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

May and June 2022

Recent cases

Climate change litigation

Regulatory

Class actions

Funding

Cyber

ESG





Recent cases

- ASIC has commenced a new prosecution against Australian Mines Limited and its director for (1) alleged failure to comply with continuous disclosure laws; and (2) as against the director, alleged failure to discharge duties with the requisite standard of care and diligence. The litigation relates to an announcement the company made in February 2018 and statements made by the director at international conferences during April and May 2018 (ie, more than 4 years ago).
- Getswift, its former CEO and its former MD have discontinued their appeal of findings made by the Federal Court of Australia earlier this year that (1) the company failed to comply with its continuous disclosure obligations and engaged in misleading and deceptive conduct; and (2) the former CEO and MDs were involved in the contravening conduct. The litigation will now proceed to a separate hearing on penalty and other relief.



Regulatory

- ASIC continues to prosecute and ban directors for a range of wrongful acts, including illegal phoenix activity and permitting companies to trade while insolvent.
- At a recent Governance Institute of Australia event, ASIC's Commissioner reinforced ASIC's commitment to tackle greenwashing.
- APRA has issued a directive to a superannuation fund regarding amendment of its constitution to permit the appointment of a further independent director, following APRA's review revealed skills gaps and deficiencies within the Board. APRA's media release can be accessed [here](#).
- ASIC has issued a release ahead of the 30 June 2022 end of financial year, calling on directors, those responsible for preparation of financial reports and auditors to ensure they properly consider changing market conditions and uncertainties, amongst other things. The release can be accessed [here](#).



Climate change litigation

- First greenwashing case: the landmark case filed against Santos Limited for alleged greenwashing is continuing through the interlocutory processes, with discovery recently completed and now orders made for the amendment of pleadings and service of the applicant's evidence in chief later this year.
- Second greenwashing case: an Australian business has been sued in the United States of America over claims its sunscreen products are "reef friendly". It is alleged the company has greenwashed and in truth its products include harmful ingredients which potentially endanger coral reefs and marine life.
- Woodside Energy is the target of a new proceeding brought by The Australian Conservation Foundation, which is seeking to prevent a gas project in Western Australia from progressing until its climate impacts are assessed. There are alleged to be grave concerns the proposed project would pose a serious risk to marine life and generate enormous greenhouse gas emissions.
- First Nations peoples from the Tiwi Islands in the Northern Territory commenced proceedings against Santos Limited on 3 June 2022, alleging they were not properly consulted in relation to proposed offshore drilling operations which are said to pose risks to the marine environment, dreaming story tracks and animals. They are supported by the Environmental Defenders Office in the litigation.



Class actions

- A new securities (shareholder) class action has been commenced against Virgin Australia, the Chair of its Board and its former CEO. The litigation arises from Virgin's 2019 prospectus involving a AUD325 million capital raising through unsecured notes issued to Australian investors. It is alleged Virgin failed to disclose its true financial position in that prospectus. The litigation is funded by Balance Legal Capital. (Matheson Property Group Pty Ltd v Virgin Australia Holdings Limited)
- A novel dispute has arisen as to the forum for the hearing of multiple class actions brought by investors in Arrium Limited. The contest of forum between proceedings in the Supreme Court of NSW and Supreme Court of Victoria is proposed to be heard by the High Court of Australia. What is presently unclear is the extent to which, if at all, a Group Costs Order made by the Supreme Court of Victoria impacts the decision on forum.
- Competing class actions continue to occupy Court time, with a recent example involving a contest of two class actions against Beach Energy. In an Australian first, the competing classes both involve proposed Group Costs Orders under the *Supreme Court Act 1986* (Vic) at up to 24.5%. Another recent example is the consolidation of two class actions filed against A2 Milk. The plaintiff class action law firms have agreed a protocol to work together and allocate work streams to avoid duplication of costs. This is now a well-established approach.
- The Courts continue to apply close scrutiny to settlements of class actions, with a recent example involving a proposed settlement in *Zantran Pty Ltd v Crown Resorts Limited*. The Judge overseeing approval of the settlement:
 - rejected criticism of the plaintiff class action law firm by a Court-appointed cost referee, finding the proper question is whether costs were reasonable and not whether some costs could have been performed more cheaply; and
 - made a funding equalisation order, rather than the common fund order of 25% proposed by the class plaintiff and defendants, thereby reducing the return to the litigation funder and increasing the return to the class.
- Settlement of a class action against Colonial First State (commenced following the Hayne Royal Commission) has been approved, with the Judge requesting a report be submitted to the Court about the *outcome* of the settlement distribution. There is no legislative requirement for this to occur, but it appears the Court wishes to have greater transparency around actual figures for the funder's commission, payment to the class plaintiff, the settlement administrator's costs and the net figure disbursed to class members.
- Settlement of a class action against 7-Eleven is under consideration, with the Federal Court making an order for an interim payment to the funder pending the Court's consideration of a proposed common fund order and legal costs.



