Governance News

COVID-19 Special Edition

19 August 2020

Contents

COVID-19 Key Developments

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COVID-19 Global mobility in the 'New Normal' managing a global workforce during COVID-19

In light of the impact that the COVID-19 pandemic has had on global mobility, the MinterEllison Migration team have released an article reflecting on the changes Australian employers will face in the 'new normal'. The article includes practical steps for employers to assist in managing their foreign workers.

The full text of the article is available on our website here.

COVID-19: The government has announced plans to introduce a new automatic recognition scheme

Treasurer Josh Frydenberg has announced that the Council on Federal Financial Relations (CFFD) will develop a framework for occupational licenses to be automatically recognised across jurisdictions. The measure will mean that individuals who hold an occupational licence in one Australian jurisdiction (eg teachers) will be able to undertake equivalent work in another jurisdiction under that licence. This is expected to decrease the regulatory burden on businesses that operate across jurisdictions, decrease their costs and help 'address' barriers to labour mobility across jurisdictions.

Timing: The Treasurer said that the CFFR will prioritise implementation of the new automatic recognition scheme, and will report back to National Cabinet on progress in October 2020. The scheme is intended to take effect from 1 January 2021, subject to the passage of legislation in individual jurisdictions'.

[Source: Treasurer Josh Frydenberg media release 17/08/2020]

Build back better: Australian business groups have called on the government to use the SDGs to inform the policy response to COVID-19

A group of 48 Australian businesses, industry groups, universities and others, coordinated by Global Compact Network Australia has written to the Prime Minister calling for the government to use the United Nations Sustainable Development Goals (SDGs) as a framework to inform the COVID-19 policy response.

The letter states,

> 'Together the 17 goals of the SDGs provide us with an internationally agreed framework, which also works at national, regional, and local levels, alongside and reinforcing existing plans and commitments. They enable Government to work cross-departmentally and with stakeholders to create programmes and policies that are coherent with the needs of our economy, society, and environment both domestically and internationally…We believe the SDGs should be used to establish the level of ambition for Australia's pandemic-recovery and to create intergenerational value that ensures all people in our country live a good life, prospering on a healthy planet no and in the future'.

The letter urges the government to use the SDGs to: 'unite all sectors behind a plan to build a stronger more resilient economy'; ensure the most vulnerable are prioritised and that historical inequalities are addressed; and to 'aid the transition to net zero'.

[Sources: Global Compact Network Australia media release 09/08/2020; Letter]

In Brief | CBA data shows there was a 'solid improvement in the majority of spending categories' in July prior to the imposition of restrictions in Melbourne

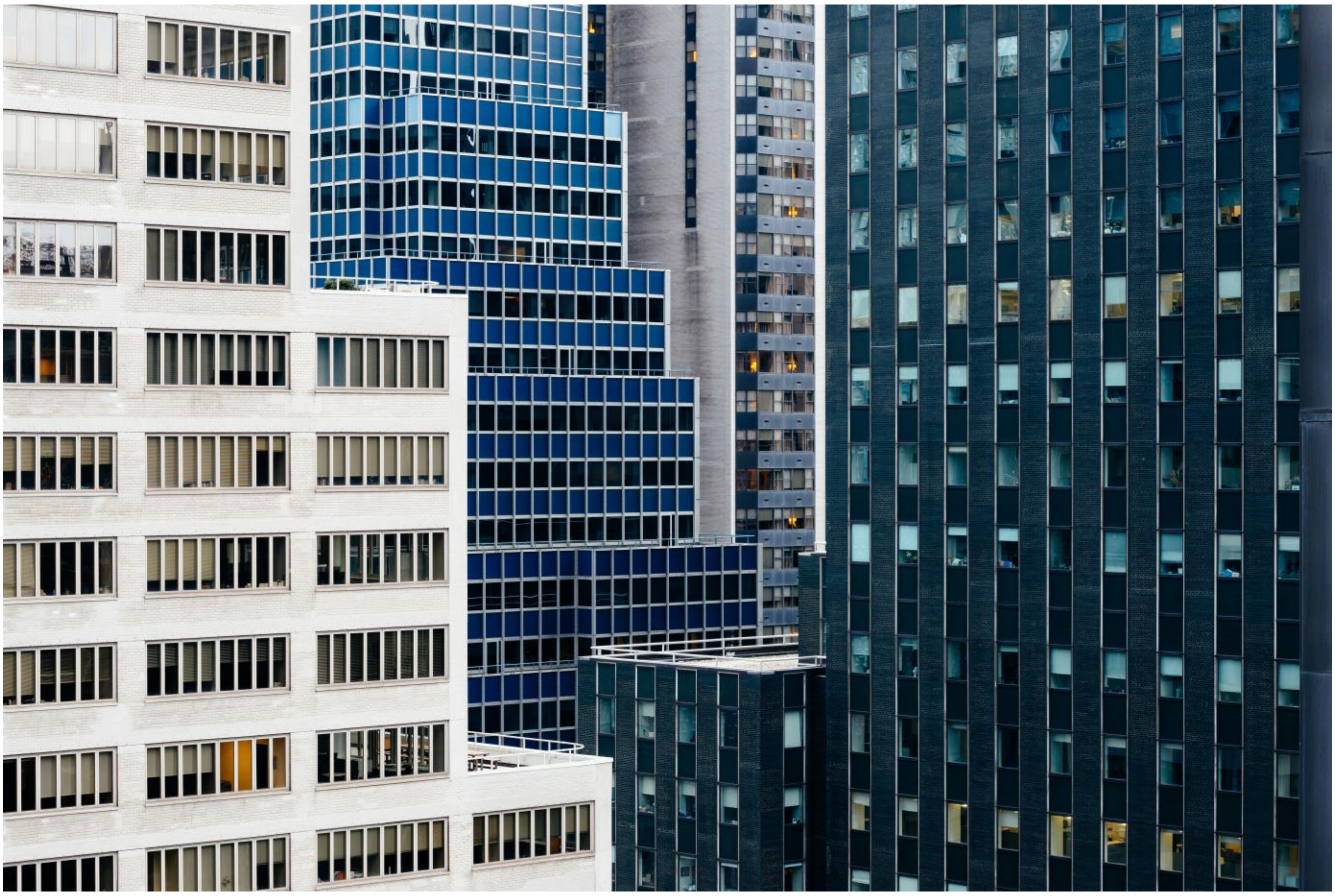
[Sources: CBA media release 18/08/2020; CBA Household spending intentions report]

In Brief | In Brief | Minutes from the RBA's most recent monetary policy meeting confirm that the bank considers the existing COVID-19 policy package is working as expected and that there no need to make adjustments. Having said this, members agreed to continue to assess the evolving situation in Australia and did not rule out adjusting the current package if circumstances warranted

[Source: Minutes of the Monetary Policy Meeting of the Reserve Bank Board 4 August (released 18 August)]

In Brief: Delayed until 2052? The March quarter Financy Women's Index shows that the disruption caused by COVID-19 will delay gender pay parity by four years

[Source: Financy Women's Index March Quarter Key Findings]



Remuneration

Top Story | Trending down: ASX 200 CEO pay at the lowest level in six years

ACSI's latest annual report into CEO pay trends has identified that ASX 200 companies are more willing than previously to exercise pay restraint

Key Takeouts

- ACSI's latest annual report into CEO pay trends has identified that overall ASX 200 CEO pay is trending down over time. ACSI CEO Louise Davidson welcomed this finding as an indication that companies are listening to investors on the issue.
- Increased accountability: ACSI welcomed the fact that remuneration committees appear to be exercising greater discretion over bonuses than previously. In particular, ACSI highlights the fact that 25 ASX 200 CEOs eligible to receive a bonus received no bonus in FY 19 (up from seven in FY 18) as an indicator that 'more boards are using sensible discretion to rein in outcomes for senior executives'.
- ACSI considers that overall, companies appear 'well-positioned' to respond to the challenges of the current environment going into the next pay cycle.

The Australian Council of Superannuation Investors (ACSI) has released its 19th annual report into CEO pay trends at ASX 200 companies . The report is based on FY19 pay data for 83 ASX100 CEOs and 73 ASX101-200 CEOs. The findings ae based on 'realised pay' (ie the value of cash and equity actually received by ASX 200 CEOs) rather than reported pay.

The headline finding is that overall, CEO pay levels are trending downwards, which ACSI has welcomed as a sign of that most (if not all) companies are listening to investors on the issue.

ACSI CEO Louise Davidson said, 'It is pleasing to see, after many years of engagement and scrutiny from ACSI and its investor members, that the trend to restraint on how CEOs and their teams are rewarded continued last year'.

