priorities 2024 07/03/2024]

Financial Services

Top Story | FAR implementation: Financial Accountability Regime (Minister Rules) 2024 published

Who is an 'accountable person' under the FAR and when will accountable entities meet the 'enhanced notification' threshold? Here's what's in the long-awaited Financial Accountability Regime (Minister Rules) 2024

Key Takeouts

- For context, the Financial Accountability Regime Bill 2023 and the Financial Accountability Regime (Consequential Amendments) Bill 2023 passed both Houses on 5 September 2023 and received Assent on 14 September 2023. The FAR which replaces and expands on the existing BEAR will apply to the banking sector from March 2024 and the insurance and superannuation sectors from March 2025. For more on the FAR read: FAR status update: FAR Bills now law
- Following consultation, the Financial Accountability Regime (Minister) Rules 2024 (Rules) have now been released in final form. Importantly, these Rules both: a) prescribe the responsibilities and positions 'which cause an individual to be an accountable person of an accountable entity' and b) prescribe when an accountable entity meets the 'enhanced notification threshold'.
- Separately, ASIC and APRA (which will jointly administer the FAR) have also now released:
  - Financial Accountability Regime Act (Information for register) Regulator Rules 2024 (Regulator rules) which 'prescribe information for inclusion in the FAR register of accountable persons'
  - Financial Accountability Regime (Consequential Amendments) Transitional Rules 2024 (Transitional rules) which 'prescribe information to be provided by authorised deposit-taking institutions (ADIs) in relation to their existing accountable persons under the BEAR at the transition point to the FAR'
- ASIC and APRA expect to jointly consult on the Regulator Rules for the FAR for the insurance and superannuation industries by the end of March 2024. also intend to consult with APRA on the Regulator rules for the FAR for the insurance and superannuation industries by the end of March 2024.

For more on the Regulator and Transitional Rules read: FAR transition | Regulators issue final Rules - Insight - MinterEllison

Who is an 'accountable person'? Responsibilities and positions in-scope of the FAR

Part 2 of the Rules prescribes the 'responsibilities and positions which cause a person to be an accountable person of an accountable entity' under the FAR.

Cross sector responsibilities and positions

Sections 5 and 6 of the Rules list a number of responsibilities and positions which apply across all regulated sectors – ie ADIs, general insurers, life insurers, private health insurers and RSE licensees - that are not foreign entities or NOHCs.

Under section 5(2), persons with **senior executive responsibility** for the following will be 'accountable persons':

- management or control of the business activities of the accountable entity and its significant related entities (if any);
- management or control of the accountable entity's financial resources or operations;
- management of the accountable entity's overall risk controls or overall risk management arrangements;
- management of the accountable entity's information management (including information technology systems);
- management of the accountable entity's: internal audit function; or compliance function; or human resource function; or dispute resolution function (whether internal or external, or both)
- management of the accountable entity's client or member remediation programs (including hardship arrangements);
- management of the accountable entity's breach reporting;

- management of the accountable entity's anti-money laundering function' if the accountable entity is a reporting entity for the purposes of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006.

The Explanatory Statement suggests that this means that the following positions may be in-scope: Chief Risk Officer, Chief Information or Technology Officer, and the Head of Human Resources.

Under Section 6(2) members of the board of directors (or equivalent) of the accountable entity are prescribed – ie each member of the accountable entity's board of directors would be an accountable person under the FAR.

'Carrying out the activity or function' is not enough

Importantly, the Rules state (s5(3)) that

> 'For the purposes of subsection (2), a person does not have senior executive responsibility for management of an activity or function merely because the person is carrying out the activity or function'.

The Explanatory Statement offers some further explanation around this:

> 'Subsection 5(3) clarifies that the prescribed responsibilities capture senior executive responsibility for management of an activity or function, distinct from a (typically lower level) responsibility for carrying out or executing the activity or function. This gives effect to the intent to capture senior executives who are responsible for development, maintenance and review (rather than execution) of a framework'.

This is also the case for the sector-specific positions/responsibilities prescribed in the Rules outlined briefly below.

Sector-specific positions/responsibilities

Sections 7-11 set out additional responsibilities (ie in addition to the cross-sector responsibilities set out in section 5) for each sector, for foreign accountable entities and for NOHCs.

