A woman with curly hair, wearing a light-colored collared shirt, is looking down at a tablet computer she is holding. The background is a dimly lit office with blurred lights and equipment. A small red square is in the top left corner.

# Governance News

COVID-19 Special Edition

20 May 2020

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Disclaimer: This update does not constitute legal advice and is not to be relied upon for any purposes

# COVID-19 Key Developments

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## COVID-19 and Managing the Safe Return to Workplaces

Prime Minister Scott Morrison has recently announced 10 National COVID-19 Safe Workplace Principles to underpin Safe Work Australia's workplace health and safety guidance.

MinterEllison has released an article discussing the 10 principles and providing practical steps to assist employers in implementing them. You can find the full text on our website [here](#).

**In Brief | COVID-19: Avoiding the COVID-19 support cliff? Support measures are due to end at the end of September, potentially triggering a second downturn. The Grattan Institute argues that a more flexible and nuanced approach, tied to business recovery, withdrawing some support earlier and extending support where needed may avoid this**

[Source: The Conversation 14/05/2020]

**In Brief | COVID-19: Suddenly withdrawing JobKeeper support could risk undoing the work the scheme is achieving in keeping businesses ticking over. Academics propose instead easing the transition from JobKeeper by replacing it with some form of government-controlled revenue-contingent loan scheme**

[Source: ARC Centre of Excellence in Population Ageing Research, Working Paper 2020/09: Transitioning from JobKeeper Bruce Chapman and John Piggott]

**In Brief | Conditional COVID-19 support: The Canadian government has made receipt of COVID-19 financial support conditional on companies meeting certain requirements including commitments to publish annual climate related disclosure reports consistent with the Financial Stability Board's Task Force on Climate-related Financial Disclosures, including how their future operations will support environmental sustainability and national climate goals**

[Source: Prime Minister of Canada, Justin Trudeau media release 11/05/2020]

# Diversity

## Top Story | (Slightly) less male, but still stubbornly pale and stale? New report finds that though some (slow progress) has been made to improve gender diversity on ASX 300 boards over the last six years, the cultural diversity of Australian boards is slipping backwards

### Key Takeouts

- The [report](#) looks at progress towards improving board diversity on ASX 300 boards in the broad sense – 1) gender diversity; 2) cultural diversity; 3) skills diversity; 4) age diversity; and 5) tenure – over the past six years
- Still mostly male: Some progress has been made in terms of increasing gender diversity on ASX 300 boards, with the largest companies (ASX 50) leading the way. For example, 34% of ASX 50 board seats are now held by women and there are zero all-male boards in the ASX 50.
- ASX 300 boards remain overwhelmingly 'pale' – over 90% of board members are from an Anglo-Celtic background. The number of directors from non-European backgrounds has gone backwards since last year.
- There has been little change in the mix of skills/expertise represented on boards. Boards continue to value/prioritise financial/accounting skills. Human resources/change management skills remain rare.
- (Slightly) older: The average ages of directors has remained virtually static as compared with last year, at 60.6 years overall. Male directors are on average 61.5 (two months older than last year) and female directors are on average 57.9 (and six months older than last year).
- Stale? 28% of the ASX300's Chairs have been in place for 10 years or more and 9% have been in place for 15+ years. The report suggests that this is an opportunity for boards to improve the composition of their boards to be more diverse.

### Report Overview | Governance Institute, Watermark Search International report: 2020 Board Diversity Index

The Governance Institute, in partnership with Watermark Search International have released their latest board diversity index. The report looks at the progress that has been made toward improving five aspects of diversity on ASX 300 boards - 1) gender diversity; 2) cultural diversity; 3) skills diversity; 4) age diversity; and 5) tenure - over the past six years.

#### Why is board diversity so important?

The report proceeds on the basis that more diverse boards in the broad sense – boards that are ethnically/ culturally, gender, skills and age diverse – make better decisions than less diverse boards, because they bring different viewpoints to the decision making process.

The report suggests that this is of particular relevance in the context of responding to the cultural, remuneration and governance issues identified by the Hayne Commission as well as in the



context of meeting the challenges/uncertainty of a continually changing business and governance landscape eg in the context of managing through the COVID-19 pandemic and the recovery period.

The report suggests that,

'...our ability to cope with radical shifts in any operating model is unlikely to be best met by continuing to do things the way in which we always have. Thinking about the potential responses to the impact of COVID-19 on your business is likely to be much more effective and much broader reaching if you have different perspectives working on the issue...We believe that boards with a broad range of views, skills, educations and backgrounds will be in a better position to cope with the ensuing uncertainty'.

## Some Key Findings

### Gender diversity: Gender balance on ASX 300 boards is improving

- **The number of female directors is increasing:** Overall, 28% (561) of the 2004 board seats on the ASX 300 are now filled by women (up from 533 last year and up from 399 in 2016).
- **Larger companies are leading the way:**
  - ASX50 boards are the most gender diverse (34% of seats are filled by women)
  - ASX 201-300 boards are less gender diverse than their larger counterparts, with only 22.8% of seats filled by women
  - At companies who joined the ASX in 2019, the figure is 15%. The report comments that this lack of board diversity is interesting given the level of concern from institutional investors around the issue and suggests that 'companies joining the ASX need to be directly encouraged to do more'.
- **The number of boards with 30% or more female directors continues to increase:** In 2016 there were 54 boards with 30% or more women, this increased to 63 in 2017, 76 in 2018, 113 in 2019 and 121 in 2020
- **The number of boards with 50% or more female directors has also increased** over the last twelve months from 15 last year to 20 in 2020.
- **The number of all-male boards continues to decrease.** Again, larger companies lead the way on the issue:
  - There are no all-male boards in the ASX 50.
  - Only one company in the ASX 50-100 category has no female directors.
  - Of the 29 all male boards ASX 300 boards, most (18) were in the ASX 201-300 category, and ten were in the ASX 101-200 category.
- **Increase in the number of female Chairs:** 21 boards are currently chaired by women, up 24% on last year
- **Little evidence of 'overboarding' among female directors?** The report found that of the female directors holding multiple roles, 62% are sitting two ASX 300 boards, suggesting that directors are not being drawn from the same small pool of candidates. This figure is expected to decrease as more women are appointed to ASX boards.
- **Barriers to increased gender diversity:** One barrier to progress continues to be the desire for potential candidates to have experience on the board of a listed entity. The report suggests that the broader adoption of board 'observer' programs may be one way to address the issue in addition to director candidates being appointed to the boards of smaller listed companies.

### Cultural (ethnic) diversity is slipping backwards...

- **Most board members are from an Anglo-Celtic background:** Over 90% of board members have an Anglo-Celtic background. ASX 100 boards have the highest representation of directors from non-European backgrounds at 6.3%. This decreases to 5% on ASX 200 and ASX 300 boards.
- **Backsliding?** The report found that cultural (ethnic) diversity on ASX 300 boards has decreased since last year's survey. In 2020 there were 99 directors from a Non-Anglo-Celtic background, down from 107 in 2019. The report comments that departing directors with an Asian cultural background appear to have been replaced with directors from the USA, Canada and New Zealand.
- **No clear reason except inaction?** The report comments that that there 'several good reasons for board cultural diversity to increase and this is just not happening. We would offer, as we did in last year's index, that; the same organisations that drove the initial recognition of the board gender imbalance...are well placed to continue their good work in cultural diversity...and we would ask them to do so'.

### Skills diversity on boards is little changed

The report found that there was little change in the skills/experience represented on boards as compared with previous surveys.