Funding

- The second Group Costs Order has now been made under the *Supreme Court Act 1986* (Vic), with the Court permitting a contingency fee of up to 40%. Our note on the applications determined to date can be found [here](#).
- In a positive step for litigation funders, the Full Court of the Federal Court has found funded class actions (involving a litigation funding scheme) are not managed investments schemes and are therefore not subject to the regulatory framework for MIS under the *Corporations Act 2001* (Cth). While many believed the MIS regime was ill-suited to litigation funding, the Full Court has concluded many provisions of the MIS regime simply cannot be applied to litigation funding schemes. In practical terms, this means litigation funding schemes no longer need to be registered as a MIS, removing a layer of regulation introduced by the former Morrison Government. However, this development is likely to enliven debate about the nature and extent of regulation for litigation funding going forward, including whether litigation funders should still be required to hold a licence.



Cyber

- A first-of-kind prosecution by ASIC in connection with alleged failures to implement adequate cyber-security measures has been settled shortly prior to trial. The decision reinforces businesses must effectively implement frameworks, policies and processes to identify cyber-related risks and keep them under active review. It is equally important that businesses respond to deficiencies in cyber risk management systems promptly.

ASIC succeeded in establishing the defendant company, RI Advice Group, acted in contravention of section 912A of the *Corporations Act 2001* (Cth). This provision requires companies providing financial services to do so efficiently and fairly and to have adequate risk management systems in place. This outcome confirms cyber-related exposures can arise under existing legislative frameworks.

The settlement included terms requiring the defendant company to pay ASIC's costs fixed at AUD750,000 and to engage a cyber-security expert to identify any further measures necessary to adequately manage risk. While ASIC did not seek a pecuniary penalty on this occasion, it has signalled it will do so in future matters.

In its statement following the litigation, ASIC encouraged businesses to *"follow the advice of the Australian Cyber Security Centre and adopt an enhanced cybersecurity position to improve cyber resilience in light of the heightened cyber-threat environment."* ASIC's full statement can be accessed [here](#).

- Proofpoint Inc reports a majority of Chief Information Security Officers in Australia surveyed believe their organisation is unprepared to detect, deter and recover from a cyber attack. A summary of the full report can be found [here](#).
- In an article published mid-month, ASIC has reiterated regulated entities need to *"re-assess their cyber risks and ensure their detection, mitigation and response measures adequately address their risk appetite"*. ASIC also signalled it may consider enforcement action to drive changes in behaviour. The full article can be accessed [here](#).
- At a recent business law conference, ASIC's Chair reinforced *"ASIC is focused on driving good cyber risk and operational resilience practices. We expect our regulated population to actively manage cyber risk as a key part of their legal and compliance obligations."* The full speech can be accessed [here](#).
- A law firm based in Sydney is currently investigating a potential class action in connection with a security breach which exposed personal, health and other sensitive data of customers of the National Disability Insurance Scheme (NDIS).



ESG

- ASIC has released an information paper on greenwashing, targeting superannuation and managed funds (but of broader relevance to companies and investors alike). The information paper (accessible [here](#)) provides a guiding framework for the target audience to use when promoting sustainability-related products. ASIC defines "greenwashing" to be *"the practice of misrepresenting the extent to which a financial product or investment strategy is environmentally friendly, sustainable or ethical"*.
- At a recent business law conference, ASIC's Chair stated, *"We want to see continued improvement in climate change governance and disclosure practices; and in particular, that climate-related disclosures by listed companies comply with the law and are decision-useful for investors"*. The full speech can be accessed [here](#).
- ASIC Commissioner, Sean Hughes, has been quoted stating *"ASIC is continuing to monitor the market and will be looking for misleading claims about ESG and sustainability. We are also appealing to industry and investors to alert us if you see suspected greenwashing in financial products."*
- APRA's Chair addressed climate change risk in a recent speech to a banking summit, reporting APRA had completed a survey of 64 APRA-regulated entities about the implementation of APRA's guidance on financial risks of climate change. While the survey reportedly delivered positive responses on embedding climate risk into existing risk management frameworks, there are some concerns about the way in which lenders are measuring emissions from their lending exposures. The full speech can be accessed [here](#).