Insurers (that are not foreign accountable entities/NOHCs): Under s7(2) of the Rules, accountable persons will include individuals that hold **senior executive responsibility** for management of either:

- actuarial function; and/or
- claims handling function.

RSE Licensees: Under s8 (d) of the Rules, accountable persons will include individuals that hold **senior executive responsibility** for management of any of the following:

- member administration operations;
- investment function;
- financial advice service;
- insurance offerings.

Prescribed responsibilities for accountable entities that are foreign accountable entities

Section 9(2) of the Rules prescribes the following four responsibilities which 'cause a person to be an accountable person of an accountable entity that is a foreign accountable entity for the purposes of paragraph 10(2)(b) of the Act'.

> '(2) Each of the following responsibilities, relating to a foreign accountable entity, are prescribed:
>
> (a) senior executive responsibility for conduct of the activities of a branch of the foreign accountable entity that is operating in Australia;
>
> (b) if the foreign accountable entity is a foreign ADI or a foreign general insurer—responsibility for overseeing the operation of a branch operating in Australia as a senior officer outside Australia with delegated authority from the board of directors (or equivalent) of the foreign accountable entity;
>
> (c) if the foreign accountable entity is an eligible foreign life insurance company—responsibility for oversight of the foreign accountable entity as a member of its Compliance Committee for the purposes of section 16ZF of the Life Insurance Act 1995;
>
> (d) if the foreign accountable entity is a foreign general insurer—responsibility as an agent in Australia for the purposes of section 118 of the Insurance Act 1973'.

Prescribed responsibilities/positions for accountable entities that are NOHCs

Section 11(1) provides that accountable persons of NOHCs of an ADI, general insurer of life insurer will be individuals that hold senior executive responsibility for any of the following:

- management or control of the business activities of the accountable entity and all significant related entities of the accountable entity;
- management or control of the accountable entity's financial resources;
- management of the accountable entity's overall risk controls or risk management arrangements; and
- management of the accountable entity's internal audit function.

The Explanatory Statement states that these prescribed responsibilities are intended to cover persons such as the accountable entity's Chief Executive Officer, Chief Financial Officer, Chief Risk Officer, and Head of Internal Audit.

Subsection 11(2) prescribes the position of a member of the accountable entity's board of directors (or equivalent). This means each member of an authorised or registered NOHC's board of directors would be an accountable person under the Act. The Explanatory Statement states that

> 'such a person is likely to have oversight of the accountable entity's activities and functions and is therefore appropriate to be an accountable person'.

Enhanced notification thresholds (for entities other than foreign accountable entities)

Part 3 of the Rules sets out the thresholds for determining when accountable entities (other than foreign accountable entities) meet the 'enhanced notification threshold'. This means that foreign accountable entities are not subject to enhanced notification, regardless of size.

For context, entities that meet the 'enhanced notification threshold' have additional disclosure obligations including requirements to provide an accountability statement for each accountable person and an accountability map to APRA/ASIC. Entities not subject to enhanced notification requirements are still required to undertake an accountability mapping exercise internally in order to meet other FAR obligations.

- **ADIs:** Section 13(2) of the Rules states that the accountable entity 'meets the threshold at a particular time during a financial year of the entity if the entity's total assets value, as reported in the entity's relevant final report, exceeds $20 billion'
- **General insurers:** Section 16(2) of the Rules states that the accountable entity 'meets the threshold at a particular time during a financial year of the entity if the entity's total assets value, as reported in the entity's most recent final report, exceeds $10 billion'.
- **Life insurers:** Section 19(2) of the Rules states that the accountable entity 'meets the threshold at a particular time during a financial year of the entity if the entity's total assets value, as reported in the entity's most recent final report, exceeds $10 billion'.
- **Private Health Insurers (PHIs):** Section 22(2) of the Rules states that the accountable entity 'meets the threshold at a particular time during a financial year of the entity if the entity's total assets value, as reported in the entity's most recent final report, exceeds $3 billion'.
- **RSE Licensees:** Section 25(2) of the Rules states that the accountable entities 'meets the threshold at a particular time during a financial year of the entity if the entity's total assets value, as reported in the entity's most recent final report, exceeds $30 billion'.