- **Newer board directors are better qualified academically** and have more formal governance training than those already in the boardroom. New female directors tend to hold more qualifications than their male counterparts.
- **Accounting, finance and legal skills are the most strongly represented** with 35% of directors holding these skills (2.4 per board).
- **The report comments that very few directors (0.8%) have human resources and/or change management skills**, despite the findings of the Hayne Commission around the need to strengthen culture, remuneration and governance practices and the shifting governance/business landscape. The report argues that the current health crisis, underlines the importance of these skills given the need for companies to make rapidly evolve their operations.

#### Age Diversity – directors are getting (marginally) older

- The number of ASX 300 companies disclosing the age of their directors remained constant at 69% (though the proportion was higher at ASX 100 with 81% reporting)
- There appears to be little variation in director age across the ASX 300 with the average age of ASX 100 directors at 60.6 years: 61.5 (two months older than last year) for males and 57.9 (and six months older than last year) for women.
- 119 directors disclosed themselves as being under 50 years of age (unchanged from last year)

#### Tenure/board independence: An opportunity to diversify?

- **Most ASX 300 directors have been on the board for four years (or less):**
  - 45% have been on the board 0-4 years
  - 36.9% have been on the board 5-9 years
  - 11.5% have been on the board 10-14 years
  - 3.3% have been on the board 15-19 years
  - 2.3% have been on the board for 20 years or more
- **The highest concentration of independent directors is in larger companies:** At ASX 100 companies, 79% of directors are considered to be independent, dropping to 75.6% for companies in the ASX 201-300 category.
- **Room for improvement?** 28% of the ASX300's Chairs have been in place for 10 years or more and 9% have been in place for 15+ years. The report suggests that companies with a 'higher degree of non-independence would benefit from reading the corporate and societal tea leaves and, in a structured way, look to change the composition of their boards to be more diverse. For a larger percentage of shareholders, it's no longer just about profit...it's about how companies go about attaining that profit and they are looking at a wide number of measures'.

[Source: Governance Institute, Watermark Search International report: 2020 Board Diversity Index, Governance Institute media release 20/05/2020]

## In Brief | US Report argues that rebuilding after the pandemic is a unique opportunity for organisations to increase diversity inclusion and equity: The report provides 'concrete' guidance from US academics and business leaders to assist entities to make progress on the issue

[Sources: Report: What works? Evidence-Based Ideas to Increase Diversity, Equity, and Inclusion in the Workplace; Media release 13/05/2020; University of Massachusetts media release 13/05/2020]

# Institutional Investors and Stewardship

## COVID-19: Virtual meetings should not become the default format post-pandemic? Institutional Investors have called on companies to commit to reverting to physical/hybrid meetings when COVID-19 restrictions allow

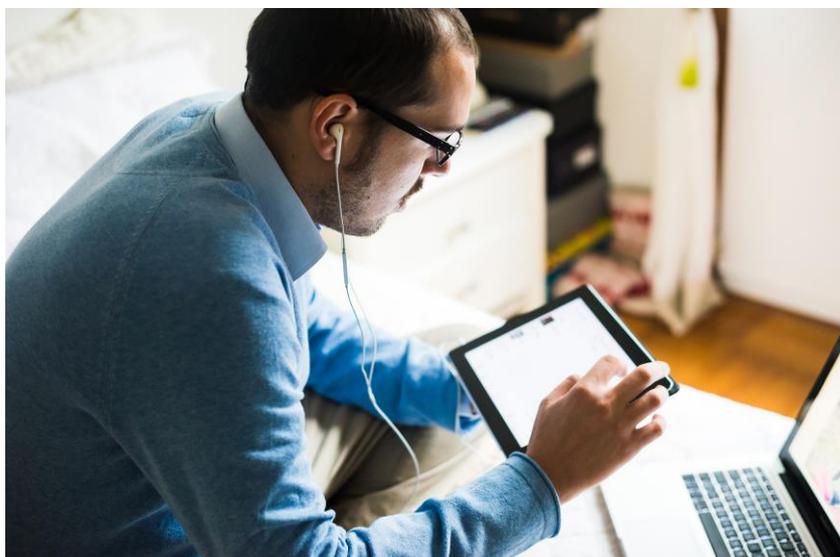
In light of COVID-19 restrictions, the Interfaith Center on Corporate Responsibility (ICCR) – a self-described coalition of over 300 global institutional investors that currently represents more than \$500 billion in managed assets - and the Shareholder Rights Group, have issued a joint statement on Shareholder Participation and Virtual Annual Meetings During Coronavirus Crisis which calls on companies to adopt their best practice guidelines for convening shareholder meetings.

The statement acknowledges that holding meetings by electronic means – either as hybrid or as virtual meetings – is a 'reasonable and necessary public health measure' in the current circumstances. However, it emphasises the importance of shareholder participation and calls on companies to ensure that shareholders are able to participate in meetings/engage with boards/management in real time, despite the technical challenges that this may pose. In addition, the ICCR expects that companies commit to reverting to holding shareholder meetings as physical meetings or as hybrid meetings post-pandemic.

The groups have called on companies to adopt their 'best practice guidance' for convening electronic meetings.

### Some Key Points: best practice guidance for convening electronic meetings

- Companies should revert to physical shareholder meetings or to hybrid meetings post-pandemic: The guidance calls on companies to commit to reverting to holding either physical meetings or hybrid meetings once COVID-19 restrictions are lifted (ie commit that virtual meetings will not become the default meeting format post-pandemic).
- Meetings should be held via live-webcast: There should be a live audio and video feed including all key company representatives who participate in the meeting. Shareholders should be able to see, hear and ask questions of board members.
- There should be provision for shareholders to ask questions and receive answers live: Every company should 'commit to foster meaningful question and answer sessions' during its AGM with 'space for shareholder voices' ie there should be provision for shareholders to ask questions live, and to receive answers from the board or CEO in real time. The guidance refers companies to the Council of Institutional Investors guidance on this issue.
- All companies should offer a 'virtual option' for shareholder proponents to present their proposals (to enable them to avoid unnecessary travel) while COVID-19 restrictions remain in place.
- Shareholder proponents should be given flexibility regarding the best means for presenting their proposals virtually eg the option to include audio/visual presentations. In addition, companies should 'work with shareholder and technical staff' to ensure that virtual participation will be audible/visible and 'on par with other aspects of the meeting'.
- Managing technical issues: The guidance also includes a number of recommendations around managing/minimising the impact of technical issues should they arise. These include:
  - Communicating details of virtual participation to shareholders, including proponents as early as



- possible including providing periodic updates as technical and logistical details are available/finalised.
  - Ensuring there is technical support available for participants from 30 minutes prior to the meeting (to enable testing) and throughout.
  - Ensuring there is a contingency plan in place to move a shareholder proposal on behalf of a proponent, should a technical issue prevent them from being able to present it themselves. This contingency plan should be discussed with the shareholder proponent(s) in advance of the annual meeting.
  - The company should archive a recording of the virtual meeting for a 'specified amount of time' after the meeting is held.
  - The company should public basic information about the meeting after it concludes eg preliminary vote count.
- [Source: ICCR media release 21/04/2020; ICCR and the Shareholder Rights Group joint statement: Shareholder Participation and Virtual Annual Meetings During Coronavirus Crisis]

## The world's largest wealth fund has dropped several coal and other companies on ESG grounds

### Divestment of five coal companies

On 13 May, Norge Bank announced its decision to exclude several coal companies - Sasol Ltd, RWE AG, Glencore PLC, AGL Energy Ltd and Anglo American PLC a from the Government Pension Fund Global, and to place 'under observation' BHP Group Ltd/BHP Group Plc, Vistra Energy Corp, Enel SpA and Uniper SE on ESG grounds.