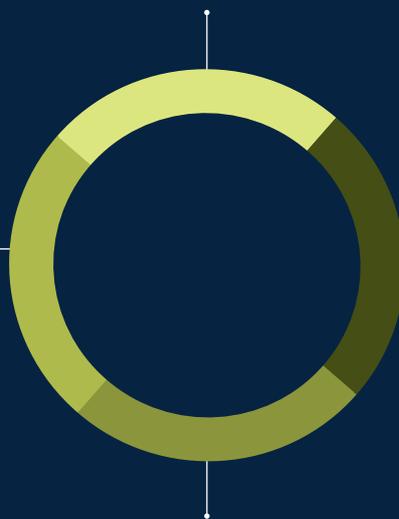
Snapshot of political and economic conditions

Federal election

- Australia has a change of government at the Federal level, with the Australian Labor Party (ALP) winning the recent election (taking 76 of 151 seats in the lower house).
- The ALP has publicly committed to enhanced emission reduction targets and signalled an intention to invest significantly in renewable energy technology.
- The ALP has also signalled reform on class actions, winding back some of the measures introduced by the Morrison Government and introducing further reform with the aim of improving access to justice for consumers.
- The ALP is also expected to reintroduce a bill (*Ransomware Payments Bill 2021*) that would create a mandatory ransomware notification scheme for businesses and government.
- In the lead up to the election, the ALP committed to introducing a range of major legislative reforms across the employment and industrial relations landscape, including by:
 - increasing wages and introducing a criminal penalty for underpayment of employees;
 - introduction of additional entitlements, including domestic and family violence leave;
 - winding back the Liberal Government definition of “casual employee”, making it easier for employees to rely on conduct during their employment to challenge their status as a “casual employee”; and
 - adopting all recommendations in the Respect@work report, including the imposition of a positive obligation on employers to take measures to eliminate sex discrimination, sexual harassment, and victimisation.

Interest rate

- 0.85% – increase by 0.50% (greater than economists’ forecasts)



Unemployment rate

- 3.9%

Albanese Government

- Australia’s new Prime Minister has appointed Australia’s first ever:
 - Minister for Climate Change and Energy
 - Minister for Cyber Security

Watch this space – developments on the horizon

- Public statements by the new ALP Government regarding carbon emission targets and class action/litigation funding reform.
- Clarification on whether proposed legislation introduced by the Morrison Government, including the *Security Legislation Amendment (Critical Infrastructure) Bill 2021*, will be progressed under the ALP Government.
- The outcome of the special leave application in *Worley* (shareholder class action).
- The AICD's next Director Sentiment Index report.
- Ongoing consultation regarding the International Sustainability Board exposure draft for disclosure of sustainable related information.
- The outcome of The Financial Regulator Assessment Authority's first annual review about ASIC, due in July 2022.
- The outcome of the first Climate Vulnerability Assessment, presently being undertaken by the Council of Financial Regulators and led by APRA. APRA's Chair recently reported:

The CVA exercise has been valuable in drawing out the unique challenges banks face in understanding climate risks. These include accounting for the broad impacts of climate change across the economy, the uncertain and extended time horizon over which climate risks may materialise, and the data challenges that I just mentioned. We recognise these challenges, and I thank the participating banks for their continued commitment to this important work. We have just received the individual bank results from the CVA: we anticipate providing an update on the outcomes in Q3 this year, with final results expected to be published towards the end of the year so that others can benefit from the outcomes of the work.

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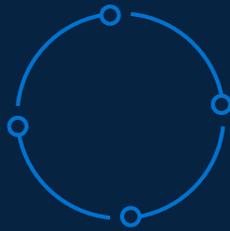
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Our Values



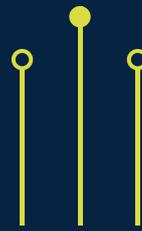
Be Supportive.

We are compassionate and inclusive, valuing diversity and acting thoughtfully.



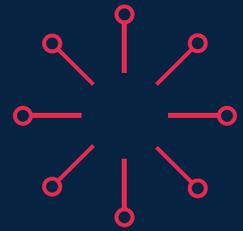
Be Collaborative.

We are proactive, passionate team players, investing in our relationships.



Be Bold.

We are fearless and inquisitive, challenging ourselves to think big and find creative new solutions.



Be Exceptional.

We are strategic and driven, exceeding standards and expectations.

