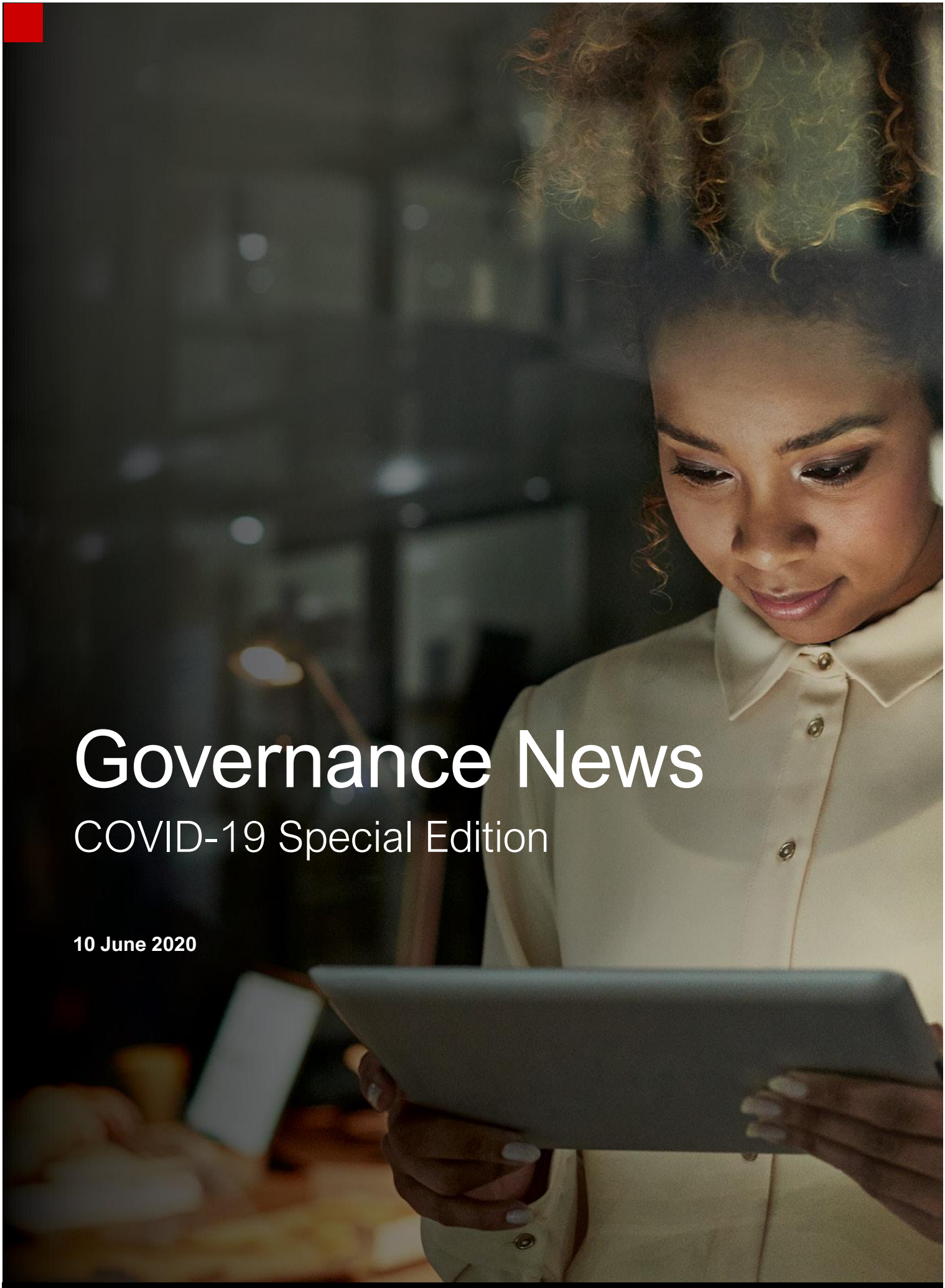


Governance News

COVID-19 Special Edition

10 June 2020

Contents

COVID-19 Key Developments

COVID-19: Debt restructuring in uncertain times

The financial impact of COVID-19 has put many businesses in the position of needing to reduce their liabilities.

MinterEllison has released a report outlining some of the main restructuring approaches which can enable a company to stay solvent or become solvent once again. You can access the full text of the report here.

COVID-19: Board refreshment is top of mind for UK listed company boards? Research from New Street Consulting group has found that the turnover rate on UK listed boards has increased

Research from New Street Consulting Group has identified that the rate of board turnover on UK listed company boards has increased and opines that the trend looks set to continue. In April 2020 there were 232 boards changes, up from the average monthly turnover rate of 206 over the past two years.

New Street attributes the uptick to the impact of the pandemic which has sharpened boards' focus on ensuring they have the optimal mix of skills/experience to respond appropriately. This increased focus has meant that the timing on succession plans/board refreshment is being accelerated.

According to New Street, leaders with experience leading businesses through the last global financial crisis are in high demand. In addition, candidates with skills/experience in restructuring, cost management, risk management, financial planning and analysis are also in high demand.

[Source: New Street Group 05/06/2020]

COVID-19: The pandemic has seen support for WFH arrangements increase, especially among parents according to WEF research

The World Economic Forum (WEF) has released the findings of a survey into employee and employer perceptions of the benefits and challenges of flexible work arrangements.