Some Interesting Findings

CEO pay is trending downwards

- Overall, CEO median and average realised pay fell during FY19 in the ASX 200
- Across the ASX 100 released pay fell an average of 7.5%. Over time, median ASX100 CEO fixed pay has declined from $1.95m in FY 12 to $1.76m FY 19.
- The report comments that the overall average of $5.24m is the lowest recorded in the six years of realised-pay data for ASX 100 CEOs. It is also the first time average ASX 100 CEO pay has fallen below $5.5m.

Bucking the trend

- Having said this, the report found that not every company followed the overall downward trend. The report highlights a number of examples of CEOs 'receiving very high realised remuneration'. For example, six ASX100 CEOs received realised pay above $10m in FY19. The highest-paid CEO on a realised-pay basis in FY19, received $37.76m in realised pay, which ACSI comments is 'highest in the history of ACSI's realised-pay data' (period FY 14 to FY 19).
- Several new companies, including seven outside the ASX 100 joined ACSI's list of the top 20 highest paid CEOs in FY 19. Three of the five highest paid CEOs in FY 19 head ASX 101-200 companies including the highest paid CEO on the list. ACSI attributes this to the rapid growth, and increased share price of the companies in question which increased the value of equity incentives awarded to CEOs.

Restraint on bonuses

- **Bonuses continue to be awarded more often than not, but they're also smaller:** ACSI welcomed the fact that companies appear to be exercising more restraint on incentives. ACSI found that the median bonus awarded as a proportion of maximum fell from 70% in FY 18 to 60% in FY 19. Previously, ACSI's 2019 report, suggested that there was opportunity to 'reexamine bonus culture' in light of the fact that 'at risk' pay, was in practice, 'not very risky'.
- **Increased accountability:** 25 ASX 200 CEOs eligible to receive a bonus received no bonus in FY 19. This is a substantial uptick on FY 18, where only seven CEOs had their bonuses zeroed out. Commenting on this, ACSI CEO Louise Davidson said that it demonstrates that 'more boards are using sensible discretion to rein in outcomes for senior executives'.

Decline in cash payments

- Across the ASX 100, median cash pay for ASX 100 CEOs was $2.69m, a fall of 6% on last year on average. According to the report, this is the lowest level since FY 16 and 8.7% lower than the record of $2.95mn in FY11. Average cash pay, at $2.74mn, was the lowest since FY 04.
- Across the ASX 101-200: Average and median cash pay also fell slightly (down 1.7% on last year on average). The report attributes the decline in part to the increased proportion of ASX101-200 CEOs receiving no cash bonus.
- The report comments that the decline in cash pay in FY19 for ASX200 CEOs 'should not obscure that CEOs of these entities continue to routinely receive large amounts of cash'. In FY19, 71.1% of the ASX100 sample received more than $2mn in cash pay (with 15.7% receiving more than $4m), while 71.2% of ASX101-200 CEOs received cash pay of more than $1m.

Less generous termination payments

Total termination payments fell to $18.35m across 14 CEOs, down from FY18's $26.08m across 15 people.

Response to COVID-19 from an executive compensation perspective?

Commenting on the challenges facing boards from a remuneration standpoint this year, ACSI CEO Louise Davidson said that in most cases, boards appear well aware of the need to exercise restraint and respond to the current environment. Ms Davidson said,

> …'companies will need to be mindful this year of how remuneration outcomes will be perceived externally, given the widespread impact of the pandemic on investors, staff, customers, governments and other key stakeholders. Remuneration trends in 2019 indicate many boards are well positioned to respond to these pressures. For others, however, there is more work to be done to make sure they are 'reading the room' on executive remuneration. As always, the measure of a good incentive system is the ability to go beyond the "check-the-box" approach to ensure pay outcomes reflect performance and the experience of investors in the company'.
>
> [Sources: ACSI media release 06/08/2020; ACSI report: CEO Pay in ASX 200 Companies]

United Kingdom | Not much movement? High Pay Centre/CIPD annual report into FTSE 100 CEO pay has identified that there has been very little change in CEO pay between 2018 and 2019

Key Takeouts

- The High Pay Centre and CIPD's latest annual review of executive pay has found that FTSE100 CEO pay remained virtually static between 2018 and 2019, though the report suggests there could be more substantial decreases in 2020 due to COVID-19 pay cuts.
- Overall, the report found that as at 3 July 2020, only 36 FTSE 100 companies had committed to reducing executive pay in response to the COVID-19 pandemic. Though responses varied, the most common reduction was a 20% cut in executive directors' salaries and a 20% reduction in non-executive directors' fees.

- In a separate update, Deloitte found that since 2019 annual reports were published, over 50% of FTSE 100 companies have announced pay cuts, usually in the form of a temporary reduction in salary. .
- The report includes a number of recommendations to help address the disparity between CEO pay and average worker pay, including recommendations to evolve the role remuneration committees in setting pay. 'Given the economic inequality across the UK population, there is a view that reducing the gap between the top earners and everybody else can strengthen faith in business and the economic system more generally' the report states.

The UK High Pay Centre and CIPD have released their latest annual assessment of FTSE 100 CEO pay packages for 2019 – FTSE 100 CEO pay packages 2019. The report also includes some insights into the way in which firms have responded to COVID-19 and suggests that planned pay cuts may mean there is a significant dip in overall CEO pay in 2020.

Overall, the report argues that CEO pay remains unacceptably high when compared with that of the average worker and that especially in the current environment, this risks 'undermining the spirit of solidarity that many companies are trying to project as they battle against the impact of the coronavirus'. The relatively small cuts in pay that have been announced in response to the pandemic suggest, the report argues, that companies are yet to consider whether perpetuating this inequality is good business sense in light of community 'scepticism about the new for very high levels of top pay'.

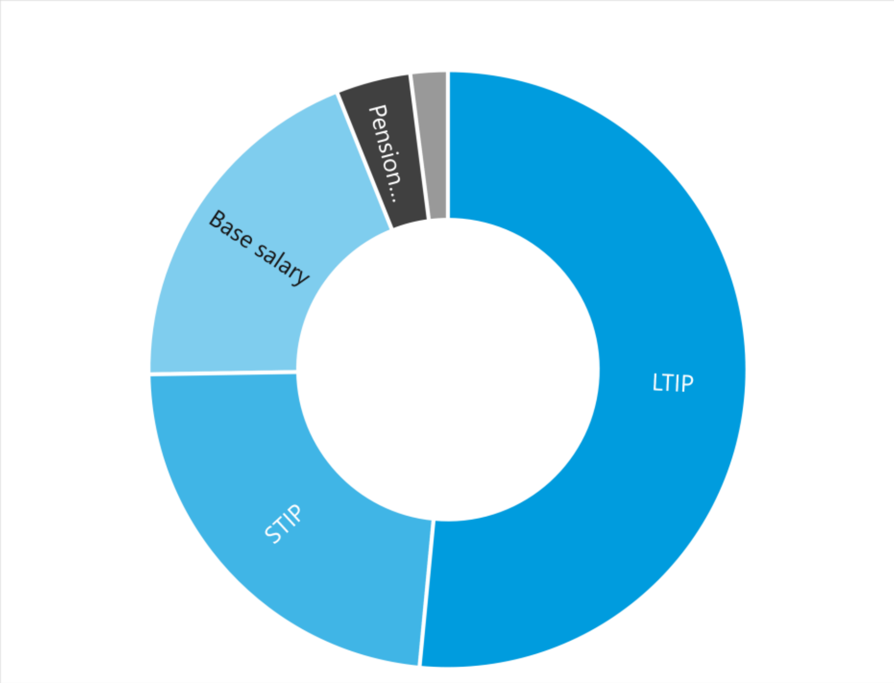
'Given the economic inequality across the UK population, there is a view that reducing the gap between the top earners and everybody else can strengthen faith in business and the economic system more generally' the report states.

