

# D&O Download

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

## July 2022

### Recent Cases

Developments involving regulators  
Revisiting the “best interest” duty  
Class actions

### Litigation funding

Cyber  
Climate change litigation  
ESG





## Recent cases

- Following the successful prosecution in *Getswift* and certain of its officer, together with the abandonment of an appeal by two of those officers, the Federal Court is now turning its attention to the appropriate relief to flow from the contraventions as found. In recent submissions to the Court, ASIC signalled it seeks USD15 million in penalties against the company and USD1 million from each of two officers successfully prosecuted (another has filed an appeal, which is yet to be determined). Further information about this case be found [here](#).
- An alleged shadow director of a company in liquidation has been prosecuted for his failure to answer questions during a compulsory examination. He was sentenced without conviction and placed on a good behaviour bond. Further information can be found [here](#).



## Class actions

- In a recently commenced shareholder class action against Virgin, a Court has ordered Virgin to provide the lead applicant with copies of any insurance policies which may respond to the class action claims. Further, Virgin's solicitors were ordered to provide information to the lead applicant's solicitor, including whether a claim had been made under any insurance policy and whether the insurer(s) had agreed or refused to provide coverage for costs and liability in the class action. The orders can be found [here](#) and were made under section 33ZF of the *Federal Court of Australia Act 1976* (Cth), which provide that the Court may make "any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding".
- A new consumer-based class action has been filed against Apple and Google Android, concerning alleged misuse of market power in contravention of the Australian Consumer Law. This is consistent with the higher percentage of new filings in recent years relating to consumer-focussed issues (rather than, for example, shareholder class actions). The class action is backed by a litigation funder.



## Regulatory

- ASIC has commenced a new action against Lanterne Fund Services, the holder of an Australian Financial Services Licence. The alleged contravening conduct includes alleged failure to have in place adequate risk management systems and resources. ASIC is seeking both declarations/penalties and the appointment of an independent expert for review of systems, processes and controls, with Lanterne to implement a risk management and compliance program once the expert has reported. Further information can be found [here](#).
- ASIC has successfully secured a conviction against Griffin Coal Mining Company Pty Limited for failing to meet its financial reporting obligations (lodging annual reports) and failing to have the required number of company directors residing in Australia. Further information can be found [here](#).
- ASIC has continued to disqualify directors for a range of offences, including for lack of oversight of the financial health of the business, failure to ensure compliance with obligations to pay superannuation and tax, improper use of position (director causing the company to make payments to the director, where he was not legally entitled to the payments) and involvement by one individual in the failure of multiple companies.
- ASIC has published its enforcement and regulatory update for the April – June 2022 quarter, reporting on:
  - key statistics, including the commencement of 60 new investigations (in addition to the 148 investigations which are ongoing);
  - its activities around financial reporting and greenwashing;
  - its success in the RI Advice Group litigation, involving findings against the company in connection with cybersecurity; and
  - sentencing of two individuals for insider trading;

The report can be accessed [here](#).



## Revisiting the “best interest” duty

- The AICD has announced it commissioned an opinion from Bret Walker AO QC and Michael Ng (accessible [here](#)) addressing the duty requiring directors to act in the best interests of the company in a modern context – mindful companies are to consider the interests of a range of stakeholders and act in a manner consistent with community expectation. With the benefit of that opinion, the AICD has developed a Practice Statement (accessible [here](#)) addressing what the ‘best interests’ duty requires of directors in real and practical terms. As this is hot off the press, we will digest this material and provide a more detailed summary and analysis next month. However, for now, key points are set out below.

### Counsel opinion

- Even if the “best interests” duty was a duty to act in good faith in the best interests of a company as a commercial entity distinct from its shareholders, the interests of shareholders would be a central, if not the central, consideration to which the directors must have regard. The interests of the company are therefore the interests of shareholders as a general body.
- The “best interests of the corporation” in section 181(1) of the *Corporations Act 2001* (Cth) accommodates evolving governance expectations. As was recognised in *Harlowe’s Nominees*, directors are the persons “in whom are vested the right and duty of deciding where the company’s interests lie and how they are to be served”.
- Directors are given a wide discretion to determine the best interests of the company. In light of that, directors can take into account possible impacts on the company’s reputation.