These decisions were based on an assessment of each of the companies against the thresholds for use of/investment in thermal coal (the coal criterion) in the Guidelines for Observation and Exclusion from the Government Pension Fund Global which provides that:

'Observation or exclusion may be decided for mining companies and power producers which themselves or through entities they control a) derive 30 per cent or more of their income from thermal coal, b) base 30 per cent or more of their operations on thermal coal, c) produce more than 20 million tons of thermal coal per year, or d) has a power capacity of more than 10 000 MW from thermal coal.'

Norge observed that though the decision was made in November 2019, it is only now being made public/the reasons disclosed because 'for several of the companies of which exclusion is now being made public, the market situation, including the liquidity of individual shares, has meant that it has taken a long time to sell the shares in a reasonable manner. That explains why a long period of time has passed between some of the decisions and the publication'.

### Divestment of seven other companies on climate grounds

Separately, Norges Bank announced its decision to exclude:

- Canadian Natural Resources Limited; Cenovus Energy Inc; Suncor Energy Inc; and 4) Imperial Oil Limited because of 'unacceptable greenhouse gas emissions'
- Eisewedy Electric Co and Vale SA because the 'risk of contribution to severe environmental damage'
- Centrais Eletricas Brasileiras SA (Eletrobras) because of 'unacceptable risk that the company contributes to serious or systematic human rights violations'.

As was the case with the decisions to exclude coal companies, Norges notes that the public announcement has been delayed due to the fact that it has 'taken a long time to sell the shares in a reasonable manner'.

In addition, Norges announced that it had decided to revoke its decision to exclude AECOM (which no longer produces nuclear weapons) and Texwinca Holdings Ltd (because the subsidiary running the factories in which there were systematic breaches of workers' rights 'is liquidated').

[Sources: Norge Bank media releases 13/05/2020; 13/05/2020; Grounds for decision: Product-based coal criterion (the Executive Board's decision 20.11.2019) 13 May 2020; [registration required] The AFR 13/05/2020; [registration required] The Australian 13/05/2020]

## Meetings and Proxy Advisers

### COVID-19: Investors are wary of virtual meetings becoming the default meeting format? Standard Life Aberdeen shareholders have rejected a resolution that would have enabled AGMs to be held 'virtually' post-pandemic

The Standard Life Aberdeen (SLA) AGM was held on 12 May as a virtual meeting because of COVID-19 restrictions. Shareholders were unable to ask questions of the board 'live', but were able to pre-submit written questions, and SLA Chair Sir Douglas Flint said in his address that questions from shareholders were welcome at any time over the course of the year, rather than only during the AGM.

#### Virtual meetings resolution

Shareholders were asked to vote in favour of a board endorsed special resolution to adopt new articles of association which, among other things, would enable the company to convene meetings by electronic means.

[Note you can find a summary of the proposed changes to the company's articles of association at p20 of the AGM guide here]

In advising shareholders to support the resolution, the board said that it considered that the change was necessary to 'modernise and bring the company into line with other large companies'.

In his address to the meeting, Chair Sir Douglas Flint made clear that the change was not intended to signal to shareholders that the company intended to move to a default virtual meeting format going forward. Rather, he expressed regret that the meeting could not be held in the usual way due to the COVID-19 restrictions and said that the company had no plans to continue to hold virtual AGMs in place of physical meetings post pandemic.

#### Result

The resolution required 75% of votes in favour to pass and secured only 62.64% of votes in support (37.36% of shareholders voting against it).

In a statement, commenting on the results of the meeting, the board attributed this result to investor concern about virtual meetings generally, and to concern in some quarters that the company 'could and possibly would use the permission to hold "virtual" meetings with no shareholders present'. The statement reiterates that this concern is unfounded.

'The Board recognises the significant percentage of votes cast against this resolution. The Board believed that the proposed update to the Company's current articles was uncontroversial and appropriate. One of the proposed changes was to provide the Company with the option to allow for shareholders to join meetings remotely and to convene meetings at which electronic facilities were available for remote participation; this would address the constraints currently in force that prevent gatherings of more than a very few participants...The Board has no plans to do away with physical meetings, but believes that allowing shareholders to also participate by electronic means would be in the interests of shareholders and allow engagement with those unable to travel to the meeting'.

The board added that it intends to engage with institutional investors around the concerns raised on the resolution and will publish an update on that engagement in the next six months.



## COVID-19: Shareholders vote in support of hybrid meetings at Rio Tinto

At the recent Rio Tinto AGMs, 99.9% of shareholders voted in favour of a board resolution (resolution 21) to amend Rio Tinto PLC's articles of association and Rio Tinto Ltd's constitution to allow the company to hold hybrid AGMs – that is, to give shareholders the choice of attending a physical meeting in person, or by electronic means - and contemporaneous general meetings, going forward.

In explaining the aims of the proposed change, the board said that the changes would facilitate increased shareholder engagement and participation (see: Appendix 3B p28 of the Notice of Meeting here.)

[Source: Results of AGM 2020; Notice of Meeting]

## ISS data shows the number of virtual AGMs globally is already almost double the total number of virtual meetings held in the 2019 calendar year

ISS has released a report outlining the regulatory changes relating to AGMs that have been implemented in 23 countries in response to COVID-19. Many of the changes are aimed at enabling AGMs to be held electronically.

As at 31 March 2020:

- 557 meetings had been cancelled or postponed
- the number of meetings to be held virtually was already 560, which is almost double the number held over the course of the 2019 calendar year (286)

ISS has also released a tracker – [the ISS COVID-19 response center](#) - tracking the number of virtual meetings in different jurisdictions. As at 13 May, there have been 35 virtual AGMs in Australia.

[Source: ISS Report, Annual General Meetings and COVID-19 1 April 2020]

## Climate remains a key focus for investors, despite the pandemic? Recent AGM results have been welcomed by climate activists as evidence of growing support for the adoption of Paris aligned emissions targets

### Key Takeouts

- Shareholder resolutions seeking that the companies align their operations with the goals of the Paris Agreement secured 50.16% support at Woodside; 43.49% support at Santos and 36.93% at Rio Tinto.
- Though the resolutions were not carried, climate activists have welcomed the result as evidence of growing support from investors on climate issues/adoption of Paris-aligned emissions targets

### Woodside Petroleum Ltd

The Australasian Centre for Corporate Responsibility (ACCR) filed four resolutions on behalf of shareholders at Woodside Petroleum Ltd: a special resolution seeking a constitutional amendment to enable shareholders to bring ordinary resolutions at general meetings, and three ordinary resolutions (that would only be put formally to the meeting only if the constitutional amendment resolution was carried).

Ordinary resolutions:

- Suspension of industry association membership (climate lobbying resolution): The first called for Woodside to suspend membership of industry associations whose advocacy runs counter to the goals of the Paris Agreement, including the Australian Petroleum Production and Exploration Association (APPEA) and the Business Council of Australia (BCA).
- Set Paris-aligned emissions reductions targets (Paris goals resolution): The second resolution called for the company to set emissions reduction targets (including Scope 3 emissions reduction targets) in line with the goals of the Paris Agreement, to align capital expenditure with those targets, and incentivise executives to achieve those targets.

- Reputation advertising: The third called for the board to review what the ACCR terms corporate and sector 'reputation advertising' (ie advertising aimed 'primarily at increasing the standing of our company's brand in the community') and to cease advertising that is not consistent with the standards set out in Chapters VI (Environment) and VIII (Consumer Interests) of the OECD Guidelines for Multinational Enterprises (OECD Guidelines) or where advertising is 'targeted at children'. The resolution also calls for the company to cease supporting advertising by industry associations aimed at influencing perceptions of the oil/gas sector which are inconsistent with the OECD guidelines.

The full text of the resolutions and supporting statements are available on the ACCR website [here](#).