WEF found that:

- Almost all people (98%) surveyed said they would like the option to work remotely for the rest of their careers. The survey also found that parents' attitudes to working from home has changed since the pandemic. WEF found that 86% of parents now want to work flexibly, up from 46% pre-coronavirus.
- Flexibility is perceived to be the top benefit of WFH arrangements: Asked to nominate the top benefits of working from home: 32% of those surveyed nominated having a flexible schedule; 26% nominated the ability to work from any location; 21% nominated not having to commute and 11% nominated the ability to spend extra time with family.
- The key challenge for remote workers was the blurring of the lines between home and their personal lives: 22% said that they found it difficult to switch off from work at the end of the day. Loneliness (due to the lack of in-person interactions) was also identified as a key challenge for 19% of those surveyed. 17% said that they found collaboration/communication more difficult working remotely.
- Managers are chiefly concerned about reduced employee productivity and focus: The top three concerns for managers are: 1) reduced employee focus and productivity (82%); 2) reduced team cohesiveness (75%); and 3) maintaining company culture (70%). Interestingly, 67% of managers said they were concerned about employees overworking.
- Barriers to implementing flexible working arrangements: The top barrier to implementing flexible working arrangements was resistance to change ie reluctance to embrace a departure from long-standing non-flexible work arrangements.
- Benefits of offering flexible working arrangements: In addition to the fact that most employees (98%) want the option to work from home, WEF nominates two other potential benefits for companies in offering flexible working arrangements.

- Attracting talent: 70% of people nominated flexible work options (ability to nominate where they work from) as a key consideration in assessing an opportunity. WEF suggests that this indicates that workplaces that fail to offer flexible working arrangements going forward may be placing themselves at a disadvantage.
- Cost savings for companies: WEF found that companies could save $11,000 per year per employee who works from home 50% of the time

[Source: World Economic Forum blog post 03/06/2020]

In Brief | COVID-19: EY research (commissioned by WWF) has found that a renewable led COVID-19 recovery package will deliver nearly three times as many jobs per dollar than a plan based on investment in fossil fuel projects

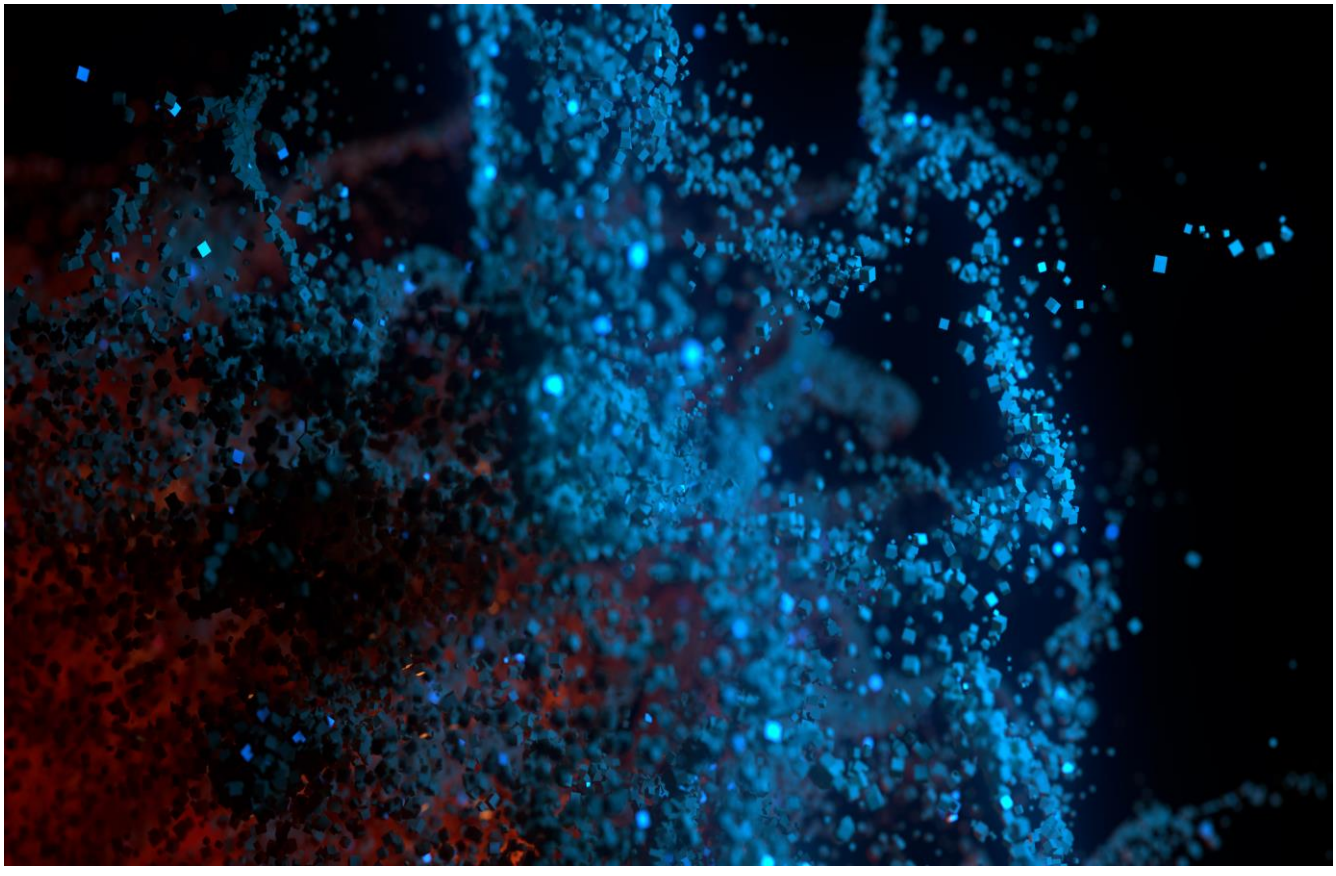
[Sources: WWF media release; Report: Australia renewable export COVID-19 recovery package; Report: Delivering economic stimulus through renewables; The Guardian 07/06/2020]

In Brief | COVID-19: The AFR reports that there is pressure from some quarters to make the list of companies using the government's JobKeeper scheme public in light of 'growing evidence' that some companies may be deliberating manipulating their cash flow to 'game the program'

[Source: [registration required] The AFR 09/06/2020]

In Brief | Early end to JobKeeper? The ABC reports that the Treasurer has not ruled out further changes to the JobKeeper scheme, following the government's decision to end support for child care workers from July

