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

August and September 2022

Developments involving regulators

Litigation funding

Class actions

Cyber

Climate change litigation/ESG

Recent cases





Regulatory

- The Australian Prudential Regulatory Authority (**APRA**) has foreshadowed significant reform of its framework in readiness to address emerging issues including crypto assets and financial risks of climate change.
- The Australian Competition and Consumer Commission (**ACCC**) has reiterated it is actively targeting greenwashing this year, and it intends to take enforcement action where consumers are misled or deceived by “green claims”. The ACCC’s statements can be found [here](#).
- The ASIC has published its Corporate Plan, setting out areas of focus over the coming four years. The immediate next step for ASIC is to progress enforcement activity, after a period of education and information awareness. In the clearest of signals, it intends to be “an active litigator”. Areas of particular focus for ASIC going forward include:
 - Driving compliance on design and distribution obligations (predominantly impacting banks, insurers, superannuation funds and managed investment funds).
 - Greenwashing, including how companies are advertising their “green credentials”.
 - Improved climate and sustainability governance, including through globally comparable standards in the medium to long term.
 - Cyber and operational resilience.
 - Becoming a digitally savvy regulator, so that it is positioned to respond to vulnerabilities and take protective measures where required in emerging and developing technologically driven areas such as crypto assets and digital scams.
- ASIC has published new guidance for financial services providers and credit licensees on customer remediation, in a clear signal the regulator expects companies to be more proactive in addressing the financial implications of alleged or agreed wrongdoing. Underpinning the guidance are key principles of fairness and efficiency. Further information can be found [here](#).
- The Financial Regulator Assessment Authority (**FRAA**)’s first annual review about ASIC has been published, recording four recommendations for immediate implementation. FRAA reports the implementation of the recommendations will require a “cultural shift” but will result in increased confidence in ASIC’s effectiveness and capabilities.
- The recommendations concern:
 - Improvement of data and technology capability.
 - A stronger focus on enhancing the quality of its engagement with stakeholders.
 - Enhanced ability to measure its own effectiveness and capability, and communicate the outcomes of such assessment transparently, both internally and externally.
 - Broadening its mix of skill sets.

ASIC’s response to the report can be found [here](#).

The Corporate Plan can be found [here](#) and ASIC’s Chair’s statement about it can be found [here](#).



Class actions

- Western Australia has introduced the *Civil Procedure (Representative Proceedings) Bill 2022* in response to the Western Australian Law Reform Commission's report on representative proceedings published in 2015. This introduces a framework for the commencement of class actions in WA Courts, replacing the current mechanism available through the Supreme Court of WA which was described as outdated, inherently uncertain and inadequate. Further information can be found [here](#).
- In July 2022, we reported that orders had been made requiring a company, Virgin, to provide a class action lead applicant with copies of any insurance policies and other documents. It has been reported that the supervising Judge has enquired why the lead applicant has not sued the insurers directly. The comment was made in the context of a dispute about whether the litigation funder backing the class action is required to provide an indemnity for the company's costs.
- In a different class action involving Dixon Advisory, the Federal Court has heard arguments about whether two insurers should be required to produce insurance policies to the class plaintiff and disclose whether indemnity has been granted for defence costs and liability. This was reportedly in response to concerns by the class plaintiff that the costs of the litigation could be disproportionate to the level of indemnity available under insurance policies. A decision is pending.
- A new class action has been commenced against a company, nine of its directors and its auditor. The class action concerns Blue Sky Alternative Investments, which is alleged to have misrepresented its true financial position and caused shareholders to acquire shares at inflated prices.
- Recent decisions on settlements of class actions reveal the Courts continue to closely scrutinise legal fees. In one class action arising from alleged underpayment of staff, the legal fees were slashed by 25% because the law firm had not complied with obligations under the applicable Legal Profession Act.



Funding

- The Albanese Government elected in May 2022 has signalled its intention to remove existing regulation applying to litigation funders, which had been introduced by the Morrison Government. An exposure draft released by the Albanese Government last month reveals it is intended to remove the legislative requirement that litigation funders hold an Australian Financial Services Licence (which of itself requires compliance with a range of obligations and requirements). Submissions about the draft closed on 30 September 2022 and it is expected proposed reforms will be tabled before the end of 2022. Litigation funders are already foreshadowing the reforms will produce a more favourable environment.