*In an insolvency context:*

- The closer a company is to insolvency, the greater the weight to be afforded to the interests of creditors in the discharge of a director’s duty to act in the best interests of the company.
- As a company approaches insolvency, the duty to avoid insolvent trading may become an even greater constraint than the best interest duty.

### Practice Statement

*Directors have discretion to identify the best interests of the company*

- Directors have a statutory duty to act in good faith and the best interests of the corporation and for a proper purpose.
- Directors have considerable discretion to identify the best interests of the company and its shareholders/members, taking into account relevant facts and circumstances.

*Relevance of stakeholder interest*

- While shareholders/members’ interests are central, directors can, and should, also consider a range of stakeholder interests (employees, customers, suppliers, creditors, Traditional Owners, the environment and broader community) – doing so is often necessary to protect an organisation’s reputation and ensure its sustainability.
- As a guiding principle, directors should take a long-term view of where the company’s interests lie, including its interest in avoiding reputational harm.

*Creditors’ interests will weigh heavily in situations of potential insolvency*

- In the context of a company’s potential insolvency, it is widely accepted that the best interests of the company will closely align with the interests of its creditors – the closer that a company is to insolvency, the greater the weight should be given to the interests of creditors.
- There is also a statutory duty to prevent insolvent trading which directors must comply with.



## Funding

- Litigation funder Omni Bridgeway (“OB”) has announced the sale of a 20% interest in a shareholder class action brought by investors against the Commonwealth Bank of Australia (arising out of action taken by AUSTRAC against the CBA in relation to alleged non-compliance with anti-money laundering lawyers). The announcement, which can be found [here](#), records the MD & CEO’s expectation that OB will “*be an active participant in the secondary market and see this as an evolutionary change in the industry...*”.



## Cyber/Privacy

- Following ASIC’s success in the *RI Advice Group* cybersecurity case, ASIC has published two important communications.
  - An article authored by ASIC’s Commissioner (accessible [here](#)) reaffirming the importance for business’ risk management framework to adequately address cyber risk. In a warning to directors, the Commissioner states “*ASIC expects directors to ensure their organisation’s risk management framework adequately addresses cyber security risk, and that controls are implemented to protect key assets and enhance cyber resilience. Failing to do so could cause you to fall foul of your regulatory obligations.*”
  - Guidance, titled “*Cyber resilience good practices*”, emphasises the importance of the Board “owning” cybersecurity and resilience and companies embedding cybersecurity within governance frameworks and processes. The guidance, presented as a number of ‘Good Practices’, can we found [here](#).
- The Australian Cyber Security Centre has released an Information Manual (accessible [here](#)), designed to provide a clear articulation of fundamental cyber security principles and guidelines for numerous matters which impact companies carrying out day-to-day operations (e.g. outsourcing, different modes of communication such as email and telephone and data transfer).
- The Office of the Information Commissioner is currently investigating a number of large Australian retailers for their use of facial recognition technology, which captures a person’s unique facial features and analyses same. One retailer representative informed print media that the use of this technology is to keep employees and customers alike safe, and to prevent unlawful activity in store.