[Source: ABC 09/06/2020]



Diversity

In Brief | ANU research has found that 75% of Australians, regardless of their ethnicity, religious views, occupation, or level of education, hold an unconsciously negative view of Indigenous Australians. Commenting on the findings, Siddharth Shirodkar (PhD researcher based in the ANU College of Arts and Social Sciences) said that the study is 'stark evidence of the solid invisible barrier that Indigenous people face in society. But the data is actually not about Indigenous Australians, it's about the rest of us'

[Sources: ANU media release 09/06/2020; The Guardian 09/06/2020; The ABC 09/06/2020]

Remuneration

COVID-19: Woolworths has awarded staff shares in the company in recognition of their 'extraordinary efforts and contribution' during a year of 'unprecedented challenges'

Woolworths has recognised the 'extraordinary efforts and contribution' of staff during a year of 'unprecedented challenges' by awarding:

- all eligible full-time workers who do not already participate in the company's short term incentive scheme up to $750 of Woolworths Group shares
- all Australian full-time and part-time team members who were employed prior to 1 March 2020 and who do not participate in Woolworths' short term incentive scheme $250 Team Member PlusCard credits (ie credit to spend in Woolworths Supermarkets, Metro, BIG W and BWS stores).
- all Australian casual team members employed prior to 1 March 2020 will receive $100

Woolworths says that scheme will benefit more than 100,000 Australian and NZ team members and will mean Woolworths has the largest number of shareholder team members in the Australian and New Zealand markets.

Announcing the scheme, Woolworths Group CEO, Brad Banducci, said that the award of shares is appropriate recognition of the contribution staff have made during the challenges this year, including COVID-19 and recognition for the role they will play in the recovery. He said,

> 'We could think of no better way to thank and recognise our team than by making them shareholders in our Group. The awarding of shares is not only recognition for our team's efforts over the last year, but also acknowledgement that our team has a critical role to play going forward as we all adjust to the new normal.'

Response

Business Insider reports that reaction to the scheme has been mixed.

- Reportedly, the Retail and Fast Food Workers Union (RAFFW) which represents some Woolworths workers, has questioned whether it is generous enough, and reiterated calls for a permanent increase in hourly pay to lift it to a 'living wage'.
- The Shop, Distributive and Allied Employees Association (SDA which also represents some WoolWorths workers, has reportedly welcomed the scheme.

[Source: Woolworths media release 02/06/2020; Business Insider 04/06/2020]

Meetings and Proxy Advisers

Top Story | COVID-19: Why not make the changes permanent? The Governance Institute has called for the government to bring the Corporations Act into the 21st century

Key Takeouts

- The Governance Institute has called on the government to bring 'the Corporations Act into the 21st century' by: a) providing companies with the option to use technology to hold meetings by electronic means (as either virtual meetings or hybrid meetings); b) allowing companies to communicate digitally with their shareholders; and c) allowing documents to be executed electronically.
- Separately, the Australian Institute of Company Directors (AICD) has also expressed support for the permanent 'modernisation' of the Corporations Act..
- The AFR reports that the Treasurer's office has indicated that the government is considering making the changes permanent.

In a submission to the Senate Select Committee on the use of technology by business during the COVID 19 crisis, the Governance Institute has called for temporary reforms to the Corporations Act 2001 (Cth) (Act) in Corporations (Coronavirus Economic Response) Determination (No 1) 2020 to be made permanent.

> [Note: Corporations (Coronavirus Economic Response) Determination (No 1) 2020 temporarily removes any legal uncertainty concerning the validity of virtual (online only meetings) by ensuring companies are able to give notice of, convene and conduct meetings by electronic means and temporarily allows company officers to sign a document electronically (ie the changes enable the entire process of executing a document to be carried out electronically). The measures were put in place because of the COVID-19 restrictions and will cease to operate on 6 November 2020. For a summary see: Governance News 06/05/2020]

Details of the recommendations

The submission recommends that the government permanently amend the Act to:

1. Provide companies with the option to use technology to hold meetings by electronic means (as either virtual meetings or hybrid meetings): The submission says that feedback received from members to date who have conducted AGMs by electronic means has been positive, and that a recent poll conducted by the Australasian Investor Relations Association indicates increased appetite (among listed companies) for companies to make use of technology in this way. The submission states, 'We consider that amending the Corporations Act to "hard wire" the option of companies to be able to hold virtual or hybrid meetings is a timely and long-overdue reform. It will clarify the law and provide certainty for companies wanting to use technology to hold a meeting'. The submission makes clear however, that the Governance Institute is not recommending that companies be required to hold meetings by electronic means, only that they have the option to do so.
2. Allow companies to communicate digitally with their shareholders: The submission recommends that sections 249J (3) and (3A) of the Act be amended to
   - enable a company to distribute meeting notices and materials to its members by electronic means, with an option for shareholders to opt in to receive them in hardcopy. Companies would be required to ensure meeting materials are available in the public domain and accessible 'using a universal or near-universal channel of communication'. It's suggested that making the materials available on the company's website would meet this requirement.
   - deem that those shareholders who fail to provide a preferred method of communication (eg email address) or to opt-in to receive hardcopy materials to have received them, provided that the materials are readily accessible (eg on the company's website) and for listed companies, that an ASX announcement has been made.

3. **Allow documents to be executed electronically:** The submission recommends that the Act be amended to enable companies to execute documents electronically. The submission states that 'If Australia's corporate markets are to be fit for purpose in the 21st century, the legislation governing corporations and the management of corporations needs to embrace a non-paper world. Government should aim to enable transactions and business to be carried out digitally end-to-end: regulation should not make it more difficult and expensive to conduct business through purely digital channels'.

The changes are overdue

The Governance Institute argues that the changes are necessary to bring the 'bring the Corporations Act into the 21st century'.