Cyber/Privacy

- In July 2022, we reported that ASIC published a guidance paper following the *RI Advice* decision. Our detailed note on this can be found [here](#).
- In August 2022, proceedings brought by the ACCC against Google were resolved on the basis the company would pay a penalty of USD60 million. The case concerned alleged misleading conduct by the company as to how it collected, used and retained location data. Further information about the background to this case can be found [here](#). The ACCC's statement after the penalty order was made can be found [here](#).
- In September 2022, significant concern has arisen from a cyber attack on a large Australian telecommunications provider. It has been revealed customers' personal information including passport numbers, dates of birth and contact details were obtained. The Federal Government has quickly foreshadowed reform to Australia's privacy laws, including significant penalties for companies that do not take adequate steps to protect the personal data of its customers. More information can be found [here](#). At least two plaintiff class action law firms are already investigating whether customers may be entitled to compensation.
- ASIC continues to explore regulation of cryptocurrencies, including as to classification as a financial product.



Climate change litigation/ESG

- Melbourne-based law firm Equity Generation Lawyers has reportedly written to ANZ Bank encouraging disclosure in its annual report about risks relating to the loss of biodiversity (as reported by the Australian Financial Review). The article can be found [here](#). It is said:
 - *Listed companies with exposure to the risks emanating from the biodiversity crisis, especially those with exposures in the agriculture and agribusiness sectors, have a legal obligation to disclose those risks to the market and outline how they plan to manage those risks," said Jack McLean, an associate at Equity Generation Lawyers working on Ms Rossiter's potential legal case.*
- APRA has reported the outcome of its climate risk self-assessment survey, noting key observations as follows:
 - Four out of five boards oversee climate risk on a regular basis, while just under two-thirds of institutions (63%) have incorporated climate risk into their strategic planning process.
 - Almost 40% of institutions said climate-related events could have a material or moderate impact on their direct operations.
 - Nearly three-quarters of institutions (73%) said they had one or more climate-related targets in place, however 23% of institutions do not have any metrics to measure and monitor climate risks.
- Over two-thirds of institutions (68%) said they have publicly disclosed their approach to measuring and managing climate risks, with 90% of those aligning their disclosure to the Task Force for Climate-related Financial Disclosures framework.

APRA's report can be found [here](#).