Some Interesting Findings

2018 vs 2019: Overall there was very little change year on year

- **Decrease of 0.5% between 2018 and 2019:** Overall, the report found that median pay for FTSE 100 CEOs decreased by 0.5% from £3.63 million in 2018 to £3.61 million in 2019. There report credits the lack of movement in CEO pay since 2011 to a number of causes, including corporate governance reforms, increased transparency and increased investor pressure.
- **CEO pay is at 2011 levels:** Median FTSE 100 CEO pay for FY 19 was £3.61 million. According to the report, this is the lowest level since 2011.
- **Historically pay remains high:** The report comments that despite the slight fall in pay, CEO pay remains high when compared with that of the average worker. In 1999 FTSE 100 CEO pay was 58 times that of the mean full time UK worker. In 2019 this gap had increased to 126 times that of the mean full time UK worker (down from 131.1 in 2019).
- **Some companies bucked the trend:** 49 companies paid more to their CEOs in 2019, and three firms doubling their CEO pay (in comparison with 2018 pay)
- **The highest paid FTSE 100 CEO received a total pay package of £58.73 million** or1935 times the median salary of a full time UK worker.
- **Higher pay correlates with higher levels of shareholder dissent?** Seven FTSE 100 companies experienced a 'significant' vote (20% or more) against the remuneration report in 2019. The report comments that median CEO pay at these companies was 'significantly higher' at £5.51 million, than the median across the FTSE 100.
- **Pay ratio disclosure:** 70 companies disclosed the pay ratio between their CEO and the median pay of their UK employees. The highest quoted pay ratio was 2,605:1 and the lowest was 15:1. The median was 84:1.
- **Automatic bonuses?** 88 FTSE 100 companies paid a CEO bonus in 2019, down from 92 in 2018 and 81 companies paid an long term incentive plan (LTIP), down from 83 in 2018. The report comments that 'When a "bonus" is paid to almost everybody every year, it cannot really be called a bonus – and its value as a reward or incentive is greatly diminished. Guaranteed incentive pay-outs also suggest that boards may not be applying sufficient scrutiny of the impact of individual executives on company performance, as opposed to other factors such as the wider economic context or the contribution of the workforce as a whole'.

- **Structure of CEO pay plans:** The majority of CEO pay (51%) in 2019 was comprised of Long Term Incentive Plans (LTIPs) (up from 48% in 2018). Short term incentive plans (STIPs) or bonuses made up 23% of total FTSE 100 CEO pay. The number of companies who awarded STIPs in FY 2019 (88) was slightly down on FY 2018 (92). CEO salary or base pay accounts for 19% of the overall amount received. Pension contributions or payments in lieu of a pension contribution, represent 4% of CEO pay, Other 'benefits' (eg car allowance, financial advice and income protection, private fuel allowance etc) represent 2% of total pay.



3 July 2020: The response to COVID-19 has varied, but cuts have been 'relatively small'

- As of 3 July 2020, 36 FTSE 100 firms had announced executive pay cuts ranging from cancelling bonuses to the temporary reduction of salaries.
- The companies that have announced executive pay cuts are predominantly in the sectors hit hardest by the COVID-19 pandemic eg retail, hospitality, construction and manufacturing. Banks and financial services firms have also announced cuts.
- The most common reduction was a 20% cut in executive directors' salaries and a 20% reduction in non-executive directors' fees.
- 11 FTSE 100 companies cancelled CEO bonuses. The report comments that, with the exception of one company, the cuts were to cash bonuses only, leaving open the possibility that bonuses may still be paid in shares.
- The report comments that the focus on CEO pay has sharpened in light of the availability of government assistance to support firms. According to the report, 19 FTSE 100 companies have drawn on government assistance eg the Coronavirus Job Retention Scheme (JRS). Most of the companies drawing on government support have also announced that they will be cutting executive pay.
- Outlook for 2020? The report comments that in light of the cuts announced already, and given that CEO pay is often closely tied to overall company performance, which in many cases, is likely to be impacted by COVID-19, it's likely that there will be further falls in pay.

Six recommendations to narrow the gap between CEO pay and that of the average worker

The report includes six recommendations to address the issue of persistently high CEO pay.

Key among them is the recommendation that remuneration committees be replaced with 'people and culture committees'. The new committee would have broader scope to consider issues such as wider workforce reward policies, organisational culture, diversity and environmental sustainability (among other considerations) than remuneration committees, ensuring that 'people issues become more of a central board focus'. This shift, the report argues would be consistent with the requirement for directors to demonstrate regard to all their stakeholders.

In addition, the report advocates: a) tying a greater proportion of CEO to non-financial performance measures (eg organisational culture); b) simplifying incentive plans by limiting the number of performance measures and ensuring they are 'more meaningful'; c) ensuring that the benefits awarded to CEOs/senior executives are 'fair' when considered in the context of those offered to the broader workforce; d) ensuring there is a formal mechanism in place to enable workers to contribute to the pay setting process; and e) amending the Corporate Governance Code to require all publicly limited companies to report on the ethnicity of their senior management teams and their direct reports (rather than only on the gender of senior management teams/direct reports).

[Sources: High Pay Centre media release 04/08/2020; High Pay Centre report: FTSE 100 CEO pay in 2019 and during the pandemic]

Related News: Deloitte has released a preview of its annual FTSE100 executive remuneration report.

Deloitte has released a preview of some of the findings in its forthcoming report into FTSE 100 executive remuneration.

Some Interesting Points

- **CEO pay remained stable in 2019:** Consistent with the findings in the High Pay Centre/CIPD report outlined above, Deloitte found that there was little movement in CEO pay in 2019. CEO pay remained at £3.7m (as compared with £3.65m for 2018). Deloitte comments that as 2019 pay packages are based on estimated values of share awards based on pre-pandemic share prices, the actual value may lower (perhaps by 10%).
- **Bonuses are shrinking:** According to Deloitte, bonuses paid to executive directors have been gradually shrinking over the last five years. In 2015, directors typically received 78% of the maximum bonus, in 2019 this had dropped 10%. Deloitte attributes the downward trend to the fact that remuneration committees are increasingly exercising their discretion when assessing performance, rather than adopting a formulaic approach.
- **Response to COVID-19?** According to Deloitte, since 2019 annual reports were published, over 50% of FTSE 100 companies have announced pay cuts, usually in the form of a temporary reduction in salary.

[Source: Deloitte media release 10/08/2020]

United States | CEO pay at 'an all-time high', shareholder support at the lowest level since 2011

Institutional Shareholder Services has released a summary of the key takeaways from its latest report into executive remuneration.

The findings are based on the 2020 proxy season. ISS comments that given the COVID-19 pandemic hit during the 2020 compensation cycle, the impact on executive compensation is likely to be more apparent in the 2021 proxy season.

Some interesting findings

- **CEO pay reached at 'an all-time high':** ISS found that median pay for continuing CEOs in the S&P 500 and Russell 3000 rose to 'record levels'. The increase is attributed primarily to larger long term equity awards.
- **Annual bonuses:** Fewer S&P 500 and Russell 3000 CEOs received discretionary annual bonuses than in previous years.
- **Drop in shareholder support:** ISS found that though fewer pay resolutions were rejected by shareholders in 2020 than in 2019, the overall median level of shareholder support declined to the lowest recorded level since 2011, to 95.3%.
- **Emphasis on performance based awards:** The prevalence of discretionary annual bonsuses decreased in both the S&P 500 and Russell 3000 in favour of performance based equity awards.

[Source: ISS media release 06/08/2020]

Diversity

Increasing board diversity: Youngest ever ASX 200 independent director appointed to the Telstra board

Telstra has announced the appointment of entrepreneur and Expert360 CEO and co-founder Bridget Loudon to the Telstra board as a non-executive director. Ms Loudon will take up her appointment from 14 August and stand for election at the upcoming AGM.

Announcing the appointment, Telstra Board Chairman, John Mullen said that he welcomed the unique perspective Ms Loudon will bring to the board.

> 'Bridget understands and is a leader in how organisations transform themselves to capture the opportunities presented by developments in technology. Her passion for solving customer problems and entrepreneurial thinking is also evident and critical for Telstra in today's environment. I am delighted to have Bridget join the Board – her youth and entrepreneurial start-up experience in particular will provide a fresh and unique perspective to ensure we are considering a range of views as we navigate Telstra through the next period.

According to The AFR, Ms Loudon is the youngest ever independent director to be appointed to an ASX 200 company.

[Sources: Telstra ASX announcement 11/08/2020; [registration required] The AFR 11/08/2020; SmartCompany 12/08/2020;

US business groups have called on the senate to pass legislation to boost board diversity

Context: A US Bill - H.R. 5084 Improving Corporate Governance Through Diversity Act of 2019 – was passed by the House in November of last year. Broadly, the Bill proposes to: a) impose a new requirement on certain issuers to disclose the racial, ethnic and gender composition of existing board members/executive offers and board nominees as well as the status of any directors/officers or nominees as veterans; b) impose a new requirement to disclose whether the company has adopted any policy/plan/strategy to promote racial, ethnic and gender diversity; and c) require the Securities and Exchange Commission (SEC) to establish a new Diversity Advisory Group to report on strategies to increase diversity (gender, ethnic and racial diversity) on boards.

Business groups have called on the senate to ratify the legislation: Seventeen business groups including the American Bankers Association, the US Chamber of Commerce and the National Association of Investment Companies (among others) have written to the Chair of the Senate Committee on Banking, Housing, and Urban Affairs Mike Crapo and to the ranking member of the Committee Sherrod Brown calling for the legislation to be passed.