The submission states:

> 'COVID-19 has exposed many of the shortcomings of the current legislative environment, particularly the out-dated, paper-based state of the Corporations Act. If Australia's corporate markets are to be fit for purpose in the 21st century, the legislation governing corporations and the management of corporations needs to embrace technology. Governance Institute has consistently advocated the need to bring the Corporations Act into the 21st century and to ensure it is technology neutral'…
>
> …'The pandemic has acted as a "step change" and we consider Government should make the most of this valuable reform opportunity to ensure Australia's corporate regulatory infrastructure is certain, coherent and fit-for-purpose'.

Separately, the Australian Institute of Company Directors (AICD) has also expressed support for the permanent 'modernisation' of the Corporations Act (as part of its broader policy reform agenda). AICD General Manager Advocacy Louise Petschler writes, 'Modernising our corporate law is an obvious focus. Just as COVID-19 disruption has accelerated digital and virtual strategies across all organisations, our laws also require a permanent revamp'.

The AFR reports that the Treasurer's office has indicated that the government is considering making the changes permanent.

> [Sources: Governance Institute Submission: Technological solutions enabling Australian businesses to survive and operate during the COVID 19 crisis period and beyond 01/06/2020; Governance Institute media release Governance Institute media release 04/06/2020; AICD blog 01/06/2020; [registration required] The AFR 05/06/2020]

Corporate Social Responsibility and Sustainability

In Brief | COVID-19: A report into how the world's 100 largest publicly listed companies are responding to the interests of their stakeholders during the pandemic has found that overall, COVID-19 appears to have accelerated the shift away from shareholder primacy toward 'stakeholder pluralism'

[Source: Report, COVID-19 Special Report: The acceleration of stakeholder centricity June 2020]

Institutional Investors and Stewardship

ACCR research has found that Australian superannuation funds are less inclined than previously to support shareholder ESG resolutions

Key Takeouts

- Two steps forward, one step back? The report found that support for shareholder ESG proposals increased from 33% in 2017 to 53% in 2018. However, this level of support was not sustained in 2019, falling back to 48%. The report does not identify a clear reason for this, but suggests that the drop in support warrants further research.
- Overall the report found that disclosure around voting behaviour and the rationale behind remains poor and make nine recommendations to improve it including recommending that funds should disclose their entire voting record in an easily accessible format and in a timely manner.

The Australasian Centre for Corporate Responsibility (ACCR) has released a report - Two Steps Forward, One Step Back – presenting ACCR's analysis of how Australia's 50 largest superannuation funds voted on 686 shareholder ESG proposals filed at companies in Australia, Canada, Norway, the UK and the US during the period 2017-2019.

ACCR says that the purpose of the report is not to suggest that funds should automatically support all shareholder ESG proposals, but rather ' to highlight the clear correlation between funds with responsible investment practices and support for shareholder proposals. Funds that are engaged on ESG issues are clearly more likely to vote for improved ESG outcomes'.

Some Key Findings

- Two steps forward, one step back? The report found that support for shareholder ESG proposals increased from 33% in 2017 to 53% in 2018. However, this level of support was not sustained in 2019, falling back to 48%. The report does not identify a clear reason for this, but suggests that the drop in support warrants further research.
- The report found that there was no 'strong correlation' between fund size and support for proposals between 2017 and 2019
- Funds are more likely to support proposals at US companies, than Australian companies? According to the report, funds supported a 'significantly higher proportion' of proposals at US companies than Australian companies over the period:
  - Only four funds supported 50% or more of the proposals at Australian companies in 2019. Eleven funds supported at least one proposal at Australian companies in 2019 and seventeen did not support any of the proposals at Australian companies in that year.
  - In contrast: Twelve funds supported more than 50% of the proposals at US companies in 2019 and six funds supported at least 10- proposals at US companies in the same year. Three funds supported at least one proposal at US companies in 2019.
- Climate related proposals and lobbying-related proposals were more widely supported than any other category of proposals during the period:
  - Support for lobbying-related proposals: Aggregate support for lobbying related proposals increased from 45% in 2017 to 74% in 2018, and remained at this level in 2019.
  - Support for climate-related proposals: Aggregate support for climate related proposals increased from 35% in 2017 to 55% in 2018, but declined to 42% in 2019.
- Impact of industry association membership on voting behaviour: Funds that are members of the Australian Council of Superannuation Investors (ACSI), the Investor Group on Climate Change (IGCC), the UN Principles for Responsible Investment (PRI) and/or the Responsible Investment Association of Australasia (RIAA) were more supportive of proposals than funds which are non-members. Interestingly, 'at least eight members' of the

Investor Group on Climate Change (IGCC) supported less than 50% of climate-related proposals (138 out of 686 proposals) over the 2017-2019 period.

- **Disclosure:** In general, retail funds (mostly members of the Financial Services Council) continue to disclose less information and support fewer shareholder ESG proposals than other funds:
- **Overall, the report concludes that disclosure of international voting records remains poor:**
  - The report found that only 18 (36%) of the 50 largest superannuation funds disclose a complete proxy voting record, including all Australian and international shareholdings.
  - Ten funds disclose their proxy voting record for Australian shareholdings only.
  - Five funds disclose a proxy voting record that is incomplete in some other way
  - Six funds disclose only a summary of their proxy voting record
  - Eleven funds either do not vote, or do not disclose a proxy voting record.

Nine recommendations to increase transparency around voting decisions

The report includes nine recommendations aimed at increasing transparency around how funds exercise their voting power.

1. Every fund should disclose their entire proxy voting record
2. Funds that delegate voting to fund managers should disclose the proxy voting record of those fund managers.
3. Voting disclosures should be easily accessible on fund websites.
4. Voting should be disclosed within a week of the company meeting (and where practicable, ahead of company meetings).
5. In addition, funds that describe themselves as 'active owners' should publish information about their active ownership strategies eg their expectations of companies/sectors during private engagement, voting bulletins or rationales explaining voting decisions on votes of public interest.
6. Funds should vote consistently with their own proxy voting policies/responsible investment policies
7. Funds should vote consistently across jurisdictions.
8. Funds should consider the interests of their members (especially when when voting at companies that employ their own members) when voting on shareholder proposals.
9. Funds should consider filing or co-filing proposals when other forms of engagement fail to deliver the desired behavioural change.