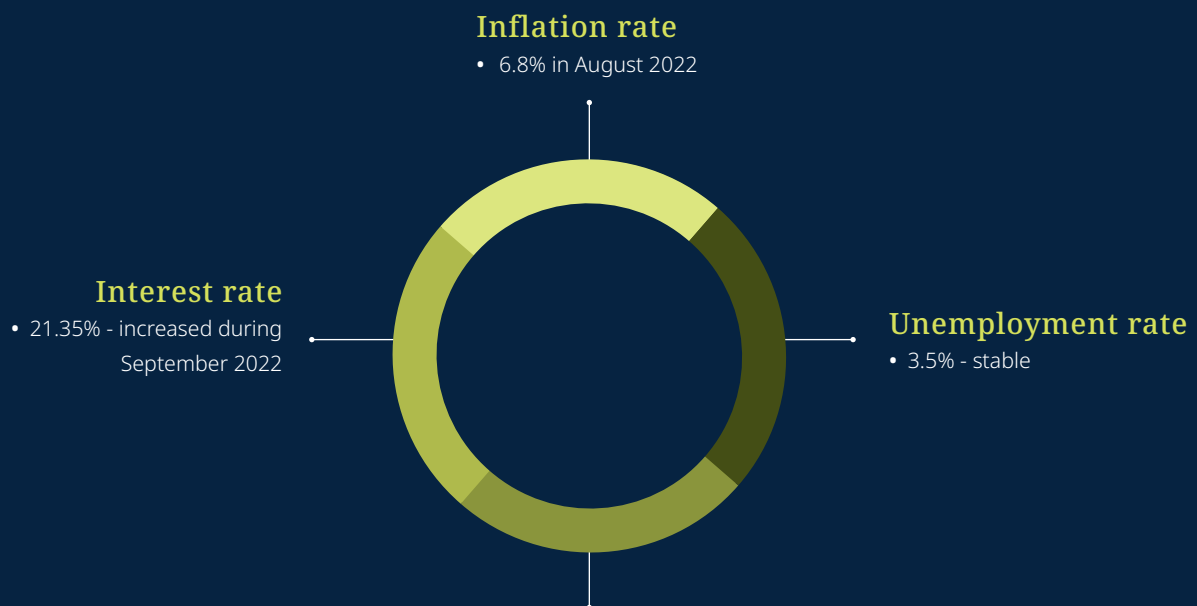
- Activist group Market Forces has made a formal complaint to ASIC about its concerns the chairman and managing director of Santos made misleading statements at an annual meeting. It has asked ASIC to investigate, with ASIC confirming it has received the complaint in confidence. It is not known if ASIC is conducting an investigation following the complaint.
- Tiwi Islanders have succeeded in halting an offshore gas project after allegations the company failed to consult the Tiwi Islanders. The Federal Court was satisfied the relevant legal authority, National Offshore Petroleum Safety and Environmental Management Authority, could not have been satisfied Santos consulted with each person it was required to before approving the project. The litigation, mentioned in our May/June edition, raised concerns the proposed drilling operations would pose risks to the marine environment and dreaming story tracks and was agitated by the Environmental Defenders Office.



Recent cases

- The NSW Court of Appeal has delivered judgment in the *Dick Smith* case, finding its former CEO and former CFO breached their duties by approving a dividend which the company could not afford and which prejudiced the company's ability to pay creditors. Our summary of the key aspects of this appeal decision can be found [here](#).
 - Australian Securities and Investments Commission (**ASIC**) has commenced proceedings against Nuix Limited and five directors of the company. The proceedings concern alleged breaches of the continuous disclosure laws and misleading and deceptive conduct in connection with a prospectus and two announcements published on the Australian Stock Exchange. Further information can be found [here](#).
 - James Mawhinney (Mayfair 101) has successfully overturned a banning order issued by ASIC after the Federal Court found that ASIC's approach had lacked procedural fairness.
- However, that is not the end of the matter, with speculation a High Court appeal will follow. Otherwise, the next step is a retrial.
- A prosecution by ASIC against Austal Limited for alleged failure to comply with its continuous disclosure obligations has reportedly been settled on the basis the company will pay a penalty of USD650,000 (subject to Court approval).
 - A separate prosecution by ASIC against Australian Mines for alleged failure to comply with its continuous disclosure obligations has reportedly been settled for USD450,000. The case against its managing director, in which ASIC seeks penalty and disqualification orders, will move forward.

