

A low-angle, upward-looking photograph of several tall skyscrapers in a city. The buildings are made of glass and steel, reflecting the sky and each other. The sun is low in the sky, creating a warm, golden glow and long shadows. The perspective makes the buildings appear to converge towards the top of the frame.

MinterEllison

Key trends to
emerge from the
2020 AGM season



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Introduction

This report provides a high level snapshot of trends from the AGMs of Australia's largest companies, ASX100 listed, over the course of the last five years.



Meeting Format

Key Takeouts

- 2020 saw a number of companies taking steps to refresh their constitutions, including making changes to facilitate the use of technology and to remove barriers to holding meetings virtually or in hybrid form.
- Ahead of the 2021 AGM season, boards who have not so far adopted this course, may wish to turn their minds to the issue. Companies will need to assess their situation on a case by case basis.
- Following what it considers to be a successful test run of changes to meetings and execution requirements introduced in response to the pandemic, the government is considering making the temporary changes permanent. It appears likely at this stage that a hybrid model will prevail over wholly virtual meetings.

2020 marked an interesting year for AGMs, brought about by Government restrictions on large gatherings, concerns about public health and safety, and restrictions on travel. This culminated in the holding of multiple wholly virtual AGMs (a 'first' for many) and enlivened strong debate on the future of AGMs in Australia.

Over 92.92% of the ASX 100 opted to convene an entirely virtual AGM (in three cases, this included meetings held by webcast in which shareholders could in one case vote live or in two cases ask questions in real time). For the remaining seven companies that did not switch to a virtual AGM, three held hybrid meetings, three held entirely physical meetings and the remaining company (which is a foreign-registered company) held its AGM as a 'closed session' in accordance with local laws which shareholders were invited to view as a webcast.

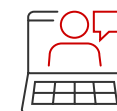
All three hybrid meetings were held in November 2020, eight months after COVID-19 was declared a global pandemic. Of the three hybrid meetings, the physical 'place' of the meeting was in Perth or, in the remaining two cases, overseas (in Ireland and the UK). For the only Australian hybrid AGM of the year, a

ticketing system, operating on a first come, first serve basis, appears to have been put into place to enable members to physically attend the meeting while complying with social distancing requirements.

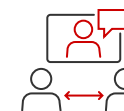
Of the three entirely physical AGMs, two took place in January 2020 (ie before COVID-19 was declared a pandemic) and the third took place in Perth in April 2020 which, unlike other Australian capital cities, was not in lockdown.

None of the ASX 100 had to postpone their 2020 AGM due to COVID-19 although some companies (particularly those with a 31 December financial year), did need to quickly transition from a physical to virtual meeting in response to the ever-evolving situation relating to COVID-19.

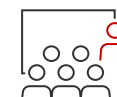
The ability for Australian companies to convene wholly virtual meetings was made possible by temporary measures introduced by the Commonwealth Treasurer in response to the COVID-19 pandemic. These temporary measures facilitate wholly virtual general meetings (among other things) by temporarily modifying the operation of certain provisions of the Corporations Act 2001 (Cth) to temporarily remove any legal uncertainty concerning the validity of



92.92%
held 100%
virtual meetings



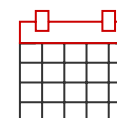
3 held
hybrid meetings



3 held
physical meetings



1
closed webcast



0 meetings
postponed due
to covid

Meeting format

wholly-virtual meetings in Australia. These temporary modifications are currently due to expire in March 2021.

Many Australian businesses and business groups have supported calls for these temporary reforms to be made permanent, citing the need to embrace technology as well as the cost benefits for businesses. A number of investor groups and proxy advisers have countered this proposal, raising concerns that virtual meetings generally do not afford shareholders the same opportunity to participate as attending a physical meeting or hold directors to account, and that hybrid meetings would be a better solution.