The group states,

> 'Our associations and members support efforts to increase gender, racial, and ethnic diversity on corporate boards of directors, as diversity has become increasingly important to institutional investors, pension funds, and other stakeholders…The "Improving Corporate Governance through Diversity Act of 2019" would establish a model to organically boost diversity on boards through disclosure. This legislation would also establish an advisory group that would carry out a study and provide recommendations on private sector strategies to increase gender, racial and ethnic diversity among boards of directors'.

[Source: Open Letter 27/07/2020]

Disclosure and Reporting

Towards standardised disclosure of non-financial risk? FCLTGlobal in collaboration with Deloitte, EY, KPMG and PwC have put forward a suggested list of metrics designed to be 'assurable by auditors and reflective of actual performance, not subjective forecasts or judgments'

In the interests of meeting investor demand for standardised reporting on non-financial risks, FCLTGlobal in collaboration with Deloitte, EY, KPMG and PwC has put forward a list of suggested metrics to supplement, rather than to replace existing and already disclosed financial metrics.

In putting forward their suggestions, the group comments that

> 'Of course, companies could also disclose additional metrics and build out reports under key frameworks such as SASB, TCFD or GRI. And these metrics and disclosures would raise new questions and increase dialogue on context rather than being an end in of itself. But for non-traditional disclosures to be useful on a broad scale to quantitative institutional investors, they need to be assurable, numeric metrics that are material to long-term success'.

The proposed metrics are based on the framework developed by the World Economic Forum in Toward Common Metrics and Consistent Reporting of Sustainable Value Creation (see p8) and are informed by input from institutional investors.

The group notes that they have been designed to be 'assurable by auditors and reflective of actual performance, not subjective forecasts or judgments'.

Suggested additional metrics include the following (among others):

- Board composition information: disclosing the gender, age, independence, tenure, executive/non-executive status of every board member
- Corruption information: disclosing the number of incidents of 'confirmed' corruption in prior years
- Gender pay equity, it's suggested that firms refer to the UK government's gender pay gap service
- Workforce information: it's suggested that firms disclose:
  - the gender, age and 'other indicators of diversity' for each employee category
  - the number of new hires, terminations, 'furloughs' or workers with zero hours, absenteeism data
- Green house gas (GHG) emissions data: On the issue of reporting GHG emissions data, the suggested metrics replicate the WEF's guidance in Toward Common Metrics and Consistent Reporting of Sustainable Value Creation (p8) adding the comment that 'standardizing approach to measurement is critical'.

[Sources: Harvard Law School Forum on Corporate Governance and Financial Regulation 17/08/2020; Toward Common Metrics and Consistent Reporting of Sustainable Value Creation]

Meetings and Proxy Advisers

Note of caution? The ASA has told the Senate Committee that temporary changes to meeting requirements and shareholder communication requirements should not be made permanent unless appropriate safeguards are put in place

Context

- The Australian Institute of Company Directors and the Governance Institute have previously called for temporary reforms to the Corporations Act 2001 (Cth) in Corporations (Coronavirus Economic Response) Determination (No 1) 2020 to be made permanent (see: Governance News 10/06/2020) as have other business groups (see: Governance News 24/06/2020).
- The government appears to be open to considering modernising Corporations Act requirements. For example, in a recent address to the CEDA conference Prime Minister Scott Morrison observed that: 'COVID has shown that our laws have not kept pace with digital technology when it comes to business communications - for example, by requiring business to use paper for storing information, instead of using electronic delivery or adopting new technologies like blockchain. These laws, too, are ripe for modernisation'. The deregulation taskforce subsequently announced that it is prioritising looking at ways to make business communications technology neutral. The Prime Minister's speech and the deregulation taskforce's announcement are covered in more detail in Governance News 17/06/2020.
- Separately, Senate Select Committee on Financial Technology and Regulatory Technology Chair Andrew Bragg has said that he considers 'virtual AGMs, electronic signatures replacing "wet" signatures and letting people execute documents electronically are all no brainers' (see: Governance News 08/07/2020).

A note of caution

Appearing before the Senate Committee on Financial Technology and Regulatory Technology, Australian Shareholder Association (ASA) Policy Advocacy Manager Fiona Balzer has raised concerns about the prospect of making temporary changes enabling virtual meetings and electronic communication with shareholders, permanent unless appropriate safeguards are not put in place to protect shareholders.

Broadly, the ASA's view is that:

- Virtual meetings generally do not afford shareholders the same opportunity to participate as attending a physical meeting. Overall, hybrid meetings are a better alternative to online-only or virtual meetings, in terms of ensuring shareholders have the opportunity to participate/engage.
- On the issue of electronic communication with shareholders, the ASA is of the view that shareholders should retain the option to receive hard copy communication from companies going forward.

Virtual meetings

Ms Balzer said that since March, an ASA representative has attended around 50 online AGMs and provided feedback to companies and share registries about the experience. Overall, Ms Balzer said that though some meetings have been positive (ie as close as possible to the experience of attending a physical AGM), others have been less so. For example, some meetings have been short with little opportunity, or in some cases zero opportunity for shareholders to participate/engage as they would do in a physical setting. On this basis, Ms Balzer questioned whether virtual meetings are an effective means of holding directors to account.

Asked whether the ASA was aware of any instances in which companies had 'wilfully or intentionally' refused to answer questions put by shareholders, and/or instances of companies not 'processing' questions or enabling questions to be asked, Ms Balzer said that 'we haven't had any of the big questions not answered yet, but we haven't had any contentious meetings as yet either'. Ms Balzer added that for transparency, the ASA would support companies being required to publish all shareholder questions submitted and the answers to those questions after the meeting.

Asked whether the ASA would support an extension of the general obligation under the Corporations Act 2001 (Cth) to provide a reasonable opportunity for shareholders to ask questions and make comments in the context of a virtual meeting Ms Balzer confirmed that this would address the ASA's concerns to some extent 'because that would enable people to point out that their question either wasn't asked or for some reason wasn't included'.

Support for hybrid rather than virtual meetings

Ms Balzer suggested that another way to address the ASA's concerns would be to enable companies to hold hybrid meetings, as the ASA has successfully done over the past couple of years. Ms Balzer said,

> 'The ASA has long supported hybrid meetings—a physical meeting with an online meeting — because those people who are disenfranchised from attending due to, say, their rural location, mobility issues or illness can attend from home while there are also people attending via physical presence. We are quite supportive of hybrid meetings being the way forward to encourage greater engagement overall, but we also note that goodwill is required on the part of the company as well as the part of the shareholders to make those meetings work'.

Electronic communication with shareholders (replacing paper communications)

On the issue of electronic communication with shareholders, Ms Balzer said that the 'ASA supports communications by email being the default communication method with shareholders being able to receive particular documents in hard copy' but that the ASA would be 'extremely concerned if this were the only method of communication'.

'No investor should be excluded from being able to buy and sell securities or receive company communications because they don't have an email address' Ms Balzer said. Ms Balzer added that the ASA has received complaints from members about 'disenfranchisement due to their rural location, disability or technology setup'.

Asked, if the reform were to become permanent, what safeguards should be put in place to ensure elderly members, members with disabilities and those in regional areas are able to participate, Ms Balzer said that it is vital that members are able to receive documents by post.

Asked whether the ASA would be 'happy with a system' which enabled shareholders to 'opt-in' to receive hard copies of communications (and otherwise receive electronic communications only), Ms Balzer confirmed that this would be acceptable.

[Source: Transcript: Senate committee on financial technology and regulatory technology 10 August]

Shareholder Activism

Market Forces to push for coal, oil and gas companies to divest or 'wind up' their oil, coal and gas production

Market Forces has released a statement flagging its intention to 'support' shareholder proposals calling on Whitehaven Coal, New Hope Group, Beach Energy, and Cooper Energy to 'demonstrate how they will 'wind up' (bring about an end to) coal, oil and gas production over time, protecting money from being wasted on new projects, and supporting workers as the economy rapidly moves on from fossil fuels to meet the Paris Agreement'.

Each of the companies, Market Forces writes, have indicated their intention to expand their investment in fossil fuel projects, and to increase production over the next several years contrary to the goals of the Paris Agreement.

The group has also called on superannuation members to write to their funds calling on them to support the resolutions.

[Sources: Market Forces media releases 12/08/2020; 12/08/2020]

Activist targets BHP over climate related lobbying and protection of cultural heritage

The Australasian Centre for Corporate Responsibility (ACCR) has filed three resolutions on behalf of BHP shareholders ahead of the company's AGMs on 14 October (Australia) and 15 October (UK).