Related accountable entities in the same corporate group

Section 28 of the Rules provides that when one accountable entity in a corporate group meets the enhanced notification threshold, all other accountable entities in the group will also be taken to meet the enhanced notification threshold.

Timing

The Rules commence on 15 March 2024 when the FAR commences for ADIs.

[Sources: Financial Accountability Regime (Minister) Rules 2024 (Rules)]

Top Story | FAR transition | Regulators issue final Rules

ASIC and APRA have finalised new Rules setting out what information they need from ADIs about their Accountable Persons (APs) at the 'transition point' from the BEAR to the FAR - Financial Accountability Regime (Consequential Amendments) Transitional Rules 2024 (Transitional Rules) - and confirming the information to be included in the FAR register of accountable persons -Financial Accountability Regime Act (Information for register) Regulator Rules 2024 (Regulator rules). Here's what you need to know

Key Takeouts

- For context, the Financial Accountability Regime Bill 2023 and the Financial Accountability Regime (Consequential Amendments) Bill 2023 passed both Houses on 5 September 2023 and received Assent on 14 September 2023. The FAR which replaces and expands on the existing BEAR will apply to the banking sector from March 2024 and the insurance and superannuation sectors from March 2025. For more on the FAR read: FAR status update: FAR Bills now law - POST - MinterEllison
- Following consultation, the Financial Accountability Regime (Minister) Rules 2024 (Rules) have been released in final form. Importantly, these Rules both: a) prescribe the responsibilities and positions 'which cause an individual to be an accountable person of an accountable entity' and b) prescribe when an accountable entity meets the 'enhanced notification threshold'. For more read: FAR implementation | Financial Accountability Regime (Minister Rules) 2024 published - POST - MinterEllison
- ASIC and APRA (which will jointly administer the FAR) have now released:
  - Financial Accountability Regime Act (Information for register) Regulator Rules 2024 (Regulator rules) which 'prescribe information for inclusion in the FAR register of accountable persons which 'prescribe information for inclusion in the register of accountable persons under the FAR'
  - Financial Accountability Regime (Consequential Amendments) Transitional Rules 2024 (Transitional rules) which 'prescribe information to be provided by authorised deposit-taking institutions (ADIs) in relation to their existing accountable persons under the BEAR at the transition point to the FAR'
- ASIC and APRA expect to jointly consult on the Regulator rules for the FAR for the insurance and superannuation industries by the end of March 2024.

ADIs Transitioning from BEAR to FAR

What information do ADIs need to provide to ASIC and APRA about their FAR Accountable Persons?

The Financial Accountability Regime (Consequential Amendments) Transitional Rules 2024 prescribe the information that ADIs that are currently subject to the BEAR and which will become accountable entities under the FAR, need to provide to ASIC and APRA (the Regulators) about their FAR accountable persons (AP), as well as when and in what form the information needs to be provided.

Broadly, for each existing AP under the BEAR who will become an AP under the FAR and for APs that are not currently APs under the BEAR but will be APs under the FAR, ADIs will need to provide the following information:

- **Personal identification details**: Director identification number (if applicable) as well as direct phone number and email
- **Employment details**: start date of the position title, start date of employment with the employer
- **Reporting lines:** position title of the person the AP reports to and the date the AP started to report to that person
- **Responsibilities information**: details of each 'General or Prescribed Responsibility or Position that causes the person to be an accountable person'. Prescribed Responsibility means any one or more responsibilities set out in the relevant sections - ss 10(1)(b)(i); 10(1)(b)(ii) 10(2)(b), 10(3), 10(5)(a), 10(5)(b), 10(6)(b)(i) of the Act; or 10(6)(b)(ii) - of the Financial Accountability Regime Act 2023.
- **'ADI Key functions information':** ADIs will need to report what 'ADI Key Function/Functions' each AP has 'effective senior executive responsibility' for and when they assumed responsibility for each. These ADI Key Functions are:

  '(a) capital management;

  (b) collections and enforcement (default, debt collections, and recovery);

(c) conduct risk management;

(d) credit risk management;

(e) data management;

(f) financial and regulatory reporting;

(g) hardship processes;

(h) liquidity and funding management;

(i) market risk management;

(j) operational risk management;

(k) product design and distribution obligations;

(l) product origination;

(m) recovery and exit planning and resolution planning;

(n) scam management;

(o) technology management;

(p) training and monitoring of relevant representatives and staff; and

(q) whistleblower policy and process'.