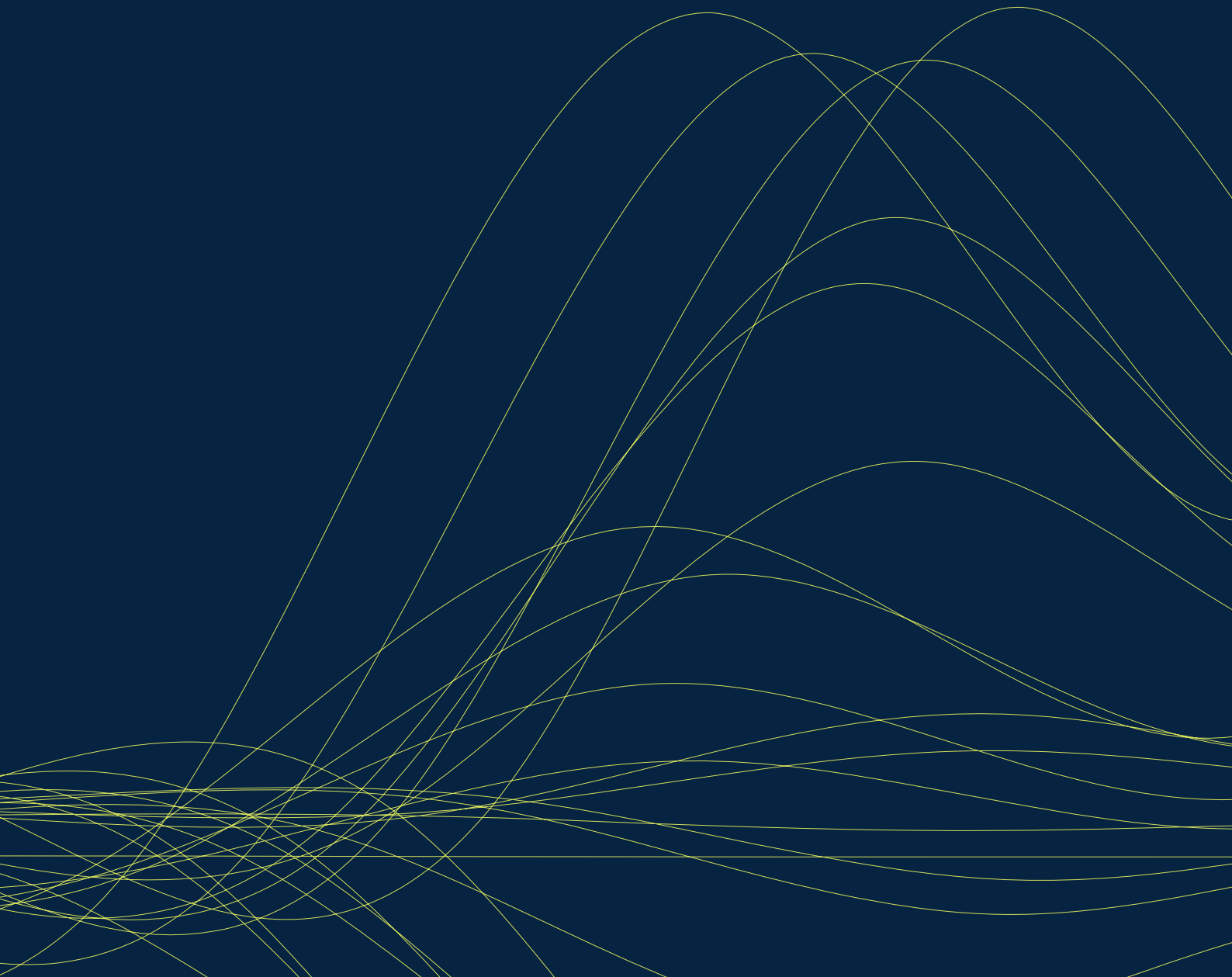
Snapshot of political and economic conditions



Parliament under the new Albanese Government

- The Albanese Government elected in May 2022 is bringing through a range of legislative changes including:
 - The *Climate Change Bill 2022* – now passed. Our overview of the Bill, as enacted, can be found [here](#).
 - The *National Anti-Corruption Commission Bill 2022*, which seeks to introduce a new Commission to investigate public corruption. The Attorney General notes the Commission will relate to conduct by parliamentarians, public sector staff and government contractors. While not applicable to private enterprise, it is a clear signal of the Albanese Government’s mandate to enhance measures surrounding investigation and accountability. Further information can be found [here](#).
 - The *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022*, which seeks to introduce a range of measures including a positive duty on employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation. Compliance and instances of contravention will be administered by the Australian Human Rights Commission. Further information can be found [here](#).

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* in light of the significant cyber attack on an Australian telecommunications provider in September 2022.
 - 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](#).
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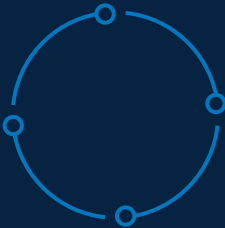
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Our Values



Be Supportive.

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



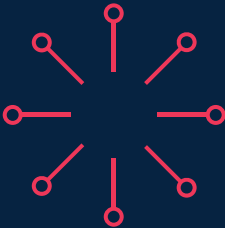
Be Collaborative.

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.