- **A special resolution** seeking to amend the company's constitution to enable shareholders to file ordinary resolutions (without the need for a special resolution). The ACCR comments that passage of the resolution would 'simply extend to us a right already enjoyed by BHP Group Plc counterparts'.
- **Two ordinary resolutions**: Contingent on the passage of the special resolution, two ordinary resolutions aimed at:
  - **protecting cultural heritage sites**: the resolution calls for: a) a moratorium on 'undertaking activities which would disturb, destroy or desecrate cultural heritage sites in Australia, to be reviewed annually by the Board'; b) the company to commit to 'non-enforcement of any relevant contractual or other provisions that limit the ability of Aboriginal and Torres Strait Islander Traditional Owners to speak publicly about cultural heritage concerns on their land'; and c) for disclosure of the company's 'expectations in relation to any lobbying on cultural heritage issues by any industry association of which it is a member'. The ACCR says that the resolution was prompted by the recent destruction of cultural heritage sites at Juukan Gorge by Rio Tinto. ACCR notes that the resolution has the support of the First Nations Heritage Protection Alliance.

- **suspending membership of industry associations whose lobbying efforts are contrary to the goals of the Paris Agreement:** The resolution calls on the company to undertake a review of industry association memberships and suspend membership where the lobbying efforts of the association are judged to be inconsistent with the goals of the Paris Agreement.

The full text of the resolutions and accompanying explanatory statements are here.

Calls to support a similar resolution at Fortescue Metals Group

Separately, the ACCR has called on Fortescue Metals Group (FMG) shareholders to support a similar cultural heritage resolution at FMG.

[Sources: ACCR media releases 13/08/2020; 13/08/2020; ACCR resolutions; BHP media release 17/08/2020]

Market Forces has welcomed Bendigo Bank's formal support of the Paris Agreement, but has called on the bank to go further

Context: On 17 August, Bendigo and Adelaide Bank released its full year results. The results presentation included a new climate policy statement, explicitly supporting the Paris Agreement and briefly outlined the four 'focus areas' in the lender's three year climate action plan which commenced in June of this year. The four focus areas are: 1) the reduction of the lender's carbon footprint; 2) 'support our customers and communities by taking actions required to mitigate, adapt and respond to climate change'; 3) 'optimis[ing]' the lender's climate change risk governance and risk management framework; and 4) disclosing climate related performance. The bank states that the commitments build on the bank's stance/actions to reduce the bank's carbon footprint and support for green projects.

Market forces has welcomed the bank's commitment to the Paris Agreement, but has called on the lender to do more

In a statement welcoming the lender's formal support of the Paris Agreement, and the commitment to increased transparency around climate risk, Market Forces called on the lender to go further. In particular, Market Forces called on the bank to publicly release the results of scenario analysis on the impacts of climate change on the agricultural sector.

Market Forces states,

> 'Given Bendigo Bank's significant exposure to the agricultural sector and its commitment to risk management and transparency, shareholders should now reasonably expect the bank to publish scenario analysis…Bendigo claims it has already conducted this analysis but that it has not been made public. The bank's failure to publish this information is contrary to the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD)'.

[Sources: Bendigo and Adelaide Bank Full Year Results Presentation 17/08/2020; Market Forces media release 17/08/2020]

In Brief | The ACCR has filed shareholder resolutions at AGL Energy calling for AGL to bring forward the closure of two coal fired power stations. The resolutions are set to be voted on at the upcoming AGM on 7 October

[Source: ACCR media release 07/08/2020]

Institutional Investors and Stewardship

The option to participate in shareholder class actions is a 'vital third arm of active ownership' HESTA CEO Debby Blakey tells parliamentary committee

Appearing before the parliamentary joint committee on corporations and financial services inquiry into litigation funding and the regulation of the class actino industry, HESTA CEO Debby Blakey described the option to take legal action (through participating in class actions) as a 'vital third arm of active ownership that complements engagement and share voting to protect shareholder value and achieve long-term systemic change for the benefit of our members'.

> 'Substantial losses from significantly unacceptable actions left unaddressed, ultimately, impact the retirement outcomes of our members as well as the functioning of markets that underpin our economy's long-term sustainability and growth' Ms Blakey said.

Asked to clarify how participating in class actions is in the interests of members, given the costs involved, Ms Blakey said taking legal action to address corporate governance or other failings at a particular company, serves not only to recover losses for members, but to raise the standards of corporate governance at the firm over the longer term. Ms Blakey said,

> 'We're a long-term investor. We invested very much for the long term, so we're seeking long-term good value on behalf of our members. Over the long term, we want to protect and enhance the value of companies. If, in the short term, there has been egregious behaviour, a failure of corporate governance or breaches, we believe that actually bringing that to the fore for a class action and recovering losses also actually gives us the opportunity to raise the bar in terms of corporate governance over the long term. In fact, we believe that, where this works, the long-term value of that company is likely to increase. So I think it's really important that, as a super fund, we look at the context of that long-term relationship as an investor'.

HESTA is currently participating in 21 active class actions on behalf of members to recover losses.

[Source: Parliamentary Joint Committee on Corporations and Financial Services Inquiry into Litigation Funding, Transcript 03/08/2020]

Corporate Social Responsibility and Sustainability

Window dressing? One year on, was the business table's statement on corporate purpose just for show? More broadly, is stakeholderism a bad idea?

Context

In August 2019, the Business Roundtable issued a revised statement (BRT statement) on the purpose of the corporation, as part of its work to ensure more 'inclusive prosperity'. The statement commits the 180+ signatory companies to not only serve their own 'corporate purpose' but to commit to delivering benefits to all stakeholders (customers, employees, suppliers, communities and shareholders). As such, the New York Times characterised it at the time as 'an explicit rebuke of the notion that the role of the corporation is to maximize profits at all costs — the philosophy that has held sway on Wall Street and in the boardroom for 50 years'. The full text of the statement is here. Our summary is here.

One year on – just window dressing?

One year on, Harvard academics Lucian Bebchuk and Roberto Tallarita argue that the BRT statement was 'a mere public relations move' rather than a genuine commitment by signatories to make substantial changes to the way in which they treat stakeholders.

Further, they argue that 'stakeholderism' – the idea that directors and officers should/should be able to consider the wellbeing of stakeholders rather than only shareholders in the context of business decision making - is itself a flawed concept which in practice does not deliver the expected benefits to stakeholders and is detrimental to their interests.

Is the BRT statement just window dressing?

Writing in Harvard Law School Forum, the authors point to the lack of board approval of the decision to sign on to the BRT statement by 98% of signatories (who responded to their request for comment) as one indicator that the signatories did not view it as a serious commitment to bring about major change but rather as an affirmation of their own firm's existing approach. The authors argue that the lack of board approval is explained by the fact that,

> 'CEOs didn't regard the statement as a commitment to make a major change in how their companies treat stakeholders. In the absence of a major change, they thought that there was no need for a formal board approval…Thus, the lack of board approval is consistent with and supports the conclusion that the BRT statement was not expected by signatories to bring about major changes'.

In their paper - The Illusory Promise of Stakeholder Governance - the authors take this further, arguing that there are a number of other indications that suggest that the BRT statement shouldn't be expected and was never intended to bring about major change. For example, the authors point to (among other indicators):

- the 'lack of attention' in the statement to legal constraints that operate to 'preclude many companies from approaching stakeholder interests as an independent end'
- the lack of clarity around 'whether the statement advocates providing stakeholders with any benefits beyond what would be useful for shareholder value'; and
- the failure to reflect the commitment to stakeholders in corporate governance guidelines.

[Note: The authors have flagged their intention to publish a series of articles on Harvard Law School Forum outlining in turn.]

What's wrong with stakeholderism?

The criticism of the BRT statement is based on one aspect of the authors' broader examination of 'stakeholderism' and its purported benefits. This broader study - The Illusory Promise of Stakeholder Governance - ultimately concludes that the concept of stakeholderism is itself flawed and in practice is detrimental to stakeholder interests.

'Our analysis concludes that acceptance of stakeholderism should not be expected to make stakeholders better off. Furthermore, we show that embracing stakeholderism could well impose substantial costs on shareholders, stakeholders, and society at large. Stakeholderism would increase the insulation of corporate leaders from shareholders, reduce their accountability, and hurt economic performance. In addition, by raising illusory hopes that corporate leaders would on their own provide substantial protection to stakeholders, stakeholderism would impede or delay reforms that could bring meaningful protection to stakeholders. Stakeholderism would therefore be contrary to the interests of the stakeholders it purports to serve and should be opposed by those who take stakeholder interests seriously'.