The Government appears to be open to considering modernising Corporations Act requirements, with Prime Minister Scott Morrison commenting in June last year that 'COVID has shown that our laws have not kept pace with digital technology when it comes to business communications'. In November 2020, the Commonwealth Treasury conducted a consultation on a proposal to amend the Corporations Act 2001 (Cth) to make permanent certain of those reforms relating to virtual meetings and document execution. As at the date of this Report, the Government had not yet released its response to that consultation, however it appears likely at this stage that a hybrid model will prevail over wholly virtual meetings.

Shareholder participation

Australia's corporate regulator, the Australian Securities and Investments Commission (ASIC), issued guidelines last March for holding hybrid and wholly virtual meetings. ASIC emphasised the importance of hybrid or virtual meetings being facilitated and conducted in a way that provided a reasonable opportunity for shareholders to participate.

In this respect, ASIC expected that shareholders at a hybrid or virtual meeting should be given an opportunity to participate 'that is equivalent to the one they would have had if attending in person'. This included giving shareholders a reasonable opportunity to ask questions live during the course of the meeting and to consider responses to questions and debate before voting on resolutions put to the meeting. Accordingly, ASIC considered that shareholders should have the option to cast a vote live during the meeting via virtual technology in the same way that they would if they attended in person. This was said to be the case even where shareholders had the option to vote prior to the meeting.

Consistent with the ASIC guidance:

- every company allowed shareholders to vote in advance of the meeting
- 90.90% of the ASX 100 allowed shareholders both to vote and raise questions (live at the meeting and in advance)
- in the context of voting, 87.87% of the ASX 100 gave shareholders the option of casting their votes live or in advance, compared to just 12.12% of companies that required voting to be conducted in advance of the meeting
- the Notice of AGM for 8% of companies referred only to the ability for shareholders to ask questions live and did not expressly invite shareholders to submit questions in advance
- one company only permitted questions to be raised in advance of the AGM

Of the 12 companies that only facilitated voting in advance of the meeting, 83.33% required voting to be by proxy compared to just two companies that provided shareholders with more than one method for advance voting (ie direct vote or by proxy).

Where the company allowed shareholders to vote live or in advance of the meeting, the proportion of companies that facilitated advance voting by proxy only was significantly lower (55.55%).

Meeting format

Flexibility for the future

In 2020, a number of the ASX 100 sought to amend their Constitution to (among other things) provide greater flexibility in convening future general meetings, including through enhancements to conduct of meeting provisions and the use of technology. While most of these companies did not directly attribute their Constitutional amendments to Covid-19 (the Notice of Meeting for four of the companies stressed that the amendments were not indicative of the method/format of future meetings, but rather were designed to maximise flexibility), it is likely that the unexpected shift to virtual meetings in 2020 highlighted existing Constitutional barriers and limitations.

In two cases, the amendments were confined to meeting provisions only. In a third instance, the company split out the proposed Constitutional updates into two resolutions (one dealt with hybrid and contemporaneous general meetings, while the other reflected general updates) – both resolutions passed and obtained similar levels of support (74.77% and 74.43% respectively). The remainder of proposed amendments comprised meeting plus broader general updates.

17 companies proposed Constitutional amendments at their respective 2020 AGMs that included amendments to give those companies greater flexibility with respect to the calling, holding and conduct of general meetings. These traversed a number of different industries: Materials/Resources (5); Financial services (3); Health care (3); Retail (2); Telco (1); and Other (3).

In the context of the nature and scope of the proposed Constitutional amendments, across the 17 companies:

- 15 sought to achieve greater flexibility with respect to the use of technology to conduct meetings –
 - in some cases, these amendments simply allow meetings to be held in two or more places linked together by any technology that gives members as a whole a reasonable opportunity to participate – these types of provisions reflect standard terminology that is commonly found in Australian Constitutions
 - in other cases, the proposed updates made clear that the use of technology included online platforms, electronic participation facilities or an instantaneous communication device
 - some companies went even further and took the opportunity to expressly provide for wholly-virtual meetings (which in some, but not all, cases were expressed as being ‘subject to law’ (or similar))
- consequential amendments included provisions dealing with:
 - quorum requirements where meetings are held using technology and/or where shareholders vote by direct vote (there was variance as to whether someone voting by direct vote should be counted when forming a quorum, although the majority did include direct voters)
 - access issues and, in particular, making clear that any a shareholder’s inability to access an electronic participation facility does not affect the validity of the meeting
 - the powers of the chairperson with respect to the conduct of the meeting (in particular, to enhance the chairperson’s powers to reject resolutions, respond to technical difficulties and deal with disruptive behaviour)
- 4 companies made clear that resolutions would be determined by poll where shareholders participate using technology
- 4 companies already permitted direct voting (although 1 of those companies refined their mechanics) and a further 6 companies introduced direct voting provisions
- 4 companies included amendments to give the company flexibility to clarify shareholders’ voting instructions where proxy appointments are incorrect or incomplete and, in one case, this was extended to also cover any direct votes
- 2 companies included provisions allowing board meetings to be conducted using technology
- 4 companies amended provisions governing circular resolutions for directors (including, in two cases, to clarify that circular resolutions can be passed using electronic means)

Meeting format

- 7 companies expressly allowed notices to be given electronically – while 3 also imposed additional requirements with respect to the content of notices of meeting (relating to matters such as access, participation and technology security)

The Constitutional amendments were strongly supported in 15 of the 17 companies – 3 companies obtained 75-79% approval, 2 companies obtained 89-90% approval, 3 obtained 90-95% approval and 7 companies received more than 95% approval.

Of the resolutions that were not passed:

- one company failed to achieve the requisite 75% approval threshold (65.03%) – the proposed Constitutional amendments were not confined to provisions governing the use of technology for shareholder and Board meetings, but included broader updates to reflect developments in the law, corporate governance principles and generally corporate and commercial practices; and
- the other withdrew the relevant item of business prior to the AGM on the basis that proxy votes suggested the special resolution would not be passed.



Remuneration

Key Takeouts

- In 2020, the number of strikes has remained steady across the ASX 100, however executive remuneration may rise up the list of shareholder concerns in 2021 as companies face scrutiny over how well their business (and their workforce) weathered the pandemic.
- Shareholders continue to use director reappointment resolutions to voice concerns over a range of issues (including executive remuneration).
- 2019 saw a marked increase in the number of directors who received a 'protest vote' (more than 10% of votes against his or her election) as compared with previous years. In 2020, the number of directors who received a 'protest vote' remained stable at 27 (unchanged from 2019).

Remuneration

Overall trends

Looking at the past five years' worth of data, 2018 stands out as the high water mark for shareholder dissent. For example, that year saw eleven 'strikes' against remuneration reports at ASX 100 companies, including a record 'against' vote rejecting a remuneration report (over 88.43%).

Following this high point, the 2019 AGM season saw comparatively few second strikes (two) and a notable absence of board spills in the ASX 100. In 2020, this continued with zero second strikes in the ASX 100.

This may be due to a number of factors including boards' increased sensitivity to community and investor expectations and to boards' preparedness to make