[Sources: ACCR media release 08/06/2020; The SMH 08/06/2020]

Financial Services

Top Story | Fundamental structural changes to the Australian foreign investment rules

On 5 June, the Treasurer announced further changes to Australia's foreign investment rules. The changes will come into effect from 1 January 2021 and include a national security test and tightening of the regime in some sensitive areas, and the proposed unwinding of the current temporary measures in place to address the coronavirus pandemic.

The changes are unrelated to the coronavirus crisis and reflect the government's move towards a greater focus on national security screening of foreign investment.

According to the Treasurer and the Prime Minister, these are to be the most significant reforms to Australia's foreign investment rules since the regime was implemented in 1975, and build on earlier significant reforms passed on 1 December 2015.

MinterEllison has prepared an expert overview of the changes and their implications. This is available on our website here.

Top Story | The Federal Court has found certain standard form contract clauses to be unfair, ASIC has called on insurers to take note

Case Note: Australian Securities and Investments Commission v Bendigo and Adelaide Bank Ltd [2020] FCA 716

The decision in Australian Securities and Investments Commission v Bendigo and Adelaide Bank Limited [2020] FCA 716 was handed down on 28 May. The case concerned the question of whether certain terms in some standard form small business loan contracts (used by two divisions of the bank), were unfair within the meaning of s 12BG(1) of the Australian Securities and Investments Commission Act 2001 (Cth) (Act).

The Court held that the terms were unfair and declared them void ab initio on that that basis. The terms will be replaced with new terms (to be negotiated between ASIC and the Bank).

ASIC's case

Broadly, ASIC alleged (and the bank accepted), that certain terms falling into four categories - indemnification clauses; event of default clauses; unilateral variation or termination clauses; and conclusive evidence clauses - included in certain standard form, small business contracts (within the meaning of s12BF(4) of the Act) were unfair (within the meaning of s12GB) and therefore void pursuant to s12BF(1)) because they:

- each would cause a significant imbalance in the parties' rights and obligations under the contract;
- are not reasonably necessary to protect the lenders' legitimate interests; and
- would cause detriment to the small businesses if the terms were relied on.

ASIC did not allege that the bank relied on any of the terms 'in a manner that is unfair or that has caused any customer to suffer loss or damage'. The bank gave ASIC an undertaking (and an undertaking to the court) that it would not use or rely on any of the impugned terms, and on this basis, ASIC withdrew its claim for injunctive relief.

Why the terms were unfair

Indemnification clauses

Justice Gleeson held that the indemnification clauses were unfair because they could be relied on by the bank to make the customer liable for loss or costs incurred by the bank that the customer had not caused, or had been caused by the bank's mistake/error/negligence, or that could have been avoided/mitigated by the bank.

As such, the Court held that the terms,

> 'create a significant imbalance in the parties' rights and obligations in that:

1) the customer has no corresponding rights;

2) the circumstances in which the liability, loss or costs may be incurred are not within the customer's control; and

3) the Bank controls at least some of the circumstances in which the liability, loss or costs may be incurred and can avoid or mitigate that liability, loss or costs'.

In addition, Justice Gleeson observed that the terms fall within the list of examples of terms in s 12BH(1) that may be unfair and that there 'there is nothing otherwise within the terms…which mitigates the unfairness of these terms'.

Justice Gleeson also accepted ASIC's argument that the terms lacked transparency.

Event of default clauses

Justice Gleeson accepted that the event of default clauses were unfair because: a) of the 'disproportionately severe default consequences' that would apply; and b) because none of the event of default clauses permitted the customer to remedy a default which could be capable of remedy.

The clauses in question could:

- create a default based on events that may not involve any credit risk to the bank (eg by providing misleading or untrue information such as a director's date of birth)
- create an event of default (in some instances) in circumstances where:
  - an untrue or misleading statement was made/repeated by the customer or its guarantors which in the context of the contract is 'insignificant' eg an error in a director's date of birth
  - the bank 'unilaterally forms an opinion that something has happened' where the opinion 'may be wrong or it may also be reasonable to hold the opposite opinion and the customer has no entitlement to rectify any matter on which the Bank's opinion is based'
  - any part of a relevant document being capable of becoming void or voidable, eg due to litigation which is within the control of the bank rather than the customers
  - in 'vague and largely undefined circumstances'.

Justice Gleeson observed that the terms are included in the list of examples of terms set out in s 12BH(1) that may be unfair and, having regard to the contracts as a whole, 'there is nothing otherwise within the terms of the Delphi Conditions and the Rural Conditions which mitigates the unfairness of these terms'.

Unilateral variation or termination clauses

Justice Gleeson found that the terms were unfair because they create a 'significant imbalance in the parties' rights and obligations'. More particularly, the terms were found to operate to:

- allow the bank to 'unilaterally' vary the contact 'permit one party, but not the other, to vary the obligations at will';
- allow the bank to terminate the contract if the customer fails to accept the new terms;
- not to give the customer any corresponding rights.

Again, Justice Gleeson observed that the terms fall within the list of examples of terms set out in s12BH(1) that may be unfair and that having regard to the contracts as a whole, 'there is nothing otherwise within the terms of the Delphi Conditions and the Rural Conditions which mitigates the unfairness of these terms'. In addition, Justice Gleeson found that the terms lacked transparency.

Conclusive evidence clauses

Justice Gleeson held that the terms were unfair because they created a significant imbalance in the parties' rights and obligations. More particularly, Justice Gleeson found that:

'1) the term allows the Bank to impose, by the issuing of a certificate, an evidential burden on the customer about matters upon which the Bank is best placed to provide primary evidence;

2) the Bank has no additional duty;

3) the customer has no corresponding right; and

4) in the case of the Delphi Conditions, the customer can only contest the amount stated in the certificate if the customer can demonstrate "manifest error".'

