Governance News

COVID-19 Special Edition

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COVID-19 Key Developments

COVID-19: The rapid adoption of new technology is set to have lasting impacts on a range of governance practices according to a joint AICD/Governance Institute report

Key Takeouts

- The joint report from the Governance Institute and the Australian Institute of Company Directors (AICD) found that the COVID-19 pandemic and the associated rapid adoption of technology has resulted in changes in board and governance practices as well as impacting boards' risk priorities.
- Among other things, the report found that despite the challenges associated, electronic meetings (hybrid or virtual meetings) are set to supplement, rather than completely replace board meetings and that hybrid AGMs are likely to supplement physical meetings into the future.
- The report found that technology has served/is serving to 'elevate' the voice of stakeholders (and in particular the voice of employees, customers and regulators) in the context of board decision making.
- The report highlights a number of ways in which boards/organisations can learn from the current crisis and improve governance practices going forward. One lesson for boards highlighted in the report is the need for boards to review their own performance during the crisis rather than just that of their management teams, and to take steps to lift capability where appropriate.

Report Overview

The Governance Institute of Australia and the Australian Institute of Company Directors (AICD) have released a joint report - Governance through a crisis: Learning from COVID-19 - highlighting the three key areas in which the COVID-19 pandemic has shifted governance and board practices and highlighting some of the learnings for boards to assist in strengthening practices going forward. The full text of the report is here.

The rapid adoption of technology: governance impacts

Board meetings: boards seem open to virtual meetings supplementing physical meetings going forward (despite the drawbacks)

- A fairly high proportion of respondents indicated that there has been an uptick in the meeting frequency since the outbreak of COVID-19 (41% of respondents indicated that board meetings are being held more frequently than prior to the pandemic). This is attributed in the report to: a) the need for boards to meet more frequently during a crisis; and b) to the relative ease of convening a meeting when no travel is involved/costs are minimised. The report suggests that this shift could have a potential upside from the perspective of board diversity as it will potentially allow a broader range of potential directors to participate.
- Over a third of respondents (34%) indicated that meetings are shorter. This is attributed to the increased frequency with which boards are meeting and the tighter agenda, as well as to the practical drawbacks of meeting electronically rather than face to face ('zoom fatigue').
- The shift toward meeting virtually and meeting more often has also had other implications including changes to:
  - the way meetings are conducted – meetings are often less formal and with shorter and tighter agendas. One challenge noted in the report is the difficulty of replicating social/informal interactions online. Page 11 of the report outlines a number of tips for fostering social engagement in an electronic environment.
  - changes to meeting protocols. On this point, the report observes that holding effective meetings requires a different style of chairing, and also requires clear communication around the 'ground rules' for participation/communication during the meeting. 'Chairs have to work harder to ensure engagement' the report observes eg for example by calling on each director after a presentation/item to give them the opportunity to comment/ask questions.

    [Note: Page 9 of the report includes a list of tips for conducting more effective virtual meetings].

  - the way in which information is provided to boards (verbal updates are sometimes replacing updates that would usually be provided in board briefing papers, because of the rapidly changing environment) and board papers are generally shorter. The report observes that one implication of this is that minutes often need to be more detailed in order to capture the reasons for decisions. Commenting on this shift overall, the report states that 'While verbal updates and truncated papers in the height of a crisis can support urgent decisions, this should not be a permanent replacement for appropriately detailed updates in board papers once the crisis stabilises'.

- Despite the fact that 47% of respondents consider board meetings held virtually to be 'somewhat challenging' for a variety of reasons, the majority of respondents nevertheless expect virtual meetings to replace (to varying degrees) face to face meetings post-pandemic. Over 40% (42%) of respondents said that they intended to hold virtual meetings 'frequently' going forward, and 52% said that they would do so occasionally. Only 4% indicated that that they had no intention of replacing physical meetings with virtual meetings.
- The shift to the virtual meeting format has meant that the stability/security of virtual platforms has gained importance in the eyes of boards: 43% of respondents consider that security/stability of virtual platforms is 'the greatest governance challenge' to emerge from the pandemic.

Hybrid and/or virtual AGMs are here to stay?

- The report found that so far, the transition to electronic meeting format appears to be 'relatively seamless' (despite the additional preparation involved). The report cites data from Computershare's report into virtual AGMs held in April-May 2020 in support of this. Computershare concluded that overall, the use of technology has increased shareholder participation/attendance in many cases.
- According to the report, 36% of listed companies intend to hold a virtual AGM this year, 31% are opting for a hybrid AGM and 33% plan to hold a physical meeting.
- Going forward, most companies indicated their intention to supplement physical meetings with the option to attend online: 42% of respondents indicated that they intend to hold hybrid AGMs. A further 17% indicated their intention to replace physical AGMs with virtual meetings. 27% indicated that they intend to replace physical AGMs with virtual meetings (depending on the circumstances). Less than a fifth of respondents (17%) ruled out holding virtual meetings entirely.

The role of technology in enabling proactive engagement and clear communication with internal and external stakeholders

The report found that during the crisis, the extent to which stakeholder interests are being factored into board decision making has increased relative to before the pandemic with 41% of respondents indicating that this is the case. In particular, respondents reported employees (87%), customers (71%) and government/regulatory bodies (53%) as the three stakeholder groups most often factored into board decisions. The report argues that technology has played a significant role in enabling this communication/outreach with stakeholders to occur, and has worked to 'elevate' stakeholder voices in the boardroom.

Business continuity planning and the importance of agile decision making

The report found that many organisations were left in the position of 'workshopping' business continuity/response plans in real time, because of gaps in existing plans.

A key message in the report, is the value of having in place a strong 'blueprint' response plan. 'A strong process that sets out how situation updates are provided in a crisis, to whom they will be given and how often, should not be underestimated' the report states.