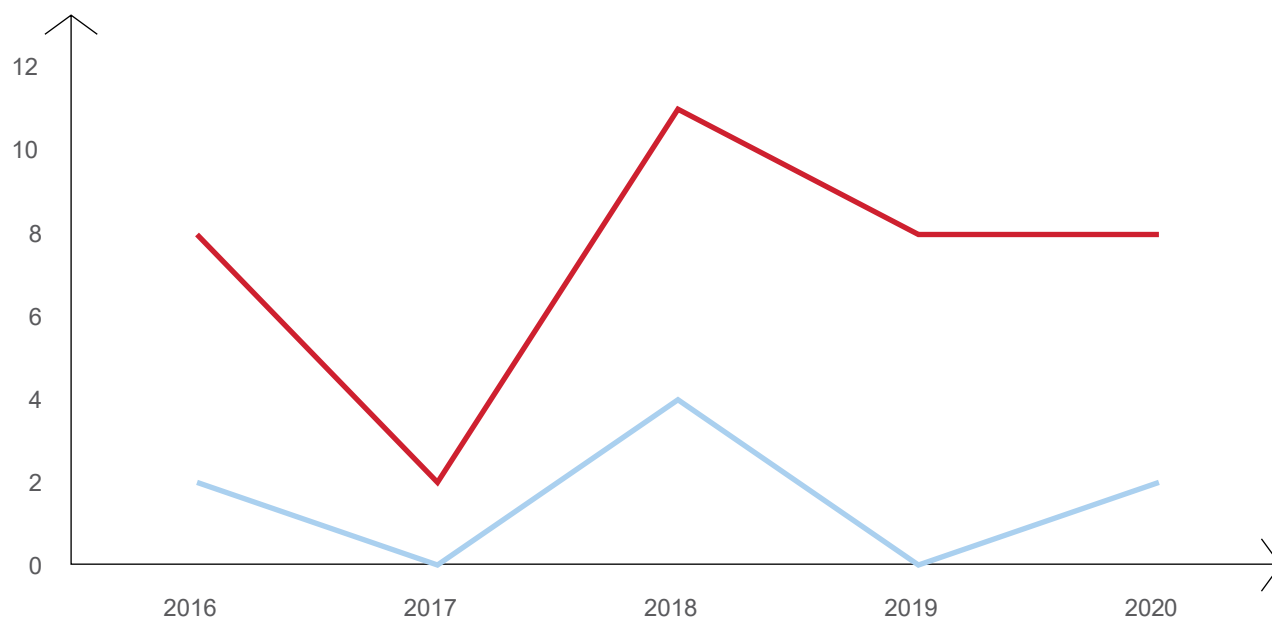
adjustments to executive pay in light of changed market conditions and/or to reflect behavioural expectations. Increased levels of engagement between boards and investors and their advisers on the issue outside the AGM process may also have contributed. Likewise, improved public communication by companies on the issue may have played a role.

As can be seen from the chart below [Figure 1], the number of companies that received a strike (ie over 25% vote against) has varied over the past five years but has remained stable over the past two years at eight.

The number of ASX 100 companies who failed to obtain approval of their remuneration reports has remained within very low limits over the period (between zero and four companies). Excluding 2018, the range shrinks to between zero companies and two.

Support for the remuneration report at the eight companies that received a strike in 2020 ranged from 32.75% to 74.44% (averaging at 55.89%). By comparison, the average approval rate 2019 was substantially higher at 69.96%.

Five year trends: remuneration reports - Figure 1



■ Number of strikes
■ Remuneration report failed to obtain approval

Sector Snapshot

Financial Services

In 2018 there was an overall increase in the number of 'strikes' against remuneration reports at financial firms with the number of strikes increasing from one in 2016 to five in 2018. Likewise, the number of remuneration reports that failed to pass tripled over three years with the average level of support for remuneration reports 10.15% lower in the financial services sector than in other sectors.

In 2019, of the eight companies that received a strike, only one was in the financial services industry and in that case, the firm in question received a second strike (though it avoided a board spill).

In 2020, again only a small proportion (two companies) of the eight companies that received a strike were financial services firms.

Further, the number of financial services directors who received a 'protest' vote of more than 10% of votes against his/her re-election, continued to decrease from a high of four in 2018, to three in 2019 to only one in 2020. In this instance, the director in question received a 12.5% against his reelection to the board.



Remuneration

Zero board spills and zero second strikes?

2019 saw two firms receive a second strike. Despite this, neither faced a board spill with shareholders overwhelmingly voting against the spill resolution (over 88%). The lack of appetite to spill a board since the introduction of the 'two-strikes' rule highlights the importance of board stability to shareholders.

In 2020 there were no second strikes in the ASX 100.

'Near misses'

2020 near misses:

In 2020, five companies narrowly avoided a strike by less than 5% (as compared with four companies in 2019 and six companies in 2018).

What came next?

Of the four companies that narrowly avoided a strike in 2019, only one received a strike in 2020 (that company's report received only 52.66% of votes in support. The remaining three received support for their 2020 remuneration reports averaging over 97%.

