

D&O Download

An overview of key developments in Australia impacting
directors, officers and their insurers

April 2022

Developments involving regulators

Class actions

Litigation funding

Cyber

Climate change litigation

ESG





Regulatory

- Last month we reported ASIC had signalled a focus on protection of consumers in connection with cryptocurrency. The Australian Prudential Regulatory Authority has now publicly advised it will not introduce new regulations concerning operational risks associated with cryptocurrency products. It has, however, warned banks, super funds and insurers of the need to understand and respond to the risks arising from cryptocurrency products. APRA has foreshadowed it will write setting out its views on management of and dealings with digital assets including stablecoins and crypto assets. APRA acknowledges “significant uncertainty” surrounds crypto, including how it is taxed and valued.
- ASIC has released its first Quarterly Update for 2022 (accessible [here](#)). The report outlines ASIC’s enforcement activity to March 2022, including the recent resolution of its case against Rio Tinto (reported in D&O Download March 2022), ongoing litigation regarding “fees for no service” and prosecuting on poor financial product advice.
- ASIC recently reported on its review of governance within “Responsible Entities”. This review considered a number of issues including Board composition, Board tenure and the interplay between the Board and Committees. ASIC’s ongoing review of governance practices emphasises the importance of directors taking reasonable steps to understand and respond to financial and non-financial risks.
- The Chair of the Australian Competition and Consumer Commission recently announced (accessible [here](#)) ACCC’s enforcement and compliance policies for the 2022-2023 financial year, including a real focus on greenwashing. ACCC is concerned by misleading and deceptive conduct where businesses falsely promote environmental or green credentials, or misrepresentations about carbon neutral targets or policies.



Class actions

- Two competing class actions against A2 Milk have come together, with two plaintiff class action law firms agreeing to consolidate their respective actions. The class actions arise from financial reporting and profit downgrades between August 2020 and May 2021 (notably during the period Australian businesses were adjusting to life with COVID-19).
- Judges continue to apply close scrutiny to settlements of class actions, with the latest examples involving:
 - the appointment of a contradictor in relation to proposed legal costs and litigation funding fee (class action against 7-Eleven);
 - the appointment of a referee to examine legal costs and particular issues identified by the presiding Judge, such as whether the solicitor gave adequate disclosure on costs and whether sufficient monitoring of legal costs was undertaken during the conduct of the proceedings (class action against Colonial First State).
- A new class action has been filed against Star Entertainment Group, following a recent public enquiry as to whether it is fit to hold a casino licence in New South Wales. The class action involves the alleged failure on the part of SEG to comply with its continuous disclosure obligations and alleged misleading and deceptive conduct. The proceedings arise in the context of alleged misconduct involving corruption, money laundering and bribery.
- The Full Court decision in Worley (addressed in D&O Download March 2022) is proposed to be under appeal, with the company filing an application seeking leave to appeal to the High Court of Australia.



Funding

- The Supreme Court of Victoria has made a further “group costs order” (the second successful application) allowing legal fees to be charged on a contingency fee basis - capped at 40%. The application was made in a class action against KPMG and former directors of Arrium. The Court took into account (in addition to factors identified by the Court in previous applications):
 - the risks associated with the action, considered to be a complex case;
 - the risk the existing litigation funder would not continue to fund the litigation, or that a rate of less than 40% would create a risk the litigation funder would not participate in a costs sharing arrangement with the plaintiff class action law firm.

The approved 40% fee will reportedly be shared between the plaintiff class action law firm and a litigation funder pursuant to a costs sharing arrangement.



Cyber

- The AICD's latest Director Sentiment Index (accessible [here](#)) reports cyber-crime and data security is *"the number one issue keeping [directors] awake at night"*.
- The Insurance Council of Australia has published its paper on cyber insurance (accessible [here](#)), including recommendations for a sustainable, effective and more targeted cyber insurance mark. It concluded:
 - cyber insurance awareness is relatively low within the Australian market;
 - take-up rates of cyber insurance remain low;
 - there is more work to be done by industry and Government to share cyber incident data;
 - one area of uncertainty is silent cyber, with regulators now encouraging insurers to review cyber exposures and products; and
 - ransomware is a growing security threat, yet there is more work to be done to incentivise cyber victims to disclose ransomware events and cooperate with law enforcement.
- In a sign that ASIC is delivering on its promise to act on crypto-based risks, ASIC has commenced action against Helio Lending (which offers cryptocurrency-backed loans to consumers) for allegedly lending without the correct regulatory licencing arrangements in place and falsely claiming it held the relevant licence.



ESG – Social (including discrimination and diversity)

- The AICD's latest Director Sentiment Index (accessible [here](#)) reports 58 per cent of directors do not think the current level of diversity on Australian boards is satisfactory.
- The AICD has released its report "Gender Diversity Progress Report" (accessible [here](#)), confirming:
 - there is no shortage of talented and experienced women;
 - gender parity on boards remains the goal, but progress remains slow; and
 - women accounted for more than half ASX 200 non-executive director appointments in the 12 months to November 2021.
- Proceedings have been commenced by a female sales trader employed by an Australian bank, alleging underpayment, racial discrimination and sexual discrimination in litigation surrounding a toxic 'boys club' culture



