

D&O Download

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

October 2022

Recent cases

Developments involving regulators

Class actions

Cyber/Privacy

Climate change litigation/ESG





Recent cases

- The High Court of Australia has declined to hear an appeal in Worley, following the successful Full Court Appeal mentioned in our March edition of D&O Download. The proceedings now revert to a single Judge for further consideration and determination.
- The Full Court of Australia has rejected attempts by the Mayfair 101 Group of companies to appeal findings of misleading or deceptive conduct, which resulted in penalties being awarded totalling USD30 million. The Federal Court was satisfied the companies had engaged in misleading or deceptive conduct in advertising their investment products in terms of their risk profile and comparability to bank term deposits. Meanwhile, the founder of Mayfair 101 Group has moved to stop ASIC proceeding with a rehearing of its prosecution, after the Full Court found its original prosecution was infected by a lack of procedural fairness.
- The Federal Court of Australia has found Austal Limited failed to comply with its continuous disclosure obligations, with its former CEO found to have been “involved in” the contravention. The contraventions were admitted by the company and former CEO, with penalties of AUD650,000 and AUD50,000 ordered respectively. An agreement was reached for the company and former CEO to pay costs agreed at AUD500,000. Further information can be found [here](#).



Developments involving regulators

- ASIC has confirmed to a House of Representatives committee that it is investigating listed companies, superannuation fund trustees and one managed fund for alleged greenwashing. The investigations were described as being in the “early stages”. In a subsequent announcement, ASIC stated, “ASIC is currently investigating a number of listed entities, super funds and managed funds in relation to their green credentials claims. Companies are on notice that ASIC is actively monitoring the market for potential greenwashing and will take enforcement action, including Court action, for serious breaches”.
- ACCC has advised the same House of Representatives committee that it has commenced “an internet sweep” for green claims with a view to locating statements which are worthy of investigation. Further information can be found [here](#).
- In its 2021-2022 Annual Report, ASIC confirmed it has concluded its investigations following the Hayne Royal Commission, with seven cases still before the Courts to be resolved or finally determined. Further information can be found [here](#).
- ASIC has continued to disqualify directors for a range of wrongful acts and omissions, including failing to cause the company to lodge tax documents, failure to maintain adequate company records and allowing companies to trade while insolvent.



Class actions

- The High Court of Australia has determined that foreign residents can be group members to a shareholder class action filed in Australia, rejecting arguments that Australia's class action laws do not have extraterritorial effect. Further information can be found [here](#).
- Contentious issues in the class action space have continued to largely be focussed on the settlement phase, with the Court closely examining the funder's desire to recoup the cost of its after the event insurance policy (in addition to its contingency) in the Opal Tower class action and the Sims Limited class action. However, it should not always be assumed that a contradictor will be appointed in respect of legal costs and litigation funding fees proposed to be applied. The Supreme Court of Victoria has expressly *declined* to appoint a contradictor in relation to an application for a Group Costs Order (ie, contingency fee) in litigation involving Crown Resorts.
- Plaintiff class action law firms are investigating avenues for action following a high-profile data breach reported in our September/October 2022 edition of D&O Download. More information can be found [here](#) and [here](#).
- Profit downgrades continue to be a focus for investigation by plaintiff class action law firms, with Slater & Gordon announcing it is investigating possible action following a profit downgrade by Ansell in January 2022. Further information can be found [here](#).



Cyber/Privacy

- The Office of the Australian Information Commissioner, Australia's independent regulator for privacy and freedom of information, has announced it has opened an investigation following a data breach at one of Australia's largest telecommunications providers last month. The investigation will examine whether the company took reasonable steps to implement practices, procedures and systems to ensure it complied with Australia's privacy principles. The Commissioner stated:

If they have not done so already, I urge all organisations to review their personal information handling practices and data breach response plans to ensure that information is held securely, and that in the event of a data breach they can rapidly notify individuals so those affected can take steps to limit the risk of harm from their personal information being accessed.

Further information can be found [here](#).

- Following the data breach referred to above, the Australian Government has moved quickly to seek to reduce the risk of stolen data being used. It has passed urgent legislation allowing the company to share information with financial institutions and Government bodies on joint initiatives intended to intercept cyberattacks, scams and fraud.