[Source: Harvard Law School Forum on Corporate Governance and Financial regulation 12/08/2020; The Illusory Promise of Stakeholder Governance]

Regulators

COVID-19: APRA has confirmed it will recommence its policy program in four areas

The Australian Prudential Regulation Authority (APRA) has announced that it will recommence public consultations on some policy reforms and begin a phased resumption of the issuing of new licenses.

Policy reforms will recommence in four areas

The policy reforms that will be recommenced in 2020 are as follows:

1. 'the cross-industry prudential standard for remuneration;
2. ADI capital reforms incorporating APRA's unquestionably strong framework, Basel III and measures to improve transparency, comparability and flexibility;
3. insurance capital reforms to incorporate changes in the accounting framework (AASB 17);
4. the prudential standard for insurance in superannuation, and updated guidance on the sole purpose test'.

In addition, APRA will recommence consultation on a limited number of its data collections, including the recommencement of its Superannuation Data Transformation project.

Announcing this, APRA Chair Wayne Byres said that though resumption of some activity is warranted, 'it is neither possible nor desirable to pursue our full policy agenda for the time being. APRA therefore intends to narrow its policy activities in the remainder of this year to a small number of high-priority prudential policy reforms'.

The statement adds that the regulator's 2021 policy program will also be subject to adjustment dependent on the circumstances, industry capacity and government priorities.

Licensing

APRA will adopt a phased approach to assessing and issuing new banking, insurance and superannuation licences.

TIMING	ACTION
Phase 1 (from September 2020)	▪ Assessing licence applications: APRA will accept new licence applications from any entity from September 2020. ▪ Issuing licence applications: APRA will issue licenses to applicants that are branches of subsidiaries of foreign entities with 'significant financial resources and a strong operational track record in a similar business'.
Phase 2 (from March 2021)	'APRA envisages new licences may be issued to any entity that meets the relevant prudential requirements'.

Review of the pathways to an ADI Licence: APRA is states that it is 'reviewing the pathways to an ADI licence, including the Restricted ADI licensing framework that was launched in 2018, to incorporate experiences to date, while continuing to support competition in the sector'.

[Source: APRA media release 10/08/2020]

Financial Services

COVID-19: So far funds have paid out $31.1bn under the government's early release of superannuation scheme, the data indicates that the number of applications coming through is slowing

The Australian Prudential Regulation Authority (APRA) has released industry-level and fund-level data on the early release of superannuation scheme for applications received during the period 20 April (inception of the scheme) to 9 August 2020.

- Total payments made since the inception of the scheme have taken an average of 3.3 business days to process, with 95% of payments made within five business days.
- Over the week to 9 August, superannuation funds received 88,000 applications. This is down on the 103,000 applications received in the week to 2 August and on the 140,000 applications received in the week to 26 July.
- Of the applications received in the week to 9 August, 44 000 were repeat applications bringing the total number of repeat applications received to date to 1.1 million.
- 44 000 were initial applications bringing the total number of initial applications to 3 million since inception of the scheme.
- Over the week to 9 August, superannuation funds made payments to 95 000 members worth $0.71 billion.
- Funds have made approximately 4 million payments since the inception of the scheme worth a total of $31.1 billion. This figure represents 97% of applications received since inception of the scheme.

[Source: APRA media release 17/08/2020]

COVID-19: Early release of superannuation scheme targeted by scammers: ASIC confirms it has received referrals concerning 'serious and organised fraud'

ASIC confirms it has received referrals from several agencies in connection with COVID-19 scams and fraud, including scams targeting the early access to superannuation scheme

In response to a question put by the Parliamentary Joint Committee on Corporations and Financial Services, the Australian Securities and Investments Commission (ASIC) has confirmed that it has received referrals eight agencies regarding COVID-19 scams and fraud. The agencies are: 1) the Australian Taxation Office; 2) Australian Federal Police; 3) Australian Competition and Consumer Commission; 4) Australian Cyber Security Centre; 5) Australian Criminal Intelligence Commission; 6) Attorney General's Department; 7) Australian Prudential Regulation Authority; and 8) the Australian Financial Complaints Authority.

ASIC said that the concerns raised relate both to 'matters that are within and outside of ASIC's jurisdiction'. Matters specifically relating to the early release of superannuation scheme include:

- 'serious and organised fraud targeting superannuation funds'
- 'serious and organised crime targeting early release of superannuation payments'
- identity theft linked to COVID-19 stimulus schemes

In a statement, Shadow Assistant Treasurer Stephen Jones said that the Federal Labor party asked the Auditor-General to investigate these issues.

The AFP has charged three people with (allegedly) submitting false claims

The Australian Federal Police (AFP) have charged three people with allegedly submitting false claims to gain early access to superannuation under the early release of superannuation scheme, bringing the total number of people charged with submitting false claims to seven.

The AFP alleged that the three submitted a number of false applications claiming to be other superannuation fund holders, in an attempt to secure $113,500. If convicted, the three could face financial penalties and/or imprisonment.

Announcing this, AFP Deputy Commissioner Brett Pointing said the 'AFP and its partners remain committed to identifying and prosecuting anyone who tries to exploit the system for their own greed and access money for which they are not eligible'.

Mr Pointing also called on superannuation members to ensure their personal financial details are secure – 'don't be an easy target for criminals' he said.

The ATO has launched a pilot program to investigate levels of ineligibility

The Australian Taxation Office has confirmed that it has commenced a pilot program to investigate the proportion of applications being made by people who are ineligible to withdraw funds early under the government's early release of superannuation scheme.

ATO second commissioner, client engagement group, Jeremy Hirschhorn said that 'at a first sweep' the ATO determined that approximately 90% of applicants were eligible or 'clearly eligible'. The pilot program is focused on a sample of 160 applicants who do not fall into this group. To date, the ATO has found that there is 'not conscious abuse of the scheme' but rather that a number of applicants misunderstood the eligibility requirements. As yet, he said no fines or notices have been issued.

On the question of responsibility for compensating superannuation members whose funds have been withdrawn by fraudsters, Mr Hirschhorn indicated that he considers responsibility to rest with the superannuation fund.

> 'We [The ATO] say that they look like they've met a condition of release. The super funds then have to judge whether they release the money under the rules of the fund. There are some dispensations from APRA in that they do not have to do all the things they would ordinarily do, but they can do all the things they ordinarily do—it's their choice. So it's to make it easier for the funds, but the funds still choose whether or not they do them. In reality, the funds, as I understand it, are holding back a percentage of applications that they feel need further review, and that is happening in reality. The funds do not automatically pay out on the basis of the declaration they receive from us'
>
> [Sources: Parliamentary Joint Committee on Corporations and Financial Services: Answer to question on notice number 65 10/08/2020; [registration required – accessed via LexisNexis Capital Monitor] Shadow Assistant Treasurer Stephen Jones media release 12/08/2020; AFP media release 09/08/2020; Transcript : Senate Select Committee on COVID-19: Australian Government's response to the COVID-19 pandemic 14/08/2020]

Assistant Minister for superannuation, financial services and financial technology reminds employers of the upcoming superannuation guarantee amnesty deadline

Assistant Minister for superannuation, financial services and financial technology Jane Hume has flagged that employers should expect to receive notices from the ATO reminding them of the 7 September expiration date for the superannuation guarantee amnesty.

Ms Hume reminded businesses that to take up the amnesty employers need to come forward and disclose to the ATO and either pay the unpaid amounts of superannuation in full with interest or put a payment plan in place before the 7 September deadline.

Ms Hume said that the ATO has 'pathways in place to work with businesses and create payment plans' where needed, and that businesses who fail to avail themselves of the amnesty and who are found to have underpaid employees after it expires will face financial penalties.

'If you are in any doubt, it is vitally important that you talk to your tax agent or the ATO today; the amnesty expires in a month and it will take time to verify the amount of any unpaid super and pay it or put a payment plan in place' Ms Hume said.

[Source: Assistant minister for superannuation financial services and financial technology Jane Hume media release 06/08/2020]

Superannuation trustees compensate members incorrectly classified as smokers

The Australian Securities and Investments Commission (ASIC) has announced that following three years of engagement, superannuation trustees who have historically classified new members as 'smokers' by default and charged them a higher life insurance premium on that basis, have ceased the practice.

According to ASIC's statement all seven superannuation businesses with whom the regulator engaged, have: a) stopped charging new members life insurance premiums at smoker rates by default; and b) have moved or are in the process of moving existing members paying 'smoker' rates by default onto non-smoker or blended rates.

Four superannuation businesses have refunded or have agreed to refund members for extra premiums paid as a result of being classified as a smoker. Announcing the move, ASIC Commissioner Danielle Press said that when planned remediation is complete more than 5000 members will have received more than $3.6 million in compensation.