Increasing willingness to vote against individual directors

2019 saw a marked increase in the number of directors who received a 'protest vote' (more than 10% of votes against his or her election) as compared with previous years. In 2019, 27 directors at 23 companies received a 'protest vote' against his/her election as compared with 17 directors at 16 companies in 2018 (noting that no directors failed to be re-elected).

In 2020, the number of directors who received a 'protest vote' remained stable at 27 (unchanged from 2019).

Consistent with 2019, no particular sector was targeted. Of the 18 companies at which directors received protest votes, seven were in the resources sector, two were in the retail sector, one was in the financial services sector and eight were in various other sectors.

This highlights stakeholders' increasingly willingness to signal their concern on a range of governance and performance issues by voting against individual directors, and their willingness to hold individual directors to account for overall good governance and company performance.

Increasingly, large asset managers are adopting this approach. For example, in 2020, BlackRock 'took voting action' against 5100 directors globally for a broad range of issues including, lack of independence on the board, insufficient board diversity and overcommitment, failure to meet BlackRock's expectations on climate risk management or disclosures and for management and compensation policies considered to be inconsistent with sustainable long term financial performance¹. In Australia, BlackRock voted against the reelection of directors at two companies in 2020 (including one ASX 100 company) as a signal of concern about the quality of disclosure on plans to transition to a low-carbon economy².

BlackRock's latest voting guidelines state that 'Where we believe companies are not moving with sufficient speed and urgency, our most frequent course of action will be to hold directors accountable by voting against their re-election³'.



0
second strikes



0
board spills



27
protest votes

¹ BlackRock Annual Stewardship Report 2020 p5. See also BlackRock 2021 Stewardship Expectations p

² BlackRock 2021 Stewardship Expectations p18 <https://www.blackrock.com/corporate/literature/publication/our-2021-stewardship-expectations.pdf>

³ BlackRock report: 2021 Stewardship Expectations Global Principles and Market-level Voting Guidelines page 4.

Environmental, Social and Governance

An aerial photograph of a winding asphalt road with yellow double lines, curving through a dense, lush green forest. A dark car is visible on the road, and another car is further up the road in the distance. The forest is composed of tall, thin trees, likely evergreens, creating a textured green canopy.

Key Takeout

Meeting heightened expectations around climate risk governance and disclosure is likely to remain a significant challenge for many companies. Stakeholder focus on the issue appears to have increased, despite the pandemic.

Environmental, Social and Governance

Overall trends

Globally the focus on the importance of environmental, social and governance (ESG) issues and the associated risks and opportunities continues to increase.

In Australia, boards and financial regulators (APRA, ASIC and the RBA) have identified climate related risk as a key area of focus and as a financial risk issue and have pushed companies to improve the depth and quality of their management, planning and reporting. Proxy advisers

and institutional investors have also sharpened their expectations. Likewise, 2020 saw an uptick in climate 'lawfare' directed at both companies, financial product issuers and their directors and officers⁴.

These developments, in addition to an increase in incidence and duration of extreme-weather events have served to elevate expectations around corporate action on and disclosure of climate-related financial risk.

In 2020, despite the COVID-19 pandemic, the number of companies targeted continued to increase.

Twelve ASX 100 companies (eight in the resources sector and four in the financial services sector) faced shareholder ESG resolutions, the vast majority of which were climate related.