- Australia's largest private medical insurance insurer experienced a data breach in mid-October 2022, with investigations ongoing as to the breadth and impact of the breach.
- The Attorney General has announced legislation will be proposed to increase the penalties applying for breach of privacy laws from a maximum penalty of AUD2.2 million to a maximum penalty of AUD50 million. In making the announcement, the Attorney General acknowledged the current safeguards are "inadequate".
- ASIC has filed its first prosecution proceeding connected with crypto, following clear signals earlier this year that crypto is an area of particular concern. The proceedings filed in late October 2022 allege that BPS Financial Pty Ltd contravened the Australian Securities and Investments Commission Act 2001 by (amongst other things) making false, misleading or deceptive representations to investors and consumers. These include statements made about the ability of consumers to exchange "Qoin" on an independent exchange or to purchase goods and services through an increasing number of businesses using "Qoin".

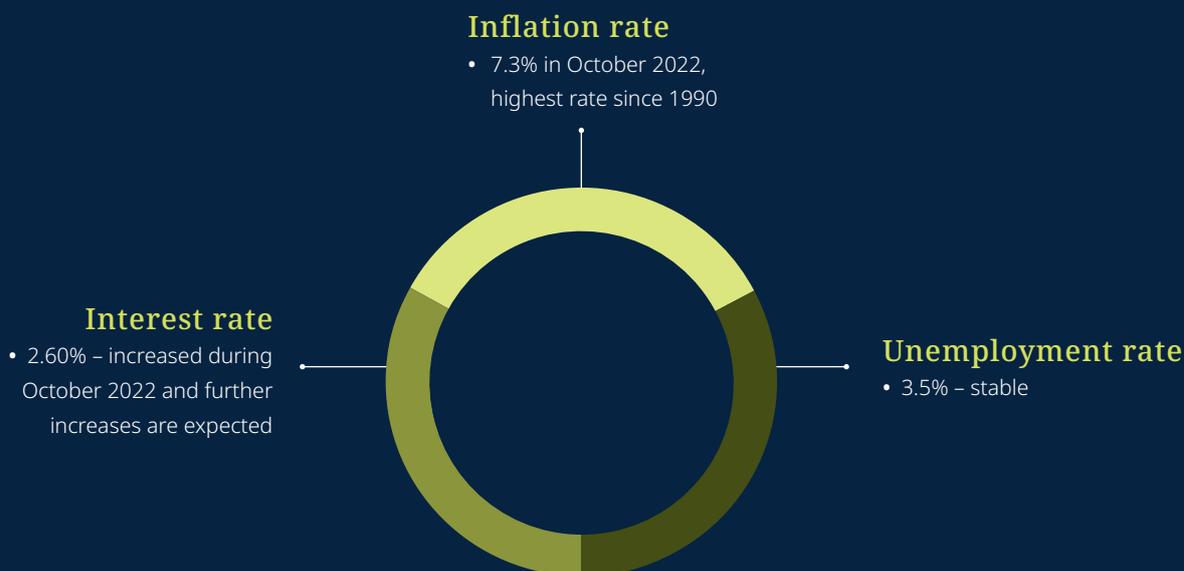


Climate change litigation/ESG

- ASIC has taken its first action against a company for greenwashing, issuing four infringement notices relating to concerns about alleged false or misleading sustainability-related statements. The statements were made to the ASX and claimed:
 - electricity produced by the company would be carbon neutral;
 - the company had environmental approval and the capability to generate certain quantities of electricity from solar power;
 - the company's gas-to-power project would be 'low emissions'; and
 - the company was equally concerned with producing 'clean energy' through the use of renewable sources as it was with developing its gas-to-power project.'

While the company has paid the infringement sum, it has not admitted any wrongdoing.

Snapshot of political and economic conditions



Watch this space – developments on the horizon

- The Australian Institute of Company Directors' next Director Sentiment Index report.
- The outcome of the first Climate Vulnerability Assessment, presently being undertaken by the Council of Financial Regulators and led by APRA.
- Ongoing consultation regarding the International Sustainability Standards Board's Exposure Draft for disclosure of sustainable related information, which, if adopted, ASIC notes would take some time to implement.
- The Federal Government's consideration of *The Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021*.
- The Federal Government's consideration of an independent tribunal of judges (as recommended by the Australian Law Reform Commission) to consider issues including a transparent process for the appointment of judicial officers. The Commonwealth Attorney General has expressed his desire for this independent body to also consider complaints about judges. Further information can be found [here](#).

For more information please contact



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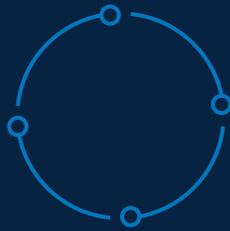
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Our Values



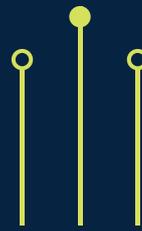
Be Supportive.

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.