Ms Press went on to comment that trustees should ensure members are not 'disadvantaged due to disengagement or inertia. I strongly encourage trustees to take into account the composition and needs of their membership and check whether their default settings for insurance coverage are reasonable'.

[Source: ASIC media release 07/08/2020]

Signs that measures to address card fraud are working? The Australian Payments Network has found that rates of card-related fraud decreased in 2019, in part due to the introduction of the CNP Fraud Mitigation framework

A report from the Australian Payments Network – 2020 Payment Fraud Report – has found that card-related fraud declined in 2019.

Some Interesting Points

- While spending on cards increased 3.9% on 2018 levels, the level of card-related fraud declined by 19.5% overall, which is below 2014 levels. The total value of card-related fraud declined 20% to $464 million.
- Fraud on lost or stolen cards fell by 37% to $35 million
- Counterfeit /skimming fraud fell by 14.3% to $16.8 million

Card-not-present (CNP) decreased despite the uptick in CNP transactions

Card-not-present fraud is where valid card details are stolen and used to make purchases/other payments without the card, usually online. This is the single largest category of fraud accounting for 87% of all card fraud.

In 2019, CNP transactions in Australia increased by 16% to $220 billion. Over the same period, CNP fraud dropped by 17.7% to $402.6 million.

Australian Payments Network comments that the drop in CNP fraud is significant because it is the first time a drop in this form of fraud has been recorded. The Australian Payments Network also considers that it is an indicator of the effectiveness of the CNP Fraud Mitigation Framework which was introduced in July 2019. .

Commenting on the overall drop in fraud levels, and in the drop in CNP fraud in particular, Australian Payment Network CEO Andy White said,

> 'It is early days but based on the 2019 data, the impact of the CNP fraud framework is starting to show. The early experience reinforces that a whole of industry approach is required to reduce fraud. Just as chip technology has shut down the space for skimming and counterfeit fraud, we have reason to be optimistic that we have turned the corner on online card fraud. However, we need to remain vigilant as e-commerce volumes increase during the COVID 19 pandemic. Moreover, criminals will be looking for new opportunities through scams'.
>
> [Sources: Australian Payments Network media release 14/08/2020; Report: 2020 Payment Fraud Report]

COVID-19: Business interruption test case: The Insurance Council of Australia has confirmed that it has commenced proceedings in the NSW Supreme Court

As previously flagged in a joint statement with the Australian Financial Complaints Authority (AFCA) (see: Governance News 05/08/2020), the Insurance Council of Australia (ICA) has commenced proceedings in the NSW Supreme Court to 'test the application of certain infectious diseases exclusions in business interruption policies'.

Consistent with the earlier joint statement, the ICA states that the case is being brought to provide clarity to industry and to small business consumers on the operation of pandemic exclusions and it is 'understood' that AFCA will use the outcome of the case in determining complaints.

ICA CEO Rob Whelan states that

> 'The industry wishes to have the case heard as quickly as possible, given the challenging times being experienced by the small business sector because of COVID-19, the past season of natural disasters and the recession. Most insurers have never contemplated coverage for pandemics in their policies, and did not price pandemic risks into premiums. They believe pandemic-related exclusions are appropriate, but wish to provide greater clarity through engaging a superior court process'.
>
> [Source: Insurance Council of Australia media release 13/08/2020]

COVID-19: How lenders should approach consumers who cannot resume repayments on their mortgages: ASIC sets expectations for lender behaviour

The Australian Securities and Investments Commission (ASIC) has released updated expectations of retail lenders for managing the expiry of six month mortgage repayment deferrals. Though the expectations are focussed on loan referrals, ASIC also makes clear that they have application beyond this to the way in which lenders approach all other credit products and assistance arrangements.

Broadly ASIC's expectation is that

> 'Lenders must do all things necessary to ensure that the credit activities authorised by their licence are engaged in efficiently, honestly and fairly. As such, we expect lenders to have processes in place that will allow for an orderly transition and importantly, deliver consumers appropriate and fair outcomes.'

The updated expectations supplement rather than replace ASIC's earlier statement of expectations which can be accessed here.

ASIC's expectations: snapshot

- **Contact consumers before their loan deferral expires:** Lenders are expected to make 'reasonable efforts', using a 'range of communication channels' to contact consumers about the expiry of their deferral and keep records 'to evidence' the steps taken. ASIC also expects that lenders will provide consumers with information to assist them in their decision making. ASIC identifies, based on its monitoring activity, that the provision of more personalised information and/or examples of the way in which assistance arrangements could affect repayments and the cost of the loan over the longer term is one area where it has observed that lenders can improve their approach.
- **Where a consumer informs the lender that they are unable to resume full repayments**, lenders are expected to:
  - **call the consumer**: lenders are expected to 'make reasonable efforts' to get in touch with the customer eg through a phone call. ASIC considers that this will assist in the process of gathering 'more personalised information about the consumer's circumstances to make a decision about the consumer's loan in a fair and appropriate manner'.
  - **enable staff to adopt a flexible approach to offering further assistance,** tailored to the needs of the consumer (if it is determined that this is appropriate). ASIC expects that lenders will keep records of what assistance options are provided to each consumer.
  - **keep people in their homes where that is in their best interests**: Where consumers identify that they are unable to resume repayments over the longer term because of the severity of their financial difficulties 'ASIC expects lenders to make all reasonable efforts to work with consumers to keep them in their homes if that is in their best interests'.
  - **where further assistance is determined not to be appropriate**: ASIC states that 'there will likely be some circumstances where offering a consumer further temporary assistance may make their situation worse. Such situations will need to be carefully identified by lenders and involve a high level of engagement with those affected consumers'.
- **Offer further assistance:** Should a consumer miss a repayment after their deferral expires, lenders are expected to 'make reasonable efforts' to contact them to assess whether further assistance is appropriate.
- **Right to complain to AFCA:** Where a consumer is dissatisfied with a lender's response/decision, for example where a lender declines to offer further assistance, lenders are expected to notify consumers of their right to complain to the Australian Financial Complaints Authority about the decision
- **Straightforward processes and clear information about assistance:** ASIC expects that lender's processes are straightforward and easy for consumers to understand and to navigate.

ASIC welcomed the fact that a number of lenders are undertaking regular reviews of their approach to consumer engagement and encouraged all lenders to build continuous improvement into their processes to support better consumer experiences/outcomes.

ASIC is working closely with APRA to ensure the regulators' respective approaches are aligned

ASIC states that it is working closely with the Australian Prudential Regulation Authority to ensure that the expectations of the two regulators are in alignment.

Related News: APRA has also updated its banking COVID-19 frequently asked questions relating to the treatment of loans impacted by COVID-19. The updated FAQs are here.

[Source: ASIC media release 13/08/2020]

APRA has released a consultation letter seeking feedback on proposed legislative instruments to formalise previously announced ADI capital measures and reporting requirements for loans impacted by COVID-19

In March of this year, the Australian Prudential Regulation Authority (APRA) announced a temporary capital treatment for a period of up to six months for loans where the Authorised Deposit Taking Institution (ADI) had granted a repayment deferral. On 9 July 2020, APRA published a letter extending this measure and adjusting the treatment of restructured loans affected by COVID-19.

APRA has now written to ADI's seeking feedback on proposed temporary legislative instruments to formalise the announced capital measures and reporting requirements.

What is APRA proposing?

- **Capital treatment:** APRA proposes to give effect to the temporary capital treatment by adding a new Attachment E to Prudential Standard APS 220 Credit Quality which modifies the application of APS 220 requirements for loans affected by COVID-19.
- **Data collection**: APRA proposes to collect and publish entity-level data on COVID-19 impacted loans through a new Reporting Standard ARS 923.2 Repayment Deferrals (ARS 923.2).

Timing: The one week consultation period closes on 21 August 2020. APRA says that it will finalise its response and register the revised APS 220 and new ARS 923.2 as soon as practicable after the consultation period.

[Source: APRA media release 13/08/2020]

In Brief | ASIC has reminded responsible entities of their obligation to 'ensure that valuations of their managed fund assets are regular and reasonably current having regard to the nature of the assets' in light of the current environment

[Source: ASIC media release 11/08/2020]

In Brief | ASIC has encouraged Indigenous consumers to be wary of scams following a 14% uptick in scam reports from Indigenous consumers to the ACCC's Scamwatch in 2019.