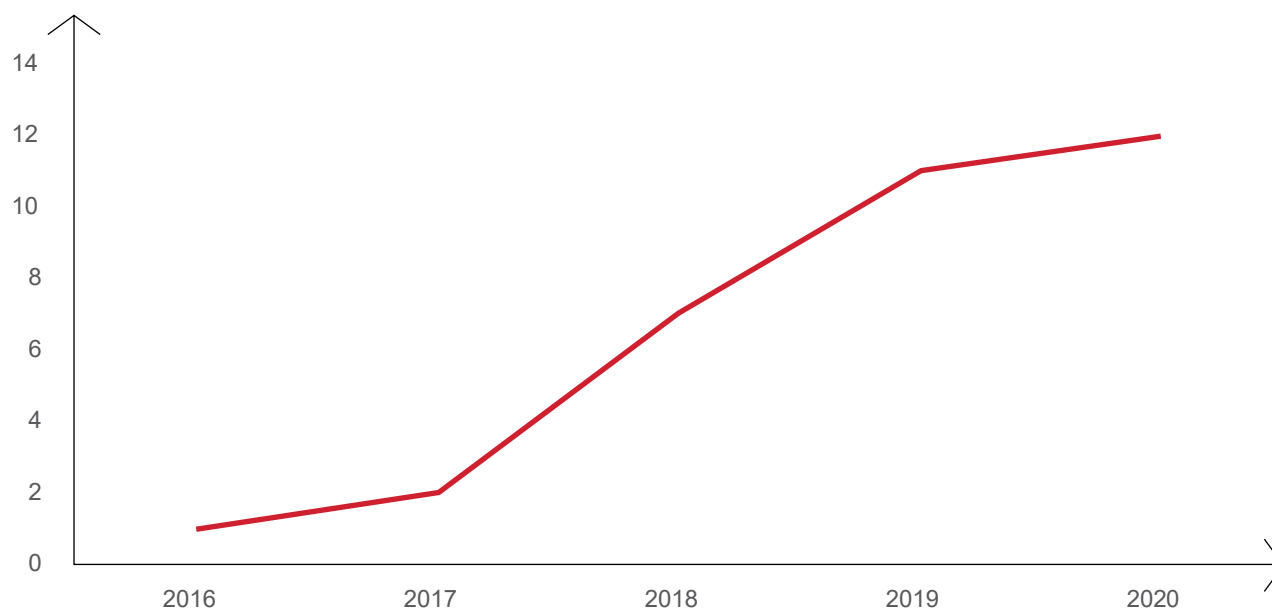
Having said this, the number of shareholder resolutions that proceed to a vote at meetings, though increasing, remains relatively modest as can be seen in chart below [Figure 2].

This may be due to a number of factors.

The relatively low numbers of ESG resolutions that proceed to meetings and their failure to pass, may not necessarily be indicative of a lack of investor concern.

Rather, as identified in previous reports, there are a number of factors at play.

ESG shareholder proposals - Figure 2



⁴ See: O'Donnell v Commonwealth & Ors (22 July 2020, VID482/2020). For insights into the case and the possible implications see our article: Misleading climate-related disclosure: are your verification and disclosure processes defensible?

Environmental, Social and Governance

Passage of a constitutional amendment appears unlikely to be supported

In Australia, the passage of ordinary shareholder ESG resolutions would necessitate a change to the company's constitution.

- All ESG resolutions in 2020 were subject to a constitutional amendment and none passed.
- One resolution in five years has not been subject to a constitutional amendment and this was the only resolution to pass (though this was also a special resolution).

This indicates that supporting a constitutional change is often a bridge too far for Australian shareholders and/or institutional investors, hesitant to encroach on what they perceive to be management's territory⁵.

It's also worth noting, as flagged in previous reports, that in other jurisdictions such as the US, where constitutional amendments are not required, the number of ESG resolutions is higher as is their success rate.

Likewise the relatively high levels of proxy support for contingent ordinary climate resolutions (that do not proceed to a formal vote) – in one instance 50.16% support for a climate resolution – is an indicator of the level of support.

Lack of board support

Only one resolution has had board support, and this remains the only ESG resolution to have passed in the 2016-2020 period. This suggests that board support is a key contributing factor.

Other contributing factors

It's worth noting the role that private engagement plays in this context. Following the filing of a resolution, companies sometimes reach agreement prior to the meeting on a particular issue or course of action as a result of which the resolution is withdrawn ahead of the meeting. This occurred in a number of cases in 2020.

Broader engagement from stakeholders (such as regulators, investors and the wider community) outside of the AGM process can also play a significant role – particularly on issues such as climate change.

Finally, as flagged already, major institutional investors including BlackRock, may elect to signal their concern about a particular issue by voting against the election/re-election of directors rather than through supporting shareholder proposals – though BlackRock has recently signalled a shift in stance on this issue⁶.