The Woodside board advised shareholders to vote against each of the resolutions. The boards' reasoning is included in the Notice of Meeting [here](#).

## Result

The Woodside Petroleum Ltd AGM was held on 30 April. None of the shareholder resolutions were carried.

The special resolution received 6.28% support and in consequence, the three ordinary resolutions were not formally put to the meeting.

However, both the ACCR and Market Forces separately welcomed the level of support for the Paris goals resolution (50.16% of votes in favour) and for the climate lobbying resolution (42.66% of votes in favour).

According to the ACCR, proxy advisers the Australian Council of Superannuation Investors (ACSI), Glass Lewis, Institutional Shareholder Services (ISS), PIRC (UK) and Regnan voted in support of the Paris Goals and Lobbying resolutions.

In a statement ACCR Director of Climate and Environment Dan Gocher said

'This is a breakthrough moment for investor action on climate change in Australia. The call for companies to set targets on Scope 3 emissions (those from products sold) is now supported by more than 50% of shareholders in Australia's largest oil and gas company, a striking number in the absence of board support. Until Woodside explains how its business will align with the goals of the Paris Agreement, the company will be in open conflict with the majority of its shareholders. This is an untenable position for the company. The onus is now on institutional investors to ensure that their vote is not ignored. We stand ready to work with our fellow shareholders to see the review and disclosure measures recommended in the two resolutions implemented by Woodside's board.'

Mr Gocher went on to say that Woodside's position is at odds with BP, BHP, Royal Dutch Shell and Total which have each committed to setting Scope 3 emissions targets.

Separately, Market Forces also welcomed the result, and called for superannuation fund members, whose funds invest in Woodside to keep up pressure on the company to 'wind down fossil fuel production in a manner consistent with a 1.5°C warming outcome' by contacting their superannuation funds and asking that the funds cease investing in/withdraw investments.

[Sources: Results of 2020 AGM; Market Forces media release 30/04/2020; The SMH 01/05/2020]

## Santos Ltd

The Santos Ltd AGM was held on 3 April. The ACCR lodged three of the same resolutions - a special resolution to amend the constitution, the climate lobbying resolution and the Paris goals resolutions) as were lodged at Woodside on behalf of shareholders (described above).

The board unanimously recommended shareholders vote against the resolutions. The boards' reasoning is set out in the Notice of Meeting [here](#).

According to The ACCR, ACSI, Glass Lewis, PIRC (UK) and Regnan voted in support of the Paris goals and lobbying resolutions.

## Result

None of the shareholder resolutions were carried.

- 6.68% of shareholders voted in support of the constitutional amendment
- The Paris Goals resolution received 43.49% support, the Climate Lobbying Resolution received 46.35% support.

In a statement welcoming the result, ACCR Dan Gocher said that 'This is further evidence that institutional investors have woken up to the damage a growing gas industry is wreaking on the planet...The onus is now on institutional investors to ensure that their vote is not ignored. Santos should immediately move to implement the review and disclosure measures recommended in the two resolutions.'

[Source: Results of AGM 2020 03/04/2020; ACCR media release 03/04/2020]

## Rio Tinto Ltd

Climate group Market Forces lodged two resolutions at Rio Tinto Ltd on behalf of shareholders:

- a special resolution seeking to amend the constitution to enable shareholders to bring ordinary resolutions at general meetings, and
- an ordinary resolution asking that the company disclose short, medium and long-term targets for its scope 1, 2 and 3 greenhouse gas emissions and performance against those targets in future annual reports.

The full text of the resolutions are available on the ACCR website [here](#).

In his address to The AGM, Rio Tinto Chair Simon Thompson explained that consistent with the board's position on similar resolutions lodged in 2018 and 2019, the board recommended that shareholders vote against changing the constitution as proposed on the basis that doing so 'is likely to cause uncertainty in relation to the authority and accountability of directors'.

In addition, Mr Thompson explained that the board recommended shareholders vote against the climate targets/disclosure resolution on the basis that the company has already set scope 1 and 2 emissions targets and 'is unable to set targets for scope 3 emissions which largely relate to the emissions of our customers in the steel industry because it is not within our control to reduce the emissions of our customers.'

Mr Thompson also drew a distinction between companies that sell/produce carbon and those that do not. He said that 'Rio Tinto does not produce or sell carbon. The emissions of our customers in the steelmaking industry arise because they use carbon purchased from other companies in the steel manufacturing process'.

## Result

The resolutions were not carried.

- 8.79% of shareholders voted in favour of the constitutional amendment
- 36.93% of shareholders voted in favour of the emissions targets/disclosure resolution

In a statement welcoming the result, Market Forces said that 'while lower than record numbers at Santos and Woodside, the vote is more than six times that of the same resolution in 2019, and marks a significant hardening of investor attitudes' and called on Rio Tinto to follow BHP, Vale and Glencore in setting scope 3 targets.

[Sources: Results of AGM 2020; Rio Tinto Chair's address; Market Forces media release 08/05/2020]

# Corporate Social Responsibility and Sustainability\_\_

## Moving beyond 'trust us, we care' towards practical implementation and accountability – Academics outline why the Delaware Benefit Corporation model could be the answer in the US context

In a recent post on Harvard Law School Forum entitled: [Purpose With Meaning: A Practical Way Forward](#), Robert G Eccles (Oxford University), Leo E Strine (Harvard Law School) and Timothy Youmans (Federated Hermes) reflect on the need for companies to move beyond merely stating their commitment to sustainability and social responsibility, as so many are increasingly doing, to actually acting in accordance with, and being held accountable for, doing so.

They write,

'If companies and institutional investors are serious about responsible, sustainable wealth creation in a manner fair to all corporate stakeholders, then they must match high-minded rhetoric about purpose with accountability. This will require a new governance form that makes a company's obligations to fulfil its purpose enforceable'.

### What needs to happen for this to occur?

To enable this shift from abstract commitment to implementation to occur, the authors consider that is necessary for companies both to:

1. have a clear statement of purpose that is not 'so generic it applies to all industry competitors'; and;
2. to adopt an integrated reporting model – for example, one of the existing reporting frameworks such as the Global Reporting Initiative (GRI), the Sustainability and Accountability Board Standards (SASB standards) or the Task Force on Climate Disclosure (TCFD) Recommendations - to enable stakeholders to evaluate the company's success in achieving its stated purpose.

Beyond the widespread adoption of statements of purpose and use of integrated reporting to enable stakeholders to understand and evaluate the actions/decisions, the authors consider that it is also necessary to strengthen existing accountability which have proven to be ineffective in practice.

'In a majority of American states today, the law explicitly allows corporate directors to give weight to the interests of stakeholders but, in reality, this rarely happens. The reason is simple. In none of those states do corporate boards have a "shall" duty to act with fair regard to workers, the environment, and the community. At best, corporate boards and managers who answer only to one constituency—the stockholders—"may" give weight to other stakeholders so long as they can do so and satisfy a stock market hungry for immediate returns'.

The authors cite the decision in [Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 \(Del. 1986\)](#), as evidence of the inadequacy of the existing approach, arguing that the case demonstrates that in practice ultimately 'all that matters in a sale of the corporation is what buyer will pay the highest price, and stakeholder concerns go out the window'.

### Suggested solution? The Delaware benefit corporation model

The authors suggest that the widespread adoption of an existing model, the Delaware benefit corporation model, provides a solution to these issues.

They write,

'Under Delaware's leading statute allowing corporations to adopt that model, benefit corporations must have a statement of purpose, and act with due regard to society, the environment, and all corporate stakeholders. Even in a sale of the company, directors must protect the interests of the workers, consumers, and communities of the corporation, and cannot sell to a callous buyer just because it offers the highest price. Not only that, the statute allows stockholders—such as socially responsible investment funds and universal investors like index funds—to sue to make the company honor its purpose and duty to stakeholders'...