[Source: ASIC media release 18/08/2020]

Accounting and Audit

UK government says it will push ahead with audit reform, including the creation of the new regulator, 'as soon as parliamentary time allows'

Key Takeouts

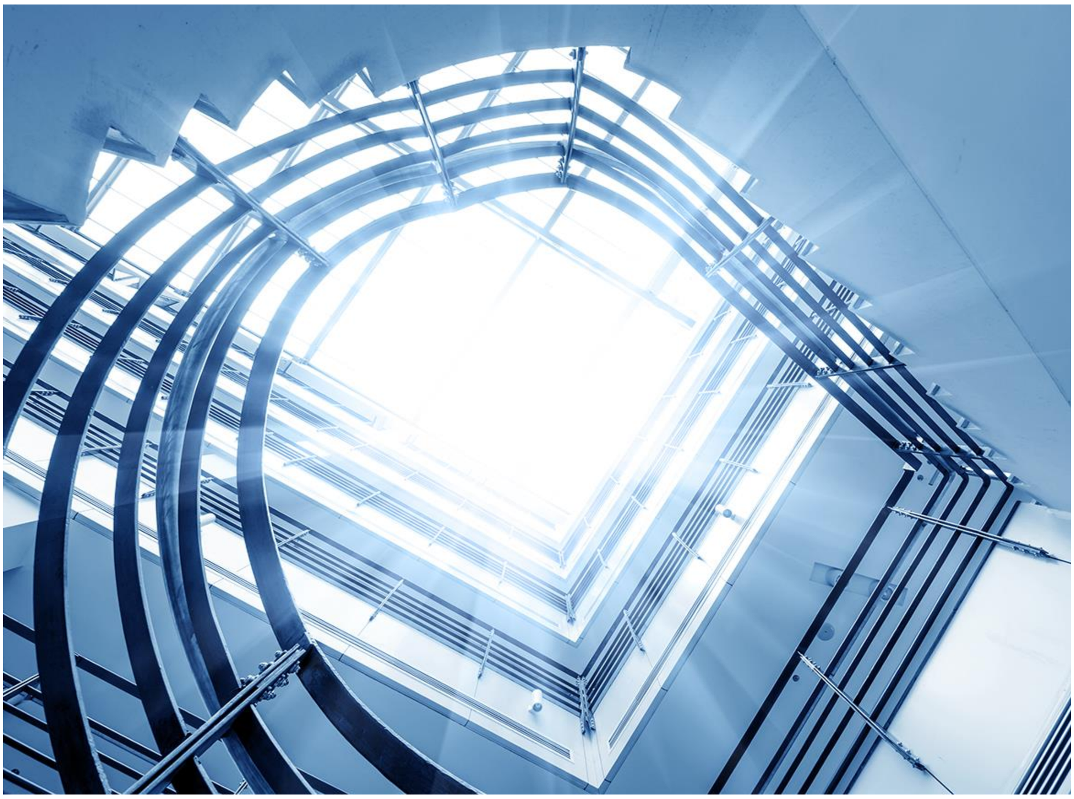
- The UK government's response to the Business, Energy and Industrial Strategy (BEIS) Committee inquiry into Thomas Cook was released on 14 July 2020.
- The response indicates that the government plans to push forward with audit reform, and in particular to push ahead with the creation of a new and stronger regulator to replace the Financial Reporting Council, but gives no timeline for doing so beyond stating that it will do so 'as soon as parliamentary time allows'.
- Other recommendatons for audit reform, including those put forward by the BEIS and those of the three recent inquiries into audit, are still being considered.

In its formal response to the inquiry into the collapse of Thomas Cook, the UK government has said that following the completion of the three recent reviews into audit, it is pushing ahead with planned audit reforms, including the creation of the Audit Reporting Governance Authority (ARGA) (a new regulator which will replace the existing Financial Reporting Council).

The government response states that the government is 'now developing a coherent reform programme that takes account of all of their recommendations. We will respond with comprehensive proposals, and legislation to create the new Audit, Reporting and Governance Authority will follow as soon as Parliamentary time allows. In many areas we do not need legislation and where that is the case we are making progress with implementation'.

Further Detail

The table below provides a brief snapshot of the government's response to some key recommendations made by the Committee. The full text of the government's response is here.



RECOMMENDATION	GOVERNMENT RESPONSE
Creation of the new regulator: A new and more powerful regulator to replace the Financial Reporting Council (FRC) should be established 'in order to achieve lasting change on executive pay and its reporting'.	The response states that the government will push ahead with establishing the new regulator as soon as parliamentary time allows. The government plans to give the new regulator 'stronger powers to scrutinise and enforce compliance with relevant reporting requirements on executive pay and corporate governance as part of an expanded corporate reporting review function'.
Pension contribution rates: The new regulator should have a role in ensuring executive pension contribution rates are in alignment with the broader workforce	The response document does not commit to giving the new regulator any formal role in overseeing changes to executive pension contributions/the alignment of executive contributions rates with those of the broader workforce. Rather, the document outlines the steps that have already been taken towards achieving this alignment. .
Bonuses: Bonus schemes should 'always use measures that are pre-defined and not ambiguous, or open to interpretation or favourable adjustment'. The new regulator should engage with investors to develop guidelines on bonuses to ensure they are 'genuinely stretching and a reward only for exceptional performance, rather than being effectively an expected element of annual salary'.	The response document states that the government is considering subjecting metrics used to assess executive performance to audit to 'provide users of accounts with more certainty that there were appropriate controls in place and potentially to deter "gaming" in order to hit bonus targets'. Further, the response document states that 'as part of the [new] regulator's new identity and focus, it is envisaged that it [the new regulator] will engage at a more senior level in a wider and deeper dialogue with UK investors and other users of financial information on corporate governance and corporate reporting, including the executive pay framework'.
Malus and clawback: All 'future performance bonus arrangements' should be required to include clawback provisions for a 'suitable period'. 'These clawback provisions need to be enforceable and cover all elements of the bonus. It is not acceptable for large bonuses to be paid, for it to subsequently be clear that the terms of the bonus award were not met, but for it not to be possible, legally, to clawback the bonus'.	The response expresses agreement that directors' contracts should include malus and clawback provisions allowing companies to withhold remuneration, or recover it if it has already been paid but does not commit to further reform.
Board diversity: ▪ The FRC should develop 'improved guidance' on diversity in the context of board membership. ▪ the government should legislate to require all FTSE 100 companies to publish their workforce data, broken down by ethnicity and by pay band. In making this recommendation, the committee welcomes the government's consultation into the issue and asks that the government prioritise its implementation in 2021.	The response expresses 'strong' agreement with the committee's views, and states that the government is 'committed to promoting business leadership diversity and inclusion'. The response does not agree to either require the FRC to develop enhanced guidance on board diversity or commit the government to legislating to require ethnicity pay reporting. Rather the response outlines the initiatives already in place and states that the government will release its response to the consultation on ethnicity pay reporting in due course.

[Source: The collapse of Thomas Cook: the Government's response to the Committee's conclusions]

Risk Management

Recent UK cases have implications for how climate change policies are administered in Australia

In Friends of the Irish Environment CLG v The Government of Ireland & Ors (2020) IESC 49 (FIE v Ireland), the Supreme Court of Ireland considered whether the Irish Government's statutory plan for tackling climate change (the Plan), adopted under the Climate Action and Low Carbon Development Act, 2015 (the Act), was unlawful and/or constituted a breach of rights. Significantly, the Court unanimously found that the Plan was unlawful, and, while it did not find that the Plan constituted a breach of rights, it left the door open for rights-based claims for future litigants in the climate change context.

MinterEllison's Climate Risk Governance Team have published an article reflecting on the implications of the decision for Australian government entities.

The full text of the article is here.

Guidance for NEDs: MinterEllison and Acclimatise have released guidance to assist NED oversight of physical climate risk management

MinterEllison has collaborated with leading global climate risk consultancy Acclimatise to launch new guidance to assist Non-Executive Directors (NEDs) exercise oversight of corporate action on physical climate risk management.

This guidance, prepared for the global Directors' climate forum, Chapter Zero, brings leading physical risk and legal expertise to bear on an issue that represents one of – if not the – key challenge facing corporates today: How can business build resilience and thrive in the context of a changing climate?

The report available here.

Discussion of climate risk as a financial and liability risk in the financial services context: Expert insights from MinterEllison's Sarah Barker

Head of MinterEllison's international climate risk governance and sustainability team, Sarah Barker delivered a webinar on managing climate risk as a finance and liability risk specifically in the financial services context.

Sarah provided insights into how recent developments globally are shaping expectations of companies and the practical implications of these developments for Australian financial services providers.

A key message from the webinar is that despite the pandemic, pressure for companies to manage and disclose their plans to mitigate climate risk continues to intensify from a number of different quarters.

The webinar also includes suggested practical steps for risk professionals/boards to take to assess their current climate risk management framework.

The webinar can be accessed here.

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