⁵ ASCI report: Is there a better way?, October 2017

⁶ BlackRock Stewardship Expectations 2021 at p18: <https://www.blackrock.com/corporate/literature/publication/our-2021-stewardship-expectations.pdf>.

You can find our summary here: <https://www.minterellison.com/articles/summary-blackrock-updated-global-principles-and-voting-guidelines-2021>



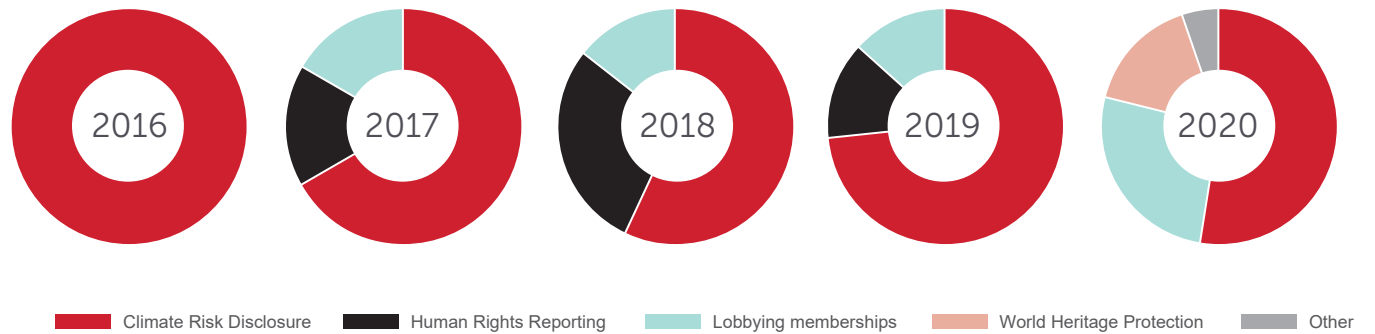
Closer look: Topics of ESG resolutions

Topics of ESG resolutions

As can be seen in chart [Figure 3], over time, the topics of ESG resolutions have diversified beyond climate related issues, to encompass a broader range of social and governance issues, though the majority remain climate-focussed.

Interestingly in 2020, despite the pandemic, not only did the number of shareholder ESG resolutions continue to increase, the overwhelming majority were climate focused as opposed to focusing on other social or governance issues such as diversity or other social issues.

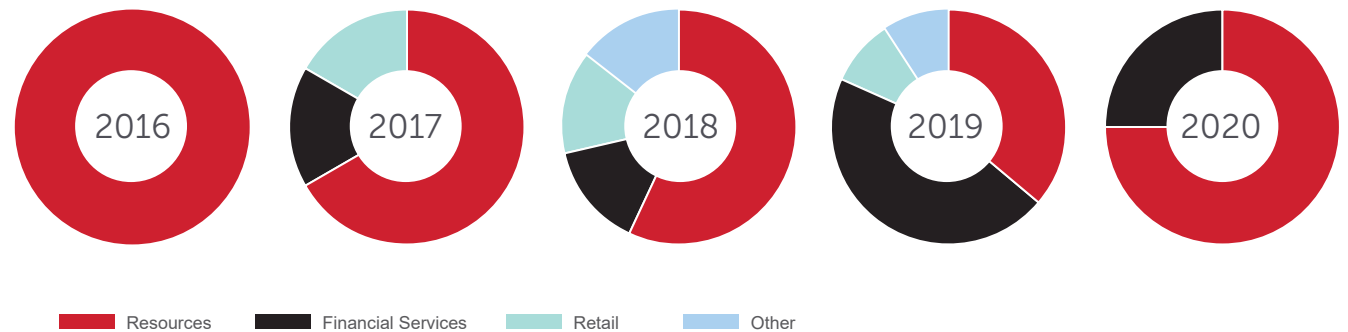
ESG topics - Figure 3



Sectors targeted?

Likewise, over time the sectors targeted have expanded beyond the resources sector to include the financial services, retail and other sectors, as can be seen in the chart [Figure 4].