## Climate change litigation

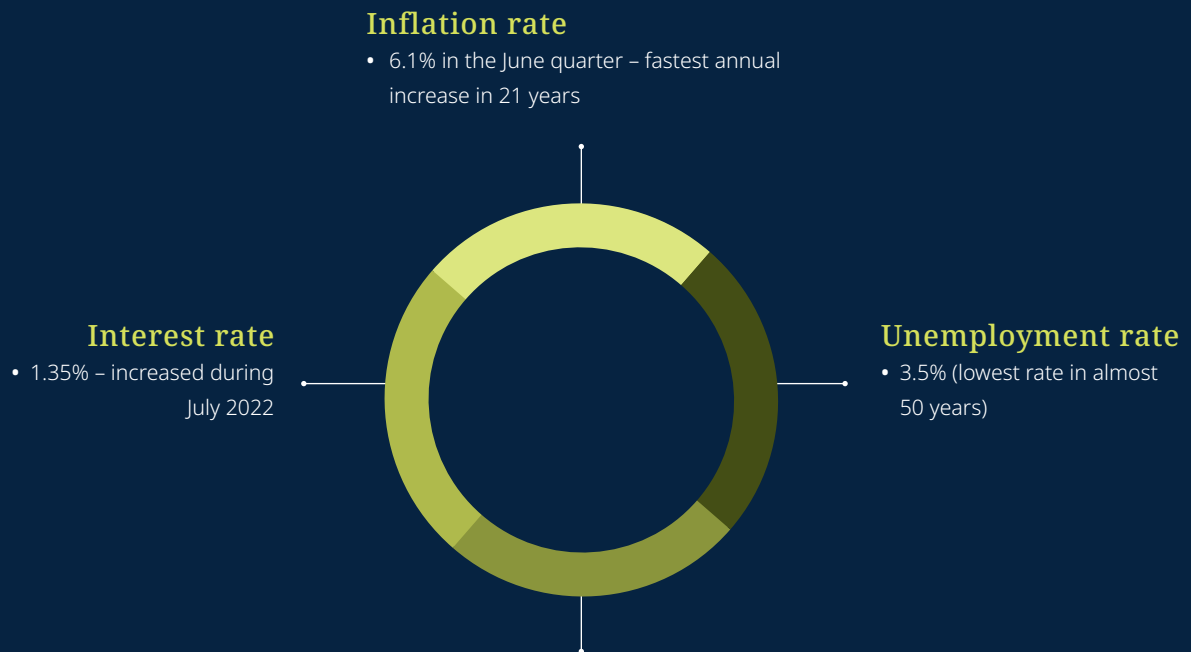
- Santos is to be the target of new claims about the alleged invalidity of its approval for drilling operations in the Tiwi Islands, after the Federal Court dismissed the first application for being too late, too prejudicial to Santos and because the Court was not satisfied on the evidence before it that the alleged impact on marine life was more than minor. While the Court accepted evidence of the Munpai people that they will suffer spiritual harm, the applicant had previously been prepared to accept some level of drilling. A further summary is set out in [this article](#) and the full case can be found [here](#).
- A proceeding commenced by Torres Strait Islanders (led by Pabai Pabai) against the Commonwealth Government for alleged failure to protect the environment from impacts of climate change (including rising sea levels) has been expedited, with lay evidence to be heard in July 2022, then a hearing for expert evidence in the second half of 2023 with judgment foreshadowed for the first few months of 2024.



## ESG

- The International Sustainability Standards Board (ISSB) has published for comment two proposed standards relating to sustainability related financial information and climate change disclosures. The deadline for submissions was 29 July 2022. The AICD has published its submissions and provided a helpful overview. The full submissions and overview are accessible [here](#).
- As observed by the AICD, the Australian director community has consistently highlighted climate change as the number one policy priority they want to see the Federal Government address. During the first sitting of the new Albanese Government, proposed legislation has been introduced – a “climate bill” – which will legislate (amongst other things):
  - the Government’s promise on carbon reduction targets (cutting emissions by 43% by 2030 and reaching net zero by 2050);
  - new functions to be served by the Clean Energy Finance Corporation, the Australian Renewable Energy Agency, Export Finance Australia, Infrastructure Australia, and the Northern Australia Infrastructure Facility; and
  - that the Climate Change Authority provide public advice on progress to achieving the set targets and the effectiveness of government policy.

## Snapshot of political and economic conditions



### Parliament under the new Albanese Government

- It has been reported that at least 18 pieces of legislation will be moved by Australia's new Government in the first sitting week. This includes legislation:
  - In relation to climate change (as indicated above);
  - Concerning payment of paid leave for victims of domestic violence and family violence
  - Establishing a new body called "Jobs and Skills Australia" to research and advise on what vocational training is required for jobs which will be in high demand in the future.
  - Effecting reform in the aged care sector.

## Watch this space – developments on the horizon

- Debate about the new Federal Government's climate change bill.
- The AICD's next Director Sentiment Index report.
- 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.
- 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 AICD's next Director Sentiment Index report.
- Ongoing consultation regarding the International Sustainability Board exposure draft for disclosure of sustainable related information.



For more information please contact



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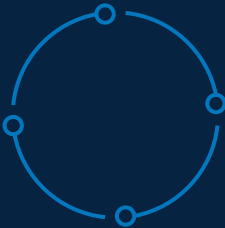
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Our Values



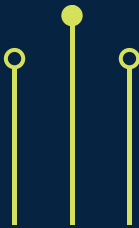
**Be Supportive.**

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



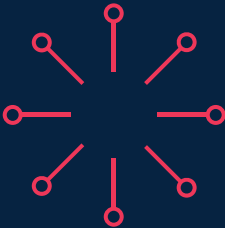
**Be Collaborative.**

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.