As such, Justice Gleeson comments that,

'Each of the terms would cause detriment if relied upon because it requires the customer to disprove matters about which the Bank is best placed to provide primary evidence. Further, it would cause detriment if relied upon in circumstances where the certificate was wrong but the customer could not or did not seek to disprove it'.

Justice Gleeson goes on to observe that each of the terms fall within the list of examples of terms set out in s12BH(1) that may be unfair, and that having regard to the contracts as a whole 'there is nothing otherwise within the terms of the Delphi Conditions and the Rural Conditions which mitigates the unfairness of these terms'.

Impact? ASIC has called on insurers to take note of the decision

Commenting on the outcome, ASIC Commissioner Sean Hughes said that it demonstrates ASIC's commitment to enforce the unfair contract terms provisions.

Mr Hughes said,

'ASIC is committed to protect small business owners of Australia from unfair terms in loan contracts, particularly where business borrowers are confronted with inflexible standard terms. Yesterday's judgement shows that ASIC will take the necessary steps to enforce the law'.

Mr Hughes also called on insurer's to take note of the decision ahead of extension of the unfair contracts terms protections to insurance contracts.

'Importantly, insurance firms should be preparing to extend these obligations in insurance contracts' Mr Hughes said.

[Note: Schedule 1 of the Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020 implements the government's response to Hayne recommendation 4.7 to extend the existing protections of the unfair contract terms regime under the ASIC Act to insurance contracts governed by the Insurance Contracts Act 1984 from 5 April 2021. The changes will apply to insurance contracts that are new or renewed after 5 April 2021, and also to terms of a contract varied after that date.]

[Sources: Australian Securities and Investments Commission v Bendigo and Adelaide Bank Limited [2020] FCA 716; ASIC media release 29/05/2020]

Consolidation of payment platforms? The NPPA board has announced a process to consider the consolidation of existing payment platforms BPAY, eftpos and NPP Australia into a single organisation

Key Takeouts

- The NPP board has announced its intention to establish an Industry Committee made up of 22 shareholders in BPAY, eftpos and NPP Australia to provide a forum to consider the consolidation of the three entities into a single organisation.
- The NPP Boards says that it expects the process could take between six and nine months including obtaining the necessary regulatory approvals before any recommendations on potential outcomes are finalised.

Context

Following the release in December 2019 of the Reserve Bank of Australia's (RBA's) Review of Retail Payments Regulation, and subsequent remarks by RBA Governor Philip Lowe, The New Payments Platform Australian Board (NPP Board) 'tested preliminary views amongst its shareholders' on the potential consolidation of existing payment platforms BPAY, eftpos and NPP Australia into a single organisation.

Support for consolidation

According to the NPP board, NPP Australia shareholders are supportive of the potential consolidation of existing platforms on the basis that it would deliver a number of benefits including (among others) facilitating the development and faster delivery of new payments functionality and maintaining a 'sustainable, resilient and scale alternative to global schemes and technology companies'.

Further, the NPP Boards says that the shift away from cash towards digital payments as a result of COVID-19 has only underlined the value of the potential benefits of consolidation as well as highlighting the importance of resilient systems, reduced complexity and targeted investment.

Process to consider the consolidation of payment systems announced

The NPP board has announced its intention to establish an Industry Committee made up of 22 shareholders in BPAY, eftpos and NPP Australia to provide a forum to consider the consolidation of the three entities into a single organisation.

Details

- The new Committee will consider the benefits of consolidation – whether consolidation, 'might be in the public interest and in the interests of the entities' existing shareholders' – and how best to achieve it. The focus of the Committee will be on issues of ownership, structure, and corporate governance.
- The Committee will be independently Chaired and supported by 'independent resources'.
- Representatives from the Reserve Bank of Australia Policy will be invited to participate in the Committee as an observer.

Timing: The NPP Boards says that it expects the process could take between six and nine months including obtaining the necessary regulatory approvals before any recommendations on potential outcomes are finalised.

[Source: NPPA media release 04/06/2020; [registration required] The AFR 04/06/2020]

The CBA has announced a crackdown on financial abuse: 'we can see you and we won't tolerate the use of our digital banking platforms to facilitate abuse'

To address the issue of users of NetBank and CommBank App services using transactions descriptions to send abusive messages, CBA has announced a new Acceptable Use Policy.

Under the policy,

> 'Any customer found to be using NetBank or the CommBank app to engage in unlawful, defamatory, harassing or threatening conduct, promoting or encouraging physical or mental harm or violence against any person may have their transactions refused or access to digital banking services suspended or discontinued'.

CBA says that the policy has been introduced after a CBA investigation found that more than 8000 CBA customers received multiple low-value deposits (often less than $1) with potentially abusive messages in the transaction descriptions.

According to CBA, messages ranged from 'fairly innocuous' to serious threats and clear references to domestic and family violence.

Announcing the release of the policy, General Manager of Community and Customer Vulnerability Catherine Fitzpatrick, said that 'the message is simple, we can see you and we won't tolerate the use of our digital banking platforms to facilitate abuse'.

Ms Fitzpatrick added that the 'changes will ensure that all customers can continue to enjoy the benefits of digital banking in a safe and secure way and represents our first step to address the issue of technology-facilitated abuse'.

Ms Fitzpatrick said that the findings of the CBA's investigation have been shared with other banks and financial services organisations to ensure the issue id known across the sector.

The CBA's announcement has been welcomed by Australian Banking Associations CEO Anna Bligh and eSafety Commissioner Julie Inman Grant.