Sectors targeted - Figure 4



Gender diversity on boards

A photograph of three business professionals in a meeting. A woman with blonde hair, wearing a grey patterned top, is smiling and gesturing with her right hand. Next to her, a woman with dark curly hair, wearing a light-colored blazer, is looking towards the right. In the foreground, the back of a person's head and shoulders are visible, looking towards the women. They are seated at a table with laptops, a tablet, a white mug, and some papers.

Key Takeout

- Most female board nominees were incumbents seeking reelection.
- Raising the female director replacement rate (putting forward female replacements for retiring female directors) is an opportunity for companies to maintain board gender diversity.

Gender diversity on boards

Diversity in leadership is increasingly viewed by regulators, investors, shareholders and other stakeholders as an asset to listed entities and as a contributor to better overall governance, culture and performance⁷.

The steady (if slow) increase in the proportion of women on boards over the past ten years, is one concrete indicator that many boards are listening⁸.

ASX 100 boards are thinking about gender diversity

Most ASX 100 companies (71.71%), from a variety of different sectors, put forward at least one female board-endorsed nominee for election to their board in 2020.

As can be seen from the chart below [Figure 5], the majority of this group put forward a single female board nominee. Interestingly, of the eight companies that put forward three or more female

nominees, half were in the resources sector. Of these companies, a high proportion have implemented annual director elections.

As can be seen from the chart [Figure 6], most female board-nominees were incumbents seeking reelection.

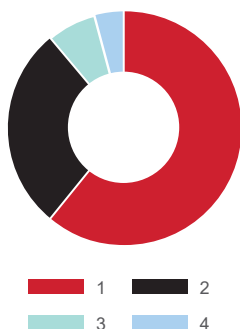
Of the new female directors elected in 2020, most had already been appointed to the board since the last AGM. In only three cases was the nominee completely 'fresh'.

Women are not always being replaced by women

Where a female director steps down from a board (and does not seek reelection), companies do not always seek to replace them with another woman.

21 female directors retired (and did not seek reelection) to ASX 100 boards in 2020. However, of the 21 companies that lost female board members, only 57.14% put forward a female nominee to replace her.

Number of female director nominees Figure 5



Incumbents versus fresh female appointments Figure 6



71.71% of companies put forward at least one female board nominee



21 female directors retired and did not seek reelection



57.14% of retiring female directors' replacements were women



3 'fresh' appointments

⁷ For example: BlackRock views diversity as a key engagement issue and is a supporter of the 30% Club - a group committed to increasing gender representation on boards and in senior management. See: <https://www.blackrock.com/corporate/literature/publication/blk-commentary-engaging-on-diversity.pdf> Closer to home, ACSI similarly views diversity as key engagement issue. See: <https://acsi.org.au/our-issues/gender-diversity>.

⁸ AICD data: <https://aicd.companydirectors.com.au/advocacy/board-diversity/statistics>

Looking forward— lessons learned and issues to consider

Electronic meetings and shareholder participation

2020 saw ASX 100 companies rapidly adapt to holding their meetings electronically (and in most cases entirely virtually). In light of the government's recent consultation on making temporary changes enabling electronic meetings permanent, it is likely that companies will have greater flexibility in their choice of meeting format going forward.

In light of this, boards should reflect on the lessons learned from their 2020 experience and plan their response accordingly. Issues that may be helpful to consider in this context include:

- The company's constitution – does the constitution permit hybrid meetings, direct voting and/or include other provisions to provide flexibility for holding meetings in the future?
- The question of shareholder participation in the online context and what improvements could be implemented to allay concerns

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ESG

Over the past five AGM seasons, the level of investor focus on ESG has intensified. In 2020 despite the pandemic, the focus on climate risk (climate risk assessment, management, transition planning and disclosure) in particular, only continued to accelerate.

Looking forward to 2021 and beyond, the issue will continue to be a key challenge for every board.

You can find more information about how boards can prepare to meet this challenge in our report: Top five considerations for meaningful climate-related corporate governance.

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