

ESG: 5 THINGS TO WATCH OUT FOR IN THE SECOND HALF OF 2022

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Following the rise in green investment during the pandemic, within the first half of 2022, ESG has become an ever more polarising topic, most recently attracting a number of allegations of fraud. As an in-house lawyer, sustainability expert or board member looking to maximise ESG opportunities for your business, whilst minimising legal and reputational risk (to the extent possible), what are the main areas to look out for in the second half of 2022? Our legal experts discuss some of the front-runners:

CONTINUED EXTENSION OF THE APPLICATION OF TORTIOUS PRINCIPLES IN ESG CLAIMS

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Since the UK Supreme Court handed down its decision in *Vedanta v Lungowe* in April 2019, the English courts have seen a number of further claims alleging that direct duties of care are owed by parent and other companies allegedly exercising (or claiming to exercise) control over overseas operations – thereby sidestepping the corporate veil. This has included claims against BHP Billiton for its alleged role in the Fundao Dam disaster in Brazil, British American Tobacco and Imperial Tobacco for allegedly profiting from forced labour in Malawi, Dyson regarding similar issues in Malaysia, Camellia Plc and PGI Group relating to allegations of sexual violence in Malawi and Facebook alleging its algorithm facilitated war crimes in Myanmar.

A number of these cases are either set for appeal hearings, appeal decisions or to be formally issued at court in the second half of 2022, which should in turn give further indications as to what is considered an arguable claim. Appeals are also due in the seminal Australian and New Zealand cases of *Sharma* and *Smith v Fonterra*, as well as the Dutch climate change case brought by Milededensie and others against Shell. Proceedings also continue in the first Thai group claim of its kind against sugar producer Mitr Phol, relating to alleged land-grabbing in Cambodia, which has also included disclosure proceedings against Coca-Cola in the US.

INCREASING REGULATION AND REGULATOR ACTION

Both the Australian and New Zealand Courts of Appeal in *Sharma* and *Smith v Fonterra* respectively (the former alleging that an Australian government minister owes a duty of care to Australian children when exercising certain official duties and the latter alleging, *inter alia*, a tortious duty on companies to prevent climate change) have stressed the need for regulation of climate change issues, rather than reliance on the courts and tortious duties to hold companies to account. This is likely to further accelerate calls for tougher regulations to force corporates to align with Paris climate targets.

Consultations on the EU proposals for a directive on corporate sustainability due diligence will continue, eagerly watched by a number of other countries which are likely to follow the EU approach in this area. The proposals also contain provision for national supervisory authorities, and a European Network of Supervisory Authorities, with the power to impose sanctions on non-conforming companies. The spectre of greater EU regulatory activity is also being mirrored on the other side of the Atlantic with proposals from the SEC to standardise reporting of ESG disclosures and hold funds to a higher standard in order to avoid greenwashing.

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Germany, of course, came out ahead of the EU with its Supply Chain Act, due to come into effect on 1 January 2023, and has also led the charge of regulators, with a raid on DWS and its majority owner Deutsche Bank over greenwashing allegations on 31 May 2022. That follows years of inaction by regulators on ESG issues, with the UK government having relied largely on civil society organisations to "enforce" the UK Modern Slavery Act and the French litigation against Total for alleged breaches of the Duty of Vigilance Law (brought not by the French government but, again, by civil society organisations) having been tied up in procedural issues for several years. It seems that the political mood is now changing and both more regulation and more targeted enforcement will be an increasing fixture over the coming months and years.

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MOVES TOWARDS MORE CONSISTENT VALUE MEASUREMENT AND RATINGS

The SEC's announcements aimed at toughening up the factual basis behind sustainability and investment labelling follows sustained discussions between a number of ratings agencies and other accountancy professionals aimed at standardising measures of non-financial value. Further progress towards an agreed standard is expected in the second half of this year.

SCRUTINY OF LIVING WAGE

A number of the allegations in current and emerging English class actions centre around the effect on farmers and other workers at the bottom of the supply chain not earning enough to sustain themselves and their families without resorting to the use of child labour or being unable to provide basic subsistence and education to their children. This issue has been discussed for some time, but to date there has been no consensus on how a living wage should be calculated on a global basis.

The emergence of living wages as a key risk area for corporates is likely to accelerate discussions in this area and we will likely see more industry-led initiatives to seek to define a living wage spring up, even if no agreed figures are reached by the end of this year.

GROWING UNDERSTANDING OF THE INTERCONNECTEDNESS OF E, S AND G

Following the increased discourse at COP26 on the need to ensure a just energy transition for all and to support those at the bottom of the supply chain in producing materials more sustainably (as well as more profitably – tying into the living wage comments above), we have also seen increased acknowledgment of climate change as a human rights issue. This includes its impact on the right to subsist from land and natural resources and the right to a family life, as well on indigenous peoples' rights, including the right to enjoy their own culture, which is often intimately connected with land. The interconnection between climate change and biodiversity with these issues is also likely to come further under the spotlight as COP15 on Biodiversity continues in October this year.

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This follows a trend of referring to human rights standards in order to prove the standing of individual claimants to bring climate change cases (including in *Milledensie et al v Shell* in the Netherlands), which is likely to continue into the second half of 2022 and beyond.

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