[Source: CBA media release 04/06/2020; [registration required] The AFR 04/06/2020]

The FPA has called for a major overhaul of the AFSL system to separate the regulation of products from the regulation of financial advice

As part of a broader five year policy reform platform, the Financial Planning Association (FPA) has called for the current Australian Financial Services Licence (AFSL) regime to be replaced with a new system that would: a) require individual financial advisers to obtain and maintain their own professional registration as advisers through a new professional registration framework; and b) maintain a licencing system but shift its focus to cover financial products and other services (ie AFSLs would no longer cover provision of financial advice).

Details

New professional registration requirement

- Under the FPA's proposal all financial planners would be required to register with a new single disciplinary body.
- The responsibility for registering with the new body would lie with the individual financial planner and not the employer or licensee.
- In order to register, financial planners would be required to provide proof (which would be verified by the disciplinary body) that they'd complied with professional standards for financial planners set by FASEA eg pass the professional FASEA examination and ongoing compliance with ethical standards for financial planners. As such, the information on the register would be 'an authorised record of whether a financial planner has complied with their professional standards.'

The FPA considers that this approach will have a number of benefits including: a) promoting individual compliance with professional standards and individual responsibility for qualifications; and b) promoting portability of qualifications.

Separation of product and advice

In addition, the FPA recommends the 'law should be changed to separate the regulation of financial products from the regulation of financial advice'.

FPA CEO Dante de Gori writes,

> 'The regulation of financial advice is currently tied to the recommendation of a financial product, reflecting a history in which a product recommendation was the core component of most financial advice. In a professionalised financial planning sector, this is no longer the case'…
>
> 'Contemporary financial planning is about a lot more than recommending financial products. There is a wide variety of topics that might be covered by financial advice and many may not include a product recommendation. Regulation of financial advice should reflect the variety of advice that can be provided, and not continue to be tied to financial product recommendations'.

Response?

Independent Financial Adviser reports that other industry associations, the Association of Independently Owned Financial Professionals (AIOFP) and the Association of Financial Advisers (AFA) though broadly supportive of the proposal, have questioned whether it should be given priority at the present time, in light of other pressures on the sector.

The AFR reports that the Federal Labor party has signalled it is open to considering the FPA's proposal, though it does not consider it to be a top priority at the moment. The AFR also reports that the proposal may not have the support of the entire opposition party.

The FPA has issued a second statement welcoming debate on the proposed reform.

> [Sources: FPA media releases 03/06/2020; 05/06/2020; Independent Financial Adviser 04/06/2020; [registration required] The AFR 04/06/2020]

COVID-19: AFCA has received more than 3100 complaints relating to COVID-19 and has urged firms to work harder on their communication with customers

Since the COVID-19 pandemic was declared in March Australian Financial Complaints Authority (AFCA) has received over 3180 COVID-19 related financial complaints, an uptick in the usual number.

Of these complaints:

- 1430 were banking and finance complaints (most (680) of these relating to financial difficulty);
- 1070 general insurance complaints; and
- 610 superannuation complaints.

AFCA says that most of the complaints concerned loan break costs, disputed transactions, requests to extend payment terms, denial of travel insurance claims, as well as delays in early release of superannuation. AFCA flagged that it expects to receive more financial difficulty complaints in the next six to 18 months as vulnerable consumers struggle to repay mortgages/other debts and as government support tails off. It's also anticipated that complaints will

not be confined to banking and finance but are likely to extend to other areas, including insurance as consumers look at whether their policies could assist.

Announcing the statistics, AFCA Chief Operating Officer Justin Untersteiner said that lack of communication with customers was a key area for firms to focus on and urged financial firms to provide early, proactive communication with consumers.

> 'Many of these complaints result from poor communication, where a consumer has trouble contacting their firm, does not understand their policy, or is confused about the information they receive…To support consumers, we encourage financial firms to ensure their contact details and resources are visible and accessible and allow for genuine engagement with customers to resolve issues early on'…
>
> …' "We encourage financial firms to minimise COVID-19 related disputes by communicating with consumers early, speaking in plain English, proactively setting customer expectations around delays, reviewing internal dispute resolution processes and regularly engaging with AFCA.'
>
> [Source: AFCA media release 27/05/2020]

The cost of insurance claims from a summer of natural disasters tops $5.19bn according to the ICA

The Insurance Council of Australia (ICA) says that the cost of four natural disasters declared over the 2019/20 summer – 1) Australian Bushfire Season for NSW, QLD, SA and VIC, declared on 8 November; 2) South-East Queensland hailstorm, declared on 17 November; 3) January hailstorms in VIC, ACT, NSW and QLD) declared on 19 January; and 4) East Coast storms and floods, declared on 10 February – now exceeds $5.19 billion.

The ICA says that almost 50% of claims have been closed by insurers.

The impact of the COVID-19 pandemic, which was declared a catastrophe on 11 March, is still being assessed.

[Source: ICA media release 28/05/2020]

Early release of superannuation scheme: 1.8 million payments worth a total of $13.5bn have been made since inception of the scheme

The Australian Prudential Regulation Authority (APRA) has released industry-level and fund-level data on the temporary early release of superannuation scheme for applications received during the period 20 April to 31 May.

- Over the week to 31 May, payments worth $1.3bn were made to 177,000 members.
- 1.8m payments worth a total of $13.5bn have been made since inception of the scheme.
- The average payment made since inception is $7 473.
- The ten funds with the highest number of applications received from the ATO have made 1.22m payments worth a total of $8.96bn. The average payment from these funds was $7,446, with over 94% of payments made within five days.
- Since the inception of the scheme, the average processing time has been 3.3 business days payments. 95% of applications have been processed within five business days.

[Source: APRA media release 09/06/2020]

Risk Management

Human Capital Management

AHRC report confirms sexual harassment is endemic in Australia's workplaces and makes 55 recommendations to improve the current approach

Report Snapshot: Australian Human Rights Commission Report, Respect@Work: sexual Harassment National Inquiry Report 2020

The Australian Human Rights Commission (AHRC) has released its 932 page report into the drivers, nature and extent of sexual harassment in Australian workplaces. The full text of the report is here.