ESG – Environmental

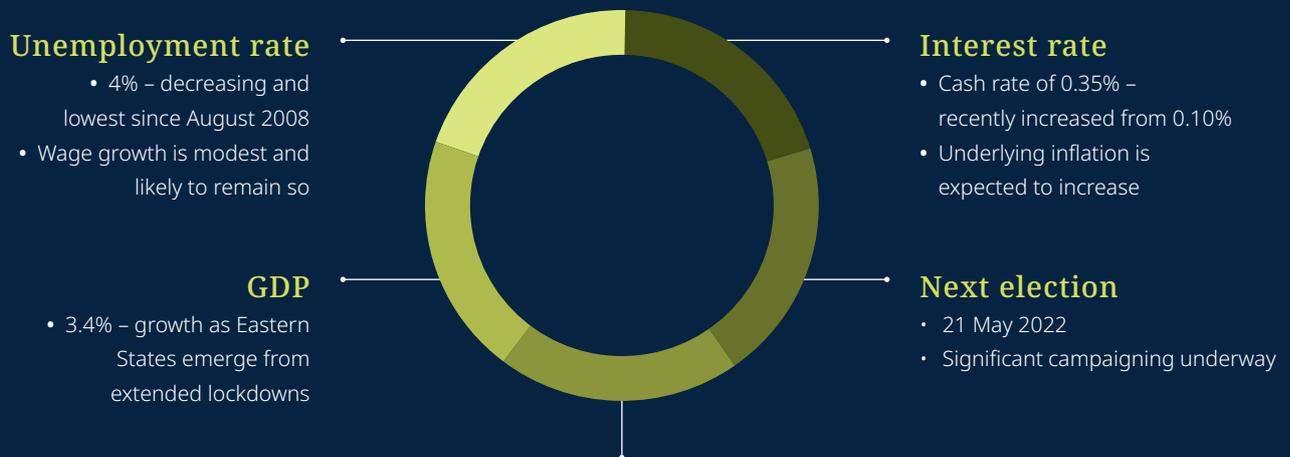
- Recent statements by ASIC (see [here](#)) reveal it continues to actively monitor developments in Australia and Internationally with respect to climate-related disclosure. Pleasingly, ASIC's observation is that more companies are producing more detailed climate-related disclosures in response to market expectations and growing awareness of these issues. ASIC confirms it is continuing to undertake surveillance work on disclosure and governance.
- International Sustainability Board released an exposure draft for disclosure of sustainability related information and climate related disclosures. The time frame for submissions on the draft closes on 29 July 2022. Consideration is being given to their potential application in Australia with the AICD currently consulting on their potential impact.



Climate change litigation

- The Full Court's recent decision in Minister for the Environment v Sharma [2022] FCAFC 35 will go unchallenged, with the Applicant (Ms Sharma) confirming there will be no attempt to appeal to the High Court of Australia.
- Queensland's Land and Environment Court has heard arguments in a challenge to the Galilee Coal Project by Youth Verdict Ltd (for First Nations people) and Bimblebox Alliance (for rural landowners). It is alleged a proposed thermal coalmine would contribute to global climate change, limit the cultural rights of First Nations people and contravene the Human Rights Act (Qld). The litigation is part-heard.
- A number of cases are still before the Court and yet to be determined, including:
 - O'Connell v Commonwealth of Australia – alleged failure to disclose climate-change related risks in connection with exchange-traded Australian Government Bond (yet to be listed for hearing);
 - Kabai & Anor v Commonwealth of Australia – alleged failure by the Commonwealth to take steps to prevent the impacts of climate change, which adversely impact Torres Strait Islanders (listed for hearing from 6 June 2023); and
 - Australasian Centre for Corporate Responsibility v Santos Limited – alleged greenwashing in connection with statements made about Santos' natural gas product and net zero emissions target.

Snapshot of political and economic conditions



AICD Survey – director sentiment index

- Over half of directors surveyed still believe Australia's economic health is strong and will remain strong in 12 months' time
- One in two directors feel national business conditions are strong and will stay strong in the coming 12 months
- The issues in the upcoming Commonwealth election of greatest concern to the majority of directors is the economy and economic management
- Chronic staff shortages remain, with the demand for and cost of labour expected to rise over the next 12 months

Watch this space – developments on the horizon

- Litigation continues to arise from employers mandating vaccinations in response to COVID-19. Telstra is the sole defendant in a class action filed in March 2022 by a former employee, arising from Telstra's requirement that all employees receive the COVID-19 vaccination by November 2021. The Fair Work Commission is to consider if this is a "lawful and reasonable" directive.
- The Full Court of the Federal Court of Australia has been invited to revisit the common practice of the Australian Courts to first consider disqualification of directors before considering whether a pecuniary penalty is payable for contravention of pecuniary penalty provisions of the Corporations Act 2001 (Cth).
- ASIC's first cyber case, against RI Advice, was recently settled (shortly prior to the hearing). The Court found RI Advice contravened section 912A Corporations Act 2001 (Cth) in failing to ensure it had adequate cybersecurity measures in place and then adequately implemented. Section 912A requires a financial service provider to act efficiently, honestly and fairly. Our detailed review of this important decision will follow in D&O Download May 2022 edition.
- The Commonwealth Government has announced a review of the Modern Slavery Act 2018 (Cth), to be complete by 31 March 2023. This review will involve the assessment of the effectiveness of the Act, whether there is effective compliance with the current provisions and whether any further measures are required.

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Our Values



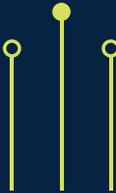
Be Supportive

We care about others, value diversity and act thoughtfully.



Be Collaborative

We give, we share and we join in.



Be Bold

We stand tall and challenge ourselves to think big.



Be Exceptional

We exceed standards and expectations.