On this, the explanatory statement makes clear that:

> 'The instrument does not require a relevant accountable entity to undertake each ADI Key Function or to assign each ADI Key Function to an accountable person.
>
> The concept of ADI Key Functions does not expand the definition or scope of responsibilities of accountable persons under the FAR Act…Relevant information in respect of ADI Key Functions should reflect actual practices. For example, one accountable person may not have the requisite level of responsibility for any applicable ADI Key Functions, while another accountable person may have the requisite level of responsibility for multiple applicable ADI Key Functions. Accountable entities can also assign an applicable ADI Key Function to more than one accountable person if those accountable persons have the requisite level of responsibility for different aspects of the ADI Key Function'.

Information to be included in the FAR Register of Accountable Persons

The Regulators are required to establish and keep a register of Accountable Persons under the FAR. The Financial Accountability Regime Act (Information for register) Regulator Rules 2024 (Regulator Rules) prescribes the information for inclusion in this register.

Broadly, the Register will include all of the information about APs outlined in the Transition Rules including 'ADI Key Functions' information. The explanatory statement comments that:

> 'The inclusion of information regarding ADI Key Functions in the register of accountable persons will assist the Regulators in assessing a relevant accountable entity's compliance with its obligation under paragraph 23(1)(a) [key personnel obligations] of the Act'.

The register will also include some additional information, for example changes to the information including details of:

> 'suspension (where the suspension is because the person has failed to comply with one or more of the person's accountability obligations under section 21 of the Act) start date and end date'.

Instruction guides for FAR reporting

The regulations state that ADIs will need to complete and submit the relevant electronic notification forms (in APRA Connect) for transitioning APs by 14 April 2024 (30 days after FAR commences for ADIs).

However, ASIC/APRA have issued a 'no action' letter confirming that they 'expect entities to submit their registration applications and to make relevant notifications to us as promptly as possible, and by no later than 30 June 2024'.

APRA has made instruction guides for APRA Connect FAR reporting available here: APRA Connect FAR reporting forms – instruction guides | APRA

[Sources: Financial Accountability Regime Act (Information for register) Regulator Rules 2024; Financial Accountability Regime Act (Information for register) Regulator Rules 2024; ASIC/APRA joint media release 08/03/2024; ADI Key Functions Descriptions]

Top Story | Tightening BNPL regulation | Government consults on draft legislation proposing to regulate BNPL as credit

A draft Bill and accompanying draft Regulations proposing to bring buy now, pay later (BNPL) products and other low cost credit contracts (LCCCs) within the scope of the Credit Act and Credit Code have been released for consultation.

Key Takeouts

- Following consultation (summarised) the government confirmed plans to progress the second of the three potential options put forward to tighten BNPL regulation (read: Tightening BNPL regulation: BNPL products to be regulated as credit products - POST - MinterEllison)
- On 12 March 2024, a draft Bill – [Exposure Draft] Treasury Laws Amendment Bill 2024: Buy now, pay later – together with draft regulations – [Exposure Draft] National Consumer Credit Protection Amendment (Low Cost Credit) Regulations 2024 – were released for consultation. The due date for submissions is **9 April 2024**.

What's in the draft Bill?

Regulating 'Low Cost Credit Contracts' (LCCCs) as credit contracts

The objective of the proposed reforms is to bring 'low cost credit contracts' (LCCCs) – which for now would only include Buy Now, Pay Later (BNPL) contracts, but with scope for other products to be added at a future date - into the scope of the National Consumer Credit Protection Act 2009 (Cth) (Credit Act) and the National Credit Code as set out in Schedule 1 to the Credit Act (Credit Code).