Ultimately, the report concludes that: a) sexual harassment is prevalent across all workplaces; b) technological change has increased opportunities for sexual harassment to occur; and c) that existing legislative and regulatory frameworks are outdated and confusing for both victims and employers (and therefore of limited effectiveness).

In her foreword to the report, Sex Discrimination Commissioner, AHRC Kate Jenkins emphasises the need to rethink the current approach. Commissioner Jenkins writes,

> 'The current legal and regulatory system is simply no longer fit for purpose. In this report, I have recommended a new model that improves the coordination, consistency and clarity between the antidiscrimination, employment and work health and safety legislative schemes. The new model is evidence-based, victim focused and framed through a gender and intersectional lens. It is also based on existing legal frameworks to avoid duplication, ambiguity and undue burden on employers. Importantly, it recognises the complementary and mutually reinforcing nature of the three schemes, while also recognising their distinctive features'.

Recommendations

The report includes 55 recommendations aimed at addressing the findings in the report, with a strong focus on prevention. Recommendations include the following.

[Note: You can find a summary of the 55 recommendations at p40-51 of the report here].

- Recommendations 2-4 of the report are aimed at promoting understanding of sexual harassment in the workplace. Among other things, the report recommends that a government funded, nationally representative survey into the prevalence, nature and response to harassment in Australian workplaces be conducted every four years to allow trends to be tracked over time and to allow analysis across/within different industries.
- Recommendations 5-13 focus on prevention of sexual harassment outside the workplace primarily through education/training programs. They include the development of guidelines for the media to promote best practice in reporting of sexual harassment, delivery of training in universities and tertiary institutions for staff and students on the drivers of gender-based violence and workplace rights; the delivery of school based training programs; and the development of educational resources for young workers on workplace rights.
- Recommendations 14-40 focus on changes to the existing regulatory/legal framework. Proposed changes include:
  - various amendments to the Sex Discrimination Act including amending the Act to expressly prohibit sex-based harassment and to introduce a positive duty on all employers to take reasonable and proportionate measures to 'eliminate sex discrimination, sexual harassment and victimisation, as far as possible'.
  - various amendments to the Australian Human Rights Commission Act including amending the Act to make' explicit that any conduct that is an offence under section 94 of the Sex Discrimination Act can form the basis of a civil action for unlawful discrimination' and to allow 'unions and other representative groups to bring representative claims to court'.
  - various amendments to the Fair Work Act including the introduction of a 'stop sexual harassment order' (the equivalent of a 'stop bullying order') into the Act and amending s387 to clarify that sexual harassment can be conduct amounting to a valid reason for dismissal in determining whether a dismissal was harsh, unjust or unreasonable. In addition, the report recommends that more guidance material for employers relating to unfair dismissal, be developed y the Fair Work Commission.

- recommendation that the Council of Attorney's General consider how to protect alleged victims of sexual harassment who are witnesses in civil proceedings, including defamation proceedings
- amending the model WHS Regulation to deal with psychological health and developing guidelines on sexual harassment with a view to informing the development of a Code of Practice on sexual harassment.
- amending state and territory human rights and anti-discrimination legislation to achieve consistency with the Sex Discrimination Act (without limiting or reducing protections).
- addressing historical complaints through establishing a government funded 'disclosure process' that would enable victims of historical sexual harassment to have their experience heard and documents to promote their recovery.
- the development by the AHRC and the Workplace Sexual Harassment Council, of a practice note or guideline that identifies best practice principles for the use of non-disclosure agreements (NDAs) in workplace sexual harassment matters to inform the development of regulation on NDAs

- **Recommendations 41-18 are focused on prevention of sexual harassment in the workplace and on improving the response to harassment**. They include:
  - the development by the Governance Institute of Australia the Australian Institute of Company Directors, in consultation with the Workplace Sexual Harassment Council, of education and training for board members and company officers on good governance in relation to gender equality and sexual harassment;
  - the introduction of a new reporting requirement public sector organisations to report to the Workplace Gender Equality Agency on its gender equality indicators;
  - the introduction of a new reporting requirement under the ASX Corporate Governance Principles and Recommendations, for ASX listed entities to report on sexual harassment measures;
  - the development of accredited training for 'individuals in roles that are responsible for advising employers on addressing workplace sexual harassment' and
  - the development of a set of good practice indicators and methods for measuring and monitoring sexual harassment prevalence, prevention and response.

- **Recommendations 45 to 55 are focused on improving the support (eg legal advice, psychological support) provided to those impacted by workplace sexual harassment.** Among other measures, the report recommends that funding to community legal centres, Aboriginal and Torres Strait Islander Legal Services and legal aid commissions be increased.

Commissioner Jenkins said that improving the system would require the support of employers.

> 'I call on all employers to join me in creating safe, gender-equal and inclusive workplaces, no matter their industry or size. This will require transparency, accountability and leadership. It will also require a shift from the current reactive model, that requires complaints from individuals, to a proactive model, which will require positive actions from employers'.
>
> [Sources: UNSW media release; Australian Human Rights Commission report: Respect@Work: Sexual Harassment National Inquiry Report 2020]

In Brief | COVID-19: Reuters reports that an Amazon employee is suing the company for failing to provide a safe working environment after she contracted COVID-19 at work and subsequently infected several members of her family, one of whom has since passed away

[Source: Reuters 04/06/2020]

Other Developments

CBH Group has announced a review of its governance structure

CBH Group has announced a review of its governance structure with a view to establishing a 'strong framework for the future'. The review is expected to take into account best practice from other cooperatives and mutuals.

Announcing the review, CBH Chair Simon Stead said that the review follows discussions with members concerning the existing governance structure at CBH in recent months and that the review will take into account members' views.

It is expected that the review will be completed prior to the next Annual General Meeting.

The AFR comments that that the review follows the departure of a number of directors, and questions over current strategy/financial performance.

[Sources: CBH media release 05/06/2020; [registration required] The AFR 05/06/2020]

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