'But by modifying the Revlon rule, imposing a "shall" duty toward stakeholders, and enabling stockholder suits to enforce the company's mandatory duties, the model gives genuine meaning to purpose. Likewise, by requiring that public benefit corporations adopt metrics to measure their performance against their Statement of Purpose and report their results, the statute creates the information flow essential to accountability. Thus, the Delaware benefit corporation model incorporates our first two steps and takes the critical third step of making the corporation's duty to fulfil its Statement of Purpose, and respect stakeholders and society, binding'.

### **Call for institutional investors and the Business Roundtable to endorse the model**

The authors consider that the endorsement of the model by both large institutional investors and by the Business Roundtable would be required in order for it to gain widespread traction.

They argue:

'If the Business Roundtable supports conversion of their public companies to this model, their mere "trust us, we care" words will become those of accountable leaders who embrace an enforceable obligation to others. But, corporate leaders cannot succeed unless institutional investors, such as BlackRock, Fidelity, State Street, and Vanguard and organizations like the Council of Institutional Investors, also walk their talk on corporate purpose and on the value of stakeholders like workers. These and other large investors have demonstrated that their voting clout can move the market. If they support public companies in converting to benefit corporation status, our corporate governance system can change for the better—fast'.

The authors conclude by arguing that the path forward is clear, it's just a question whether 'the powerful players' rallying behind it, to drive adoption of the model.

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 16/05/2020]



# Disclosure and Reporting

## COVID-19: ASIC has further extended reporting deadlines by one month for listed and unlisted entities and extended AGM deadlines for two months for balance dates up to and including 7 July 2020

### Reporting relief

On 13 May, the Australian Securities and Investments Commission (ASIC) announced that it will further extend the deadline for both listed and unlisted entities to lodge financial reports by one month for balance dates up to and including 7 July 2020 balance dates.

The table below provided more detail.

REPORT TYPE	REVISED REPORTING DATE
Full year reporting deadline for directors' report and auditor' reports extended by one month	<ul style="list-style-type: none"><li>Listed entities have four months</li><li>Unlisted disclosing entities and unlisted registered schemes now have four months</li><li>All other unlisted entities (including public and proprietary companies that are not disclosing entities or registered schemes) have five months</li><li>Auditors will have four months to complete the compliance plan audit report</li></ul>
Half year reporting deadline for financial reports, directors' reports and audit/review reports for listed entities and unlisted disclosing entities extended by one month	<ul style="list-style-type: none"><li>Listed entities and unlisted disclosing entities (including unlisted registered schemes that are disclosing entities) now have 75 days plus one month</li></ul>
P&L and balance sheets deadline extended by one month	<ul style="list-style-type: none"><li>Australian financial services (AFS) licensees that are bodies corporate and also disclosing entities or registered schemes have four months</li><li>Unlisted AFS licensees that are body corporates and are not disclosing entities or registered schemes have five months</li><li>AFS licensees that are not bodies corporate have three months</li></ul>

The relief will not apply to registered foreign companies.

**Additional relief:** ASIC says that additional relief may also be granted to entities that make use of the extended deadlines. ASIC's [announcement](#) sets out the details.

### Reporting periods ending after 7 July 2020?

ASIC says that it will continue to monitor how market conditions and COVID-19 developments are affecting financial reporting and AGM obligations for balance dates after 7 July 2020.

### Another two months to hold AGMs: ASIC will continue to take 'no action' where AGMs are postponed because of COVID-19

ASIC announced that it has adopted a 'no action' position where public companies do not hold AGMs within 5 months after the end financial years that end from 31 December 2019 to 7 July 2020, but do so up to 7 months after year end.



For public companies with 1 June 2020 to 7 July 2020 year ends, ASIC said the 'no action' position also applies where holding an AGM in January or February 2021 results in the requirement to hold an AGM in the 2020 calendar year not being met.

ASIC asks that companies who elect to delay their AGMs should not hold them in late December 2020/early January 2021 (peak holiday period).

### **The AICD has welcomed ASIC's announcement**

In a statement welcoming ASIC's announcement the Australian Institute of Company Directors (AICD) CEO and Managing Director, Angus Armour, said that the 'financial reporting extension will give directors and boards the breathing space to work through the complex reporting issues posed by COVID-19.'

The AICD said that it had called on ASIC to extend financial reporting deadlines for all Australian companies in light of the disruption caused by COVID-19.

Mr Armour said that 'The AICD applauds the measures taken by ASIC to adapt their approach to acknowledge the challenges facing companies during this time.'

[Sources: ASIC media release 13/05/2020; AICD media release 13/05/2020]



## Regulators

### COVID-19: AFCA has announced changes to the way in which it will deal with complaints from small business owners regarding certain COVID-19 relief measures

The Australian Financial Complaints Authority (AFCA) has announced changes to the way in which it will deal with complaints from small business owners regarding certain COVID-19 relief measures.

Specifically, AFCA says that it will:

- limit the matters it takes into account when considering a complaint about a loan provided under the Coronavirus SME Guarantee Scheme.
- exclude complaints about repayment deferrals provided to small business borrowers for existing loans, where the deferral is provided between 25 April 2020 and 24 April 2021.

The changes are reflected in the amended AFCA rules here.

[Source: AFCA media release 14/05/2020; AFCA Rules: Approved Rules effective 25 April 2020]

### COVID-19: The UK FRC will release an initial assessment of good corporate governance and AGM practices 'in the summer', ahead of the release of the annual Corporate Governance Review



- **Initial report on good AGM and governance practice due to be released 'in the summer':** In light of the pandemic, and the heightened importance of governance and stewardship in the present circumstances, The UK Financial Reporting Council is currently monitoring corporate governance and AGM reporting and practices, with a view to publishing an initial assessment of good practice in the summer, ahead of the release of its annual review of

corporate governance.

- **Annual review to be released later in the year:** The annual review will be released later in the year and will focus on evaluating the quality of reporting and practice on the main areas of change to the UK Corporate Governance Code.
- **Stewardship/governance team has been expanded:** The regulator adds that it has enlarged its corporate governance and stewardship team and that this will enable it to work with a widening range of stakeholders to develop corporate governance and stewardship policy and guidance.

- **Stewardship reports:** The FRC says that it will continue its outreach to stakeholders on the Stewardship Code to establish expectations for high quality reporting next year. The deadline for receiving stewardship reports remains 31 March 2021.

[Source: FRC media release 14/05/2020]

## SEC is targeting COVID-19 related misconduct: The SEC charged two companies and a CEO with COVID-19 related fraud

The US Securities and Exchange Commission (SEC) has brought fraud charges against two companies Applied BioSciences Corp and Turbo Global Partners Inc (and against the CEO of Turbo Global Partners Inc), in connection with (allegedly) fraudulent claims made about products they offered to combat COVID-19.

SEC alleges that

- public statements made by Applied BioSciences that it had begun offering and shipping finger-prick COVID-19 tests to the general public that could be used for 'Homes, Schools, Hospitals, Law Enforcement, Military, Public Servants or anyone wanting immediate and private results' were misleading/inaccurate. The SEC's complaint against Applied BioSciences charges the company with violating antifraud provisions of the federal securities laws and seeks permanent injunctive relief and civil penalties.
- public statements made by Turbo Global and authorised/drafted by Turbo Global CEO Robert Singerman regarding a 'multi-national public-private-partnership' to sell thermal scanning equipment to detect individuals with fevers were misleading/inaccurate. The SEC's complaint against Turbo Global and Mr Singerman charges them with violating antifraud provisions of the federal securities laws and seeks permanent injunctive relief and civil penalties, and an officer and director bar against Mr Singerman.