For context, section 13C of the draft Bill defines a LCCC as follows:

> '13C Meaning of low cost credit contract
>
> (1) A contract is a low cost credit contract if:
>
> (a) credit is, or may be, provided under the contract; and
>
> (b) the contract is:
>
> (i) a buy now pay later contract; or
>
> (ii) a contract prescribed by the regulations for the purposes of this subparagraph; and
>
> (c) the period during which credit is, or may be, provided under the contract is no longer than the period (if any) prescribed by the regulations for the purposes of this paragraph; and
>
> (d) the contract satisfies any requirements prescribed by the regulations for the purposes of this paragraph that relate to fees or charges that are, or may be, payable under the contract; and
>
> (e) the contract satisfies any other requirements prescribed by the regulations for the purposes of this paragraph'. [emphasis added]

The draft Explanatory Memorandum observes that though this definition is only proposed to apply to BNPL contracts at this time, the drafting enables 'other classes of LCCC' to (potentially) be covered in the future (such as wage advances)'.

BNPL products will be an arrangement, or a series of arrangements, under which:

> '(a) a person (merchant) supplies goods or services to a retail client;
>
> (b) a third person (BNPL provider) pays the merchant for the services; and
>
> (c) there is a contract between the BNPL provider and the retail client for the BNPL provider to provide credit to the retail client in connection with the supply of the services'.

Proposed new obligations for BNPL providers

Broadly, it's proposed that LCCC providers (including BNPL providers) would:

Need to hold an Australian credit licence and comply with the relevant licensing requirements and licensee obligations, including obligations relating to internal and external dispute resolution, hardship, compensation arrangements and marketing.

Be subject to a 'modified version' of the existing Responsible Lending Obligations (RLOs). LCCC providers would be exempt from the requirement to undertake a preliminary assessment of unsuitability. An unsuitability assessment will still be required before the LCCC is entered into, but it's proposed that LCCC providers would have the option to conduct a modified form of the inquiries required to undertake an unsuitability assessment. 'LCCC providers [who take up this option will need to] take appropriate and proportionate steps to assess the suitability of lending' to the consumer before entering into a credit contract with a consumer or increasing a consumer's credit limit. The Government however acknowledges that this alternative may in some cases not reduce what is reasonably required ' for example, a provider was targeting a particularly risky target market or had poor product design.' (1.33, draft Explanatory Memorandum)

LCCC providers would also be required to have in place and review a written policy (unsuitability assessment policy) setting out how they assess whether a contract is unsuitable.

The steps that LCCC providers are proposed to be required to take are included in the draft Regulations.

It's also proposed that LCCC providers would have the option to comply instead with the existing RLOs in Divisions 1 to 4 of Part 3-2 of the Credit Act. The draft Explanatory Memorandum explains that this is to

> 'allow firms offering both LCCCs and currently regulated consumer credit products to use common responsible lending processes if they wish'.

Interest rates and charges: LCCC providers that charge interest on the provision of credit would also need to comply with mandatory disclosure obligations concerning interest rates and charges in section 17 of the Credit Code. The comparison-rate requirements in Part 10 of the Credit Code are not proposed to apply to LCCCs. On this, the draft Explanatory Memorandum comments:

> 'Given that a relatively small portion of Buy Now, Pay Later LCCC fees are charges to consumers (as opposed to merchants), comparison rates may be more likely to mislead consumers rather than assist them'.

It's also proposed that LCCC providers would be permitted to prompt consumers to increase their credit limit.

Proposed timing

The changes are proposed to commence on the earlier of 'a single day to be fixed by Proclamation' or six months after the Bill receives Assent.

> [Source: Treasury Consultation: Buy Now Pay Later regulatory reforms 2 March 2024 - 09 April 2024]

Greater transparency for the financial services sector on planned regulatory initiatives | Treasurer flags plans to publish a UK-style 'regulatory initiatives grid'

The government has announced that Australia will follow the UK in introducing a 'financial sector regulatory initiatives grid' (grid).

> [Note: The Treasurer has said that the planned grid will be modelled on a similar initiative in the UK. You can find the latest iteration of the UK grid here]

The (planned) grid is described by the Treasurer as:

> 'a rolling, 24-month forward program of regulatory initiatives that will materially affect the financial sector, including banking, credit, insurance, superannuation, investment, payments, and capital market entities, updated twice a year'.

Planned scope: The grid (to be established and administered by Treasury) is planned to include timelines for proposed legislation, rule, and regulation and standard making consultation processes, as well as data collection processes. It is also planned to include initiatives by financial services regulators/agencies (ie Australian Securities and Investments Commission (ASIC), the Australian Prudential Regulatory Agency (APRA), the Australian Competition and Consumer Commission (ACCC), the Reserve Bank of Australia (RBA), and the Australian Taxation Office (ATO)).

