

D&O Download

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

November and December 2022

Recent cases

Developments involving regulators

Class actions

Litigation funding

Cyber/Privacy

Climate change litigation/ESG





Recent cases

- A former director of Tesla Australia has pleaded guilty to insider trading charges brought by the Commonwealth Department of Public Prosecutions. He is to be sentenced in February 2023. Further information can be found [here](#).



Developments involving regulators

- During ASIC's Annual Forum on 3 November, ASIC's chair addressed ASIC's strategy concerning climate change and sustainability-related finance (addressed below), the challenges surrounding regulation of cryptocurrencies and its enforcement priorities during 2023. Consistent with vast majority of recent ASIC statements, ASIC's chair reiterated the priority is protection of consumers. The enforcement priorities were expressed to be protection of consumers, responding to emerging issues and maintaining market integrity. During December 2022 there has been a noticeable increase in the number of filings by ASIC. Further information can be found [here](#).
- ASIC has commenced two new prosecution proceedings for alleged misleading and deceptive conduct and breach of continuous disclosure laws.
 - The first case against McPherson's Limited arises from earnings guidance issued in October 2020, a cleansing notice lodged with the ASX in November 2020, and statements made on 1 December 2020. ASIC also alleges the former CEO breached his duties in failing to prevent the company from breaching its obligations. It is seeking declarations and pecuniary penalties. Further information can be found [here](#).
 - The second case against 11 current and former directors and officers of The Star Entertainment Group Limited arises (amongst other things) from the alleged failure to pay sufficient regard to the risk of money laundering and associations with criminals. ASIC is seeking declarations, pecuniary penalties and banning orders. Further information can be found [here](#).
- A Parliamentary Joint Committee has published terms of reference for an inquiry into ASIC. The inquiry will concern a range of topics including whether:
 - ASIC is meeting the expectations of government, community and businesses; and
 - the enforcement measures by ASIC are effective.

The inquiry follows criticisms of ASIC during the Hayne Royal Commissions and from certain parliamentarians about its effectiveness as a regulator and in execution of its enforcement function. Further information can be found [here](#).



Class actions

- A class action against the Commonwealth Bank of Australia (**CBA**) was heard in the Federal Court of Australia during November 2022, involving alleged failures to comply with Australian disclosure laws resulting from CBA's alleged money laundering contraventions. A judgment is not expected until at least 2023.
- The Star Entertainment Group (**SEG**) has been served with a second class action over its alleged failure to comply with its continuous disclosure obligations and alleged misleading and deceptive conduct in the context of alleged misconduct involving corruption, money laundering and bribery. The first class action was commenced earlier this year and mentioned in our April 2022 edition of D&O Download. It remains to be seen whether the two class actions will remain separate, with SEG stating the class actions make substantially the same claims.
- Blue Sky Alternative Investments and EY have been served with a second class action filed in the Federal Court of Australia. The class action alleges failures to comply with Australian disclosure laws and misleading and deceptive conduct against the company, flowing from financial reports for the 2016 – 2019 financial years. It remains to be seen whether the two class actions will remain separate, although it has been acknowledged that there is overlap. The plaintiff class action law firms have not yet agreed a basis on which the proceedings could move forward together. Further information can be found [here](#).
- There continues to be a flow of applications for approval of proposed contingency fee arrangements (or Group Costs Orders) and even debate about whether a contradictor should be appointed in such applications.



Litigation funding

- The Federal Government has passed litigation funding regulations which generally exempt litigation funding from the managed investment scheme framework and other obligations under the *Corporations Act 2001* (Cth). In effect, this means less regulation for litigation funders. Further information can be found [here](#).



Cyber/Privacy

- The Federal Government has passed the *Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022*, assented to in October 2022. This legislation will affect a range of changes, including increasing the maximum penalty from USD2.2 million to USD50 million. The Government has passed the legislation swiftly following two significant and highly publicised data-breach incidents during October 2022.
- Following on from the data-breach within Australia's largest private medical insurance insurer in mid-October 2022:
 - the company has confirmed customer data including names, dates of birth and addresses are accessible on the dark-web, and various print media sources are reporting that private health information for selected customers have been released;
 - plaintiff class action law firms have moved swiftly to investigate a potential class action;
 - APRA has publicly stated it is intensifying its supervision of the company, noting an external review commissioned by the company will examine the incident, effectiveness of controls and the company's response to the incident; and
 - a law firm has lodged a complaint with the Office of the Australian Information Commission (**OAIC**) on behalf of customers, seeking compensation. The OAIC will now need to conduct an investigation.



Climate change litigation/ESG

- During ASIC's Annual Forum on 3 November, ASIC's chair disclosed ASIC's strategy concerning climate change and sustainability-related finance (addressed below) involving:
 - enforcement of existing laws (including as to greenwashing);
 - contributing to law reform and issuing ongoing guidance;
 - developing the medium to long term strategy including by strengthening ASIC's own capabilities.Further information can be found [here](#).
- The Carbon Reduction Institute (**CRI**) has brought proceedings in the Federal Court of Australia against skincare business Sukin, alleging it falsely advertised it held CRI's accreditation. CRI provides a climate change certification program in Australia. Further information can be found [here](#).
- ASIC has issued further infringement notices for alleged greenwashing. ASIC contends the company made statements in Product Disclosure Statements which may have misled by overstating its mechanism intended to inhibit investment in companies with significant tobacco sales. In this instance, the alleged conduct did not concern environmental claims but rather ethical ones. Further information can be found [here](#).

For more information please contact



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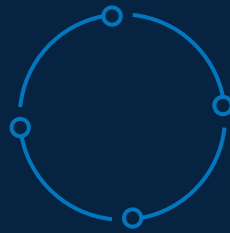
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Our Values



Be Supportive.

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



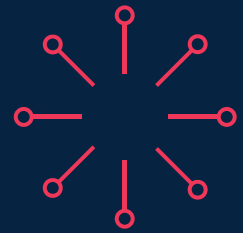
Be Collaborative.

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.