Co-Director of the SEC's Division of Enforcement Stephanie Avakian said that the SEC is 'actively monitoring the markets to detect potential fraudsters who seek to use the COVID-19 crisis as a basis for investment scams...As alleged in these complaints, Applied BioSciences and Turbo Global sought to take advantage of the COVID-19 crisis by misleading investors about their ability to provide solutions. These fraud actions demonstrate the SEC's vigilance over public companies that make materially misleading claims in press releases...We will continue to act swiftly when necessary to protect investors.'

[Note: In Australia, the ASX has said that misleading COVID-19 related announcements are also an area of focus. So far, ASX has reviewed approximately 70 announcements, of these 50 have been deemed by the ASX to be misleading and have either been substantially amended prior to release or withdrawn. ASIC has also said that it will be monitoring the market closely for serious consumer harm or sharp practice for example, misleading/deceptive advertising. See: [Governance News 13 May at p22.](#)]

[Source: SEC media release 14/05/2020]

## In Brief | UK regulators have brought forward the release of a pilot 'Regulatory Initiatives Grid' setting out the timing of planned regulatory projects over the next 12 months to assist stakeholders, many of whom are impacted by COVID-19, in their planning. The timing of most initiatives, including climate initiatives, has been pushed back because of COVID-19 disruption

[Source: FCA media release 07/05/2020; FCA regulatory initiatives grid]



# Financial Services\_\_

## Foreign Bank Tracker released

Now in its fifth year, MinterEllison's Foreign Bank Tracker report reveals capital flow trends into Australia via foreign banks based on Australian Prudential Regulation Authority (APRA) statistics.

The report explores the highlights of 2019 and considers the impact that emerging market issues such as the COVID-19 pandemic may have going forward.

You can access the full text of the report on our website [here](#).

## 'Junk insurance' remains a focus area for ASIC: ASIC has provided an update on its work to address issues with Consumer Credit Insurance (CCI) and announced a review of its guidance on remediation

### Key Takeouts

- Consumer Credit Insurance (CCI) remediation update: 434,000 consumers are set to receive over \$160 million in CCI remediation
- ASIC said that it is continuing to investigate the suspected misconduct of several unnamed entities involved in the CCI product market, 'with a view to taking enforcement action'.
- ASIC's expects that value is improved for customers continuing to hold CCI policies and that it will monitor claims ratios accordingly
- ASIC considers that incoming design and distribution obligations 'will mean that junk insurance like this will not reach customers'
- ASIC plans to conduct a review of its current remediation guidance (set out in Regulatory Guide 256) to ensure it applies effectively across the entire financial services sector and to clarify ASIC's expectations about how firms should be conducting consumer-centric remediations. The review will also seek to improve transparency about consumer remediation outcomes.

### Consumer Credit Insurance (CCI) remediation update

- **Context:** In July 2019, The Australian Securities and Investments Commission (ASIC) published the findings of its review into the design and sale of Consumer Credit Insurance (CCI) by 11 major banks and lenders in [Report 622 Consumer credit insurance: Poor value products and harmful sales practices \(REP 622\)](#) (for a summary see: [Governance News 17/07/2019](#)). The review identified systemic issues with the design and sale of CCI and confirmed the standards ASIC expects of lenders who sell CCI and insurers who design the products and handle claims. At the same time, ASIC announced that it had commenced enforcement investigations into a number of entities involved in mis-selling CCI to consumers.
- **Remediation program:** As a result of these investigations, ASIC required that certain insurers and banks remediate consumers who were: a) unfairly sold CCI policies (ie where lenders used pressure selling/unfair sales tactics); b) sold policies on which they were ineligible to claim or unlikely to benefit from/need; or c) who were incorrectly charged for CCI/had their claims unfairly declined.
- **Remediation paid to date?** On 13 May, ASIC announced that lenders and insurers have to date paid over \$128 million to over 312,000 consumers. ASIC said that shortly a further \$32 million would be paid to 122,000 consumers taking the overall CCI remediation program total to \$160 million.

### CCI continues to be a focus for ASIC

- **Investigations are ongoing:** ASIC said that it is continuing to investigate the suspected misconduct of several unnamed entities involved in the CCI product market, 'with a view to taking enforcement action'.
- **Other ongoing work:** ASIC lists a number of initiatives that have been undertaken to address concerns about CCI. This includes:

- Ensuring the standards outlined in Report 622 are being met: ASIC says that though it has deferred work on seeking assurances that the minimum standards in REP 622 are being met and that changes implemented have been effective until later in 2020 because of COVID-19, it will still collect data from the entities.
- Expectation that value is improved: ASIC notes that though the eleven lenders included in the CCI review have stopped selling new CCI with credit cards, personal loans, or home loans, many of their customers will continue to hold and pay premiums for existing CCI policies. Accordingly, ASIC says that it will continue to monitor claims ratios and that it expects lenders (and insurers) to 'significantly improve' them.
- **Reminder about incoming design and distribution obligations:** Under the new design and distribution obligations, financial services providers will be required to design and sell products that are fit for purpose and better meet consumer needs. Ms Chester said that 'Importantly, the forthcoming design and distribution obligations will mean that junk insurance like this will not reach consumers. This underscores the value to consumers and ultimately business of the DDO legislative reform which will come into effect in 2021.'
- **Ultimately it's 'costly to business to sell junk insurance':** Announcing the remediation total ASIC Deputy Chair Karen Chester emphasised the imperative for lenders/insurers to ensure consumers are treated fairly. 'It's both unfair to consumers and ultimately costly to business to sell junk insurance. There is nothing fair about selling on-going consumer credit insurance to a 65-year-old when eligibility falls away at 66. There is nothing fair about selling insurance with involuntary unemployment cover to an unemployed worker. These sales practices were systemic and through ASIC's work, hundreds of thousands of consumers like these ones, have been compensated' Ms Chester said.

## Review of remediation guidance

ASIC will shortly commence a public review of its current remediation guidance (set out in Regulatory Guide 256). The purpose of review is to ensure that ASIC's guidance applies effectively across the entire financial services sector, and to clarify ASIC's expectations about how firms should be conducting consumer-centric remediations. It will also seek to improve transparency about consumer remediation outcomes.

## Consumer Action Law Centre calls on ASIC to do more

In a statement, the Consumer Action Law Centre (CALC) welcomed ASIC's announcement but emphasised that the sale of 'junk policies' remains an issue for consumers.

CALC called for:

- **The government to urgently progress Hayne reform legislation.** CALC CEO Gerard Brody said 'Following the Banking Royal Commission, the Federal Government promised reforms to stop bundled sales of junk add-on insurance. We need this reform to pass Parliament as soon as possible to prevent this type of scandal continuing to harm consumers. Ideally, these junk insurance policies shouldn't be sold at all'.
- **ASIC to exercise its product intervention power** to prevent the sale of 'junk insurance and warranties' sold in car yards.
- **CALC also expressed concern about the delay in the implementation of design and distribution obligations to 5 October 2021.** 'These have been on the agenda for over five years and have already been passed by Parliament. Insurers and their retailing partners have known these reforms were coming for years – any push to delay is a cynical exercise' Mr Brody said.

[Sources: ASIC media release 13/05/2020; Consumer action law centre media release 14/05/2020; [registration required] The AFR 13/05/2020; The Guardian 14/05/2020]

## COVID-19: The FSC has announced that participating life insurers have committed to temporary measures to ensure that COVID-19 will not impact the way in which TPD claims are assessed

The Financial Services Council (FSC) has issued a statement announcing that participating life insurance member companies have committed to ensure that COVID-19 related changes (eg being stood down from employment, reduced working hours) will not impact the way in which claims for total and permanent disability (TPD) cover are assessed.