Rationale: The initiative is expected to deliver a range of benefits including:

- enabling financial sector businesses 'to allocate their resources more efficiently when implementing regulation – reducing compliance burden and costs'
- helping financial services businesses to 'engage with the government and regulators more effectively'
- enabling regulators to 'avoid duplication, build shared strategic priorities, and focus on how to best implement reforms'.

Writing in The AFR, the Treasurer also points the potential for productivity gains.

Timing: No details around when the grid may be implemented have been provided. The Treasurer's statement flags that Treasury will 'continue to engage with financial sector stakeholders in the development of the grid'.

Initial response

The Australian Banking Association (ABA) has welcomed the plan. ABA CEO Anna Bligh commented:

> 'We've seen a similar initiative in the UK deliver productivity gains and more innovation, and now the same will be able to be achieved here in Australia. Better coordination of regulation will provide more certainty for banks and ensure the sector continues to deliver for customers and the economy. The industry has been calling for a regulatory roadmap for some time and we welcome the Federal Government's recognition of a pathway forward. Being able to better navigate regulatory reform will allow banks to reduce compliance costs and invest more in areas such as innovation and new technology. The introduction of this grid will also be good for competition within the industry, with mid-tier banks having better visibility of regulatory change, enabling them to better plan and allocate resources more effectively.'
>
> [Sources: Joint media release: Treasurer Jim Chalmers and Assistant Treasurer and Minister for Financial Services Stephen Jones media release 11/03/2024]

Fast-tracking regulatory approvals, providing transparency to the financial services sector on regulatory changes, removing 'nuisance tariffs' and merger reform are key to boosting productivity says Treasurer

In his 11 March 2024 address to the AFR Summit Treasurer Jim Chalmers spoke about four government initiatives intended to 'help boost productivity, minimise compliance costs and improve the investment environment'.

Briefly, these are:

- **The planned abolition of (approx) 500 'nuisance tariffs'** on a range of imported goods including household necessities from 1 July 2024. The Treasurer said that the planned measure is expected to:

  > 'save businesses over $30 million in compliance costs each year, or over $120 million over the next four years. It will simplify the system, reduce costs, improve supply chain resilience, and make it easier and cheaper for businesses'.
  >
  > [Note: Treasury is seeking views on the 'nuisance tariffs' selected for removal. See: Treasury consultation - Tariff reform: removal of nuisance tariffs 11 March 2024 – 01/04/2024. The Treasurer said in this speech that the final list is hoped to be released in upcoming Federal Budget.]

- **Fast track the regulatory approvals process** through streamlining the Environmental Protection and Biodiversity Conservation process and making changes to the Petroleum Resource Rent Tax. The Treasurer said that the planned changes are intended to enable faster decision making eg in the context of offshore gas projects approvals. Mr Chalmers added that the government also plans to clarify consultation requirements for offshore oil and gas storage regulatory approvals, and 'provide better upfront guidance on when approvals are required so proponents know if their project needs to go through the process'.
- **Providing 'direction and certainty in the financial sector' through publication of a Regulatory Initiatives Grid** (modelled on the UK version).

  > [Note: This is covered in a separate post in this issue of Governance News]

- **Merger reform**: The Treasurer confirmed the government's intention to push ahead with merger reform. Mr Chalmers said that the government wants to streamline legal pathways to a merger, observing that 'the current merger system is too slow and that these delays are costly for business, as they wait for formal authorisation which can hold up transactions' and that this is 'harming productivity growth'. The Treasurer noted that the Treasury Competition Taskforce has concluded consultation on options for merger reform (read: Starter gun fired on merger

reforms in Australia - Insight - MinterEllison) adding that the government is 'looking forward to working through that and concluding a position and announcing it as soon as I can'.

[Source: Treasurer speech: Address to the Australian Financial Review Business Summit, 11/03/2024]

Consultation on standard definitions and standard cover for insurance launched

Treasury has released a consultation paper seeking feedback on potential natural hazard terms for standardisation and potential options to reform the existing standard cover regime. Here's our brief summary of the main points.