FSC CEO Sally Loane said that 'today's announcement ensures that if you make a TPD claim resulting from an illness or injury occurring since the pandemic has started, participating life insurers will assess your claim based on your working arrangements as at 11 March 2020 - the date when COVID-19 was declared a pandemic – meaning you keep

the cover you had based on your working arrangements before the COVID pandemic declaration. This announcement has been timed to ensure the initiative is up and running before anyone is adversely affected'.

Life insurers will confirm their participation by making a statement on their website.

**The changes are temporary:** The FSC says that the changes will be in place until 27 September 2020 (to align with the JobKeeper Payment scheme) and will apply to claimed lodged before 1 January 2021.

### **Super Consumers Australia has called on the measures to be made permanent**

In a statement, Super Consumers Australia Director Xavier O'Halloran said that though it is 'good to see the FSC acknowledging there is a major problem with restrictive terms in people's life insurance in superannuation' more is required. Mr O'Halloran said that what is proposed is a 'band-aid solution' to a longstanding problem and called on superannuation funds and insurers to 'ban these junk terms once and for all.'

Mr O'Halloran was also critical of the September deadline for the initiative on the basis that it will '

see people falling off a financial cliff. The forecasts are not showing a full recovery in unemployment levels for years, not months. The industry's plan will see some people caught out.'

[Source: FSC media release 19/05/2020; Super Consumers Australia media release 19/05/2020 (at time of publishing, Super Consumers had not yet published the statement on their website)]

## **APRA data shows private health membership is decreasing especially among younger people, CHOICE has called on the government to institute a public inquiry**

The Australian Prudential Regulation Authority (APRA) has released its private health insurance statistics for the March quarter.

### **Some Key Points**

- As at 31 March 2020, 43.8% of people had hospital cover (down 0.2% on 31 December 2019 ie 9,760 fewer people hold customer cover)



- As at 31 March 2020, 53.2% of people had general cover (down 0.2% on 31 December 2019 ie 5,200 fewer people hold general cover)
- The largest decrease in coverage during the March quarter was 9,565 for people aged between 30 and 34. The largest net decrease (taking into account movement between age groups) was for the age group between 25 and 29, with a drop of 11,176 people.
- The age group for which most hospital benefits are paid is between 60 and 84.

### Consumer group CHOICE has called for a public inquiry into private health insurance

In a statement commenting on the release of the statistics CHOICE Health Campaigner Dean Price said that they are 'further proof that Australians are giving up their health insurance in droves' and called for the government to 'review the whole system by undertaking a thorough public inquiry.'

[Sources: APRA media release 19/03/2020; APRA Quarterly Private health insurance statistics March 2020; CHOICE media release 19/05/2020]

### Buy now pay later Code of Conduct delayed until 1 January 2021

**Context:** The Australian Finance Industry Association (AFIA), announced a consultation on a Code of Conduct for Buy Now Pay Later (BNPL Code) providers in December 2019. The proposed implementation date was 1 July 2020.

**Implementation has been delayed:** On 18 May, AFIA announced that the implementation date has been deferred to 1 January 2021 because consultation had taken longer than anticipated and to allow time to finalise certain aspects of the Code to be finalised. Issues still to be finalised include:

- determining 'what a fair, reasonable and capped fee might look like'
- reviewing upfront assessments of customer suitability
- introducing additional actions to support vulnerable clients
- codifying existing commitments that BNPL providers have made around not permitting the purchase of weapons or gambling services.

In the interim, AFIA said that BNPL providers are already introducing many of the commitments in the Code eg membership of the Australian Financial Complaints Authority (AFCA), having hardship programs in place; and ensuring customers cannot continue to use a BNPL service if they miss a payment.

Diane Tate, AFIA CEO commented 'Our BNPL members – Afterpay, Brighter, flexigroup, Klarna, Latitude, OpenPay, Payright and Zip Co – strongly believe that good consumer outcomes are achieved with customer-centric product design, and industry initiatives that go above and beyond the law; and our new code delivers just that...Despite the delay in launch date, our BNPL members are bringing forward best practice standards by already introducing many of the commitments in the new code'.

[Source: AFIA media release 18/05/2020]

### Industry has welcomed the passage of a Bill that will make tax relief for merging superannuation funds permanent

On 14 May, [Treasury Laws Amendment \(2020 Measures No 1\) Bill 2020](#) passed both Houses without amendment.

**Tax relief for merging superannuation funds:** Among other things, Schedule 2 of the Bill is intended to remove impediments to mergers between complying superannuation funds by permitting the roll-over of both revenue gains or losses and capital gains or losses. The explanatory memorandum accompanying the Bill states that this will make 'tax relief for merging superannuation funds permanent from 1 July 2020'.

The Schedule commences on the first 1 January, 1 April, 1 July or 1 October to occur after the day the Bill receives the Royal Assent.

**Industry groups have welcomed the passage of the legislation:** In separate statements, the Australian Institute of Superannuation Trustees (AIST), the Financial Services Council (FSC) and the Association of Superannuation Funds of Australia (ASFA) have welcomed the passage of the Bill.

ASFA CEO, Dr Martin Fahy, said 'The passage of the Treasury Laws Amendment (2020 Measures No.1) Bill 2020 will provide vital certainty to the industry and ensure that tax implications do not impede mergers that would otherwise be in the best interests of superannuation fund members'.

The FSC statement quotes FSC CEO Sally Loane as welcoming the legislative certainty for superannuation fund mergers that the legislation provides, but expressing disappointment that the new laws also contained changes which will create more unnecessary taxation on Australia's managed funds. Ms Loane said 'the legislation also contains changes to the definition of Significant Global Entity (SGE) to include managed investments – this will impose an unnecessary tax compliance burden on Australia's managed funds. A recent survey by Morningstar shows Australia ranks equal last for tax and regulation of managed funds and the SGE change will not help improve our ranking.'

[Sources: Treasury Laws Amendment (2020 Measures No 1) Bill 2020; AIST Policy News 14 May; ASFA media release 14/05/2020; FSC media release 14/05/2020]

## ASIC has flagged concerns about the superannuation consolidation process

The Australian Securities and Investments Commission (ASIC) has released an article written by Jane Eccleston, ASIC's Superannuation Senior Executive Leader, outlining concerns about the potential misuse of the superannuation consolidation process and outlining expectations of superannuation trustees regarding oversight of the use of by third parties of their SuperMatch2 authorisation.

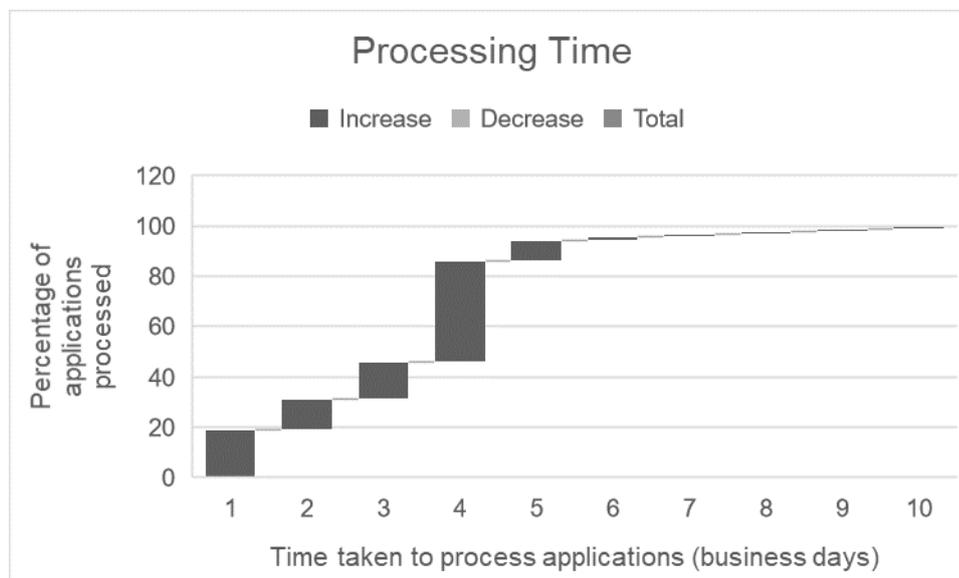
The article emphasises that ASIC is supportive of superannuation consolidation where the process is carried out appropriately, but that the risks must be managed appropriately. The article flags concerns that 'some financial advisers and superannuation trustees are leveraging this for their own benefit, without considering what is best for the member or the client'.