Potential natural hazard terms for standardisation

- The consultation paper proposes that the terms 'Fire'; 'Storm'; and 'Stormwater and rainwater run-off' should be prioritised for standardisation. Feedback is sought (among other things) on whether stakeholders agree that these terms should be prioritised and whether there are any exclusions that should apply.
- The consultation paper suggests that the terms 'storm surge', 'earthquake' and 'actions of the sea' are not currently a priority for standardisation.
- The consultation paper observes that the Insurance Council of Australia is progressing work (separate to Treasury's work) on standardising the term 'wear and tear'.

Potential options to reform the existing standard cover regime

The consultation paper puts forward the following three options for the potential reform of the 'standard cover regime' noting that stakeholder feedback suggests the regime is 'effectively redundant in its current form'.

- Option 1: Repeal the existing standard cover regime in its entirety on the basis that it is not fit for purpose
- Option 2: Retain and amend the standard cover regime for home building insurance only. Broadly, it's proposed that a baseline level of cover for home building insurance would be mandated for insurers offering this form of cover. The consultation paper states that this change would 'mean consumers could compare policies primarily on price as the basic features would be the same across all policies'. Further, to ensure that the 'baseline product' is affordable across Australia, it's suggested that the government 'may mandate that insurers offer flood coverage on an opt out basis as part of the base product. Alternatively, the opt out could be broader and exclude all natural water-related damage'. To be clear, under this option, the standard cover regime would no longer apply to the other four areas of general insurance currently covered (ie motor vehicle, personal accident, consumer credit and travel).
- Option 3: Retain and amend the standard cover regime to mandate that insurers implement a 'vertically differentiated rating system' for home building insurance only (as with option 2 above, this option would only apply to home building insurance – the existing standard cover regime would be repealed for motor vehicle, personal accident, consumer credit and travel). Under this option, insurers would be required to:

  'classify their home building insurance cover into different tiers, with each tier configured to provide a predetermined minimum level of cover. An example of vertical differentiation that currently exists in Australia is the 'gold, silver, bronze and basic' tiers that were introduced to private health insurance in 2019'.

Among other things, the consultation paper seeks feedback on whether the standard cover regie should be retained for insurance products other than home insurance, which of the three potential options for reform is the preferred option and whether there are any additional reform options to amend standard cover not listed that should be considered.

Timing: The due date for submissions is 4 April 2024

[Source: Treasury Consultation: Standard definitions and standard cover for insurance 07 March 2024 - 04 April 2024]

Annual super performance test: Consultation paper seeks feedback on potential options for reform

The government has released a consultation paper, seeking stakeholder feedback on potential design options to improve the 'sophistication' of the annual superannuation performance test 'in the longer-term'.

Why are changes to the test being considered?

The Consultation Paper notes that stakeholders raised concerns about the operation/impact of the test in Treasury's 2022 Review of the Your Future, Your Super reforms (YFYS Review). More particularly, the consultation notes that stakeholders

> 'raised concerns that the current test is a blunt tool that is leading to unintended consequences that affect the investment decisions of all funds (not just underperformers) and can potentially reduce long-term returns for members'.

The table at p7-8 of the Consultation Paper provides a summary of the specifics of these stakeholder concerns.

While some action has already been implemented by the government to address some of the concerns raised, which the Consultation Paper opines 'could feasibly be implemented in time for the 2023', the consultation paper observes that the changes 'will not address all the identified potential unintended consequences' identified.

Potential options for future reform

The paper includes four potential options for reform (though the consultation paper makes clear that the government 'is open to alternative proposals from stakeholders').

Briefly, the four broad design options are summed up in the consultation paper as follows.

- 'Status quo – retain the current testing framework but improve it.
- Alternative single-metric – consideration of a different single-metric framework that would better assess performance. This paper includes three specific examples which are the Sharpe ratio, a peer comparison, and a simple-reference portfolio frontier.
- Multi-metric framework – consideration of a multiple metric framework that provides a more fulsome assessment of performance. This option includes two specific examples which are a framework that aligns with the APRA heatmaps, and a targeted three-metric test.
- Alternative framework – an opportunity for stakeholders to put forward an option they see as most fitting to improve the operation of the performance test'.

The due date for submissions is 19 April 2024.

> [Source: Consultation: Annual Superannuation Performance Test – design options 08 March 2024 - 19 April 2024]

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