[Source: ASIC article - Finding and consolidating 'lost' superannuation 19/05/2020]

## APRA has published its weekly update on the early release of superannuation scheme

The Australian Prudential Regulation Authority has released its latest weekly data on the early release of superannuation scheme. The report includes applications received between 20 April - 10 May 2020 and is based on data submissions from 177 funds. Funds have submitted on a best endeavours basis.

### Key Points



1,188,000 applications have been processed since the commencement of the scheme

\$2.7 billion in payments were made over the week to 10 May. \$9bn in payments have been made since the commencement of the scheme.

The average payment is \$7546

### Average processing times

The average time taken to pay an application is 3.3 business days, with 94% of applications processed within APRA's guideline of five business days.

[Sources: APRA media release 18/05/2020; Early Release Scheme entity level data - 10 May 2020 period; Early Release Scheme entity level reporting - 10 May 2020 period]

In Brief | COVID-19 capital requirements: APRA has released guidance for authorised deposit-taking institutions to assist them in determining their requirements under APS 116 Capital Adequacy: Market Risk

[Source: Banking COVID-19 frequently asked questions 18/05/2020]

In Brief | The Australian reports that AUSTRAC has launched an investigation into Paypal's compliance with AML/CTF reporting requirements. The external auditor's report is reportedly due to be provided to the regulator in August

[Source: The Australian 11/05/2020]

In Brief | Consumer group CHOICE has issued a statement calling on banks to immediately reduce interest rates on existing Virgin Velocity Frequent Flyer credit cards to 10% to reflect the fact that the value of the Virgin program is currently 'in jeopardy'

[Source: CHOICE media release 19/05/2020]

In Brief | COVID-19: The UK FCA has outlined plans to run a 'test case' in the High Court to resolve legal uncertainty around the handling of claims under business interruption insurance policies

[Source: FCA media release 15/05/2020]



# Risk Management

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## Cybersecurity, Technology and Privacy

### COVID-19: COVIDSafe App privacy protections now 'enshrined' in law

The [Privacy Amendment \(Public Health Contact Information\) Bill 2020](#) passed both houses on 14 May 2020 and received Assent on 15 May. The [legislation](#) is now in force.

The purpose of the legislation is 'to provide stronger privacy protections for users of the Commonwealth's COVIDSafe app and data collected through the app (COVID app data) than the protections that would otherwise apply under Australian law'.

#### Some Key Points

The legislation:

- defines the limited circumstances in which COVIDSafe data can be collected, used/disclosed. Under the legislation, data can only be accessed by authorised state and territory health officials for contact tracing purposes after a user who has tested positive to the virus consents to their encrypted data being uploaded.
- prescribes criminal and civil penalties for any misuse (eg decrypting app data, coercing a person to use the app, storing/transferring COVIDSafe data to a country outside Australia) including jail terms of up to five years, or a fine of \$63,000 per offence.

The operation of the legislation is subject to independent oversight by the Office of the Australian Information Commissioner.

In a joint media release announcing the passage of the Bill, Attorney General Christian Porter and Minister for Health Greg Hunt said that 'strict privacy protections for users of the COVIDSafe app will now be enshrined in law'.

[Sources: Attorney General Christian Porter media release 14/04/2020; Privacy Amendment (Public Health Contact Information) Bill 2020]

### The ACCC is seeking feedback on a draft news media and digital platforms bargaining Code

The Australian Competition and Consumer Commission (ACCC) has released a concepts paper and is seeking feedback on the issues to be covered in a new draft mandatory Code to address bargaining power imbalances between Australian news media businesses and Google and Facebook.

The full text of the concepts paper is [here](#).

Responses are due by 5 June 2020.

[Source: ACCC media release 19/05/2020]

### In Brief | COVID-19: The AFR reports that the Federal government has convened a national group – the Digital Economy and Technology Senior Officials Group – of state and federal ministers to improve coordination of technology initiatives and policy planning in the wake of COVID-19

[Source: [registration required] The AFR 18/05/2020]

In Brief | The Law Council has told the Inquiry into the Telecommunications Legislation Amendment (International Production Orders Bill) 2020 that it has 'significant concerns about the lack of adequacy of safeguards affecting nearly all aspects of the proposed International Production of Orders or IPO scheme' and has outlined over 30 'constructive suggestions' to address them in a submission

[Sources: Law Council of Australia media release 12/05/2020; Law Council of Australia's submission to the Inquiry]

## Climate Risk

In Brief | Net-zero by 2050? The Spanish government has reportedly released a draft law that proposes (among other things) the immediately ban on all new coal, oil and gas projects. The changes are reportedly expected to shape Spain's COVID-19 recovery

[Source: Climate Change News Weekly 18/05/2020]

In Brief | King Review released: The report makes 26 recommendations to reduce Australia's carbon emissions. Announcing the release of the report Energy Minister Angus Taylor said it is the next step in the government's 'technology not taxes' approach to reducing carbon emissions which will 'incentivise voluntary emissions reductions on a broader scale – without imposing new costs on households, businesses or the economy'

[Sources: Minister for Energy Angus Taylor media release 19/05/2020; Report of the expert panel examining additional sources of low cost abatement (the King Review)]

## Other Developments

### Aged Care Extra Services Under ACCC Spotlight. Insights re Bupa Case

After Bupa Aged Care Australia Pty Ltd self-reported false or misleading representations made to residents of its residential aged care facilities to the Australian Competition and Consumer Commission, the Federal Court of Australia has ordered Bupa pay \$6 million in pecuniary penalties and pay compensation to affected residents.

MinterEllison has released an article providing expert insights into the implications for industry. You can access the full text of the article [here](#).

### New Inquiry into class action litigation funding and the regulation of the class action industry announced

The Parliamentary Joint Committee on Corporations and Financial Services will conduct an inquiry into litigation funding and the regulation of the class action industry.

The inquiry has been asked to consider whether 'the present level of regulation applying to Australia's growing class action industry is impacting fair and equitable outcomes for plaintiffs' with particular reference to a range of issues including 'factors driving the increasing prevalence of class action proceedings in Australia'.

You can find the Terms of Reference [here](#).

**Timing:** Submissions to the inquiry are due by 11 June 2020. The Inquiry is due to report by 7 December 2020.

[Sources: Parliamentary Joint Committee on Corporations and Financial Services, Litigation funding and the regulation of the class action industry; Inquiry Home Page; Money Management 14/04/2020; The SMH 14/04/2020; [registration required] The Australian 14/04/2020]



## Contacts



**Mark Standen**  
**Partner**

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mark.standen@minterellison.com  
T +61 2 9921 4902 | M +61 412 104 902



**Siobhan Doherty**  
**Partner**

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siobhan.doherty@minterellison.com  
T +61 2 9921 4339 | M +61 413 187 544



**Kate Hilder**  
**Consultant**

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kate.hilder@minterellison.com  
T +61 2 9921 8785