The report advises boards to:

- be prepared: boards are advised to 'work with management to regularly document and stress-test upfront contingency planning under a range of scenarios before a crisis hits'.
- ensure the plan is a 'blueprint not a rulebook' so that it remains sufficiently flexible/adaptable to meet the needs of the specific circumstances.

Key challenges during COVID-19?

Asked what the biggest challenge in terms of governance process has been during the pandemic respondents nominated: the flow of information (44%); the security and stability of virtual platforms (43%); access to management (28%) and constitutional barriers to use of technology for board meetings (8%).

Lessons for boards

The report highlights a number of lessons arising from the rapid shift in governance practices. These include the following.

- Technology should be 'seen as an enabler not an end in itself'. As such it has a role in 'promoting agility and getting boards together quickly'.
- A possible benefit of the adoption and integration of technology into board processes is the potential to support increased diversity on boards. 'Organisations should be encouraged to think about how technology could impact on director recruitment and foster diversity on boards' the report suggests.
- Going forward, boards should ensure that 'management has developed and implemented robust crisis management and business continuity plans and procedures'. These should be regularly revisited, stress tested and adapted as necessary to ensure they are ready to be implemented under a range of different scenarios before the need arises. Firms may also consider reassessing existing risk appetite statements.
- Boards should take the opportunity once the immediate crisis is passed to review their own performance as well as that of their management team. Boards should be assessing what they did well and what could be improved, and look to strengthen their processes/approach ahead of the next crisis, from both from a capability and relationship perspective.

[Sources: Governance Institute media release 11/09/2020; Governance through a crisis: Learning from COVID-19]

COVID-19: ASX has announced further changes to temporary emergency capital raising relief

Context: In March 2020, the ASX introduced two class order waivers implementing temporary emergency capital raising measures to assist listed entities impacted by COVID-19 to raise capital. The waivers were updated on 22/23 April and on 13 July were extended until 30 November 2020.

Update: In light of 'the significant stabilisation in market conditions', ASX has issued two replacement Class Waivers - Temporary Extra Placement Capacity Class Waiver and Non-renounceable Offers Class Waiver, which will apply to all relevant capital raisings announced on or after the 16 September and on/before 30 November 2020.

Key changes? ASX states that,

> 'From 16 September 2020, any entity wishing to rely on the Class Waivers must satisfy ASX that the entity is raising capital predominantly for the purposes of addressing the existing or potential future financial affect on the entity resulting from the COVID-19 health crisis, and/or its economic impact, along with satisfying the other conditions set out in the Class Waivers'.

Should ASX consider that a capital raising appears to have 'inequitable features for existing security holders, ASX may still withhold the benefit of the Class Waivers for that capital raising, even if the capital raising is specifically COVID-19 related and urgently needed'.

No prospect of extension? The AFR speculates that the latest adjustment signals that there will be no further extension given.

[Source: Listed@ASX no/9 20 15/09/2020; Temporary Extra Placement Capacity Class Waiver; Non-renounceable Offers Class Waiver; [registration required] The AFR 16/09/2020]

COVID-19: The ACCR has issued suggested guidance for investors on engaging with companies on the issue of workers' rights/protections

The Australasian Centre for Corporate Responsibility (ACCR) has issued 'a detailed engagement guide for investors to ensure that companies [companies operating in essential industries] adhere to strong social, labour rights and human rights standards' during the COVID-19 pandemic.

The guidance covers three main topics: 1) workplace health and safety; 2) contracting arrangements; and 3) use of government stimulus.

For the purposes of the guidance, 'essential industries' are considered to include sectors where workers, due to the nature of their work, have been unable to work from home eg childcare, aged care, supermarkets, meat production and warehouses.

The table below provides an overview of some of the issues the ACCR suggests that investors raise during their engagement discussions.

ISSUE	COMMENTARY
Workplace health and safety	The ACCR considers that the effectiveness of pandemic plans and pandemic leave arrangements should both be topics of engagement. **Pandemic plans**: Among other things, the ACCR suggests that investors should be talking to companies about: ▪ the extent to which workers are directly involved in the development, implementation and monitoring of a pandemic plans including: adequate provision of PPE and training in how to use it correctly and pandemic leave provisions. ▪ the measures implemented to ensure workers are not penalised (eg through loss of wages, loss of shifts) for raising safety issues/removing themselves from unsafe working environments. ▪ how contracts/subcontractors/labour hire workers are integrated into pandemic plans and how the company ensures there is clear accountability for reporting potential transmissions and infection breaches. **Pandemic leave:** Among other things, the ACCR suggests that investors should be talking to companies about: ▪ whether they have instituted paid pandemic leave provisions and if so, whether pandemic leave is available to the entire workforce ▪ any limitations in the amount of paid off time available
Contracting arrangements	▪ The number of COVID-19 infections across companies' entire workforces (including contractors, subcontractor and labour hire workers) should be disclosed. ▪ The ACCR suggests that investors be talking to companies about whether labour hire workers or contractors have been brought in to meet staffing shortfalls (eg due to employee self-isolation). Where this is the case, questions should be asked about measures put in place to ensure that labour hire workers/contractors are informed of COVID-19 risk on the site and to enable workers to self-isolate if/when necessary (eg pandemic leave arrangements.) ▪ The ACCR also suggests that investors should be engaging with companies on the measures companies have implemented to ensure their contractors/subcontractors have safe working conditions eg how companies are ensuring that all contractors and subcontractors are being provided with sufficient training, personal protective equipment and social distancing in order to be able to complete their jobs
Use of government support payments	▪ The ACCR observes that the intended purpose of the support payments is to enable companies to retain existing workers. On this basis, companies disclose how government payments are being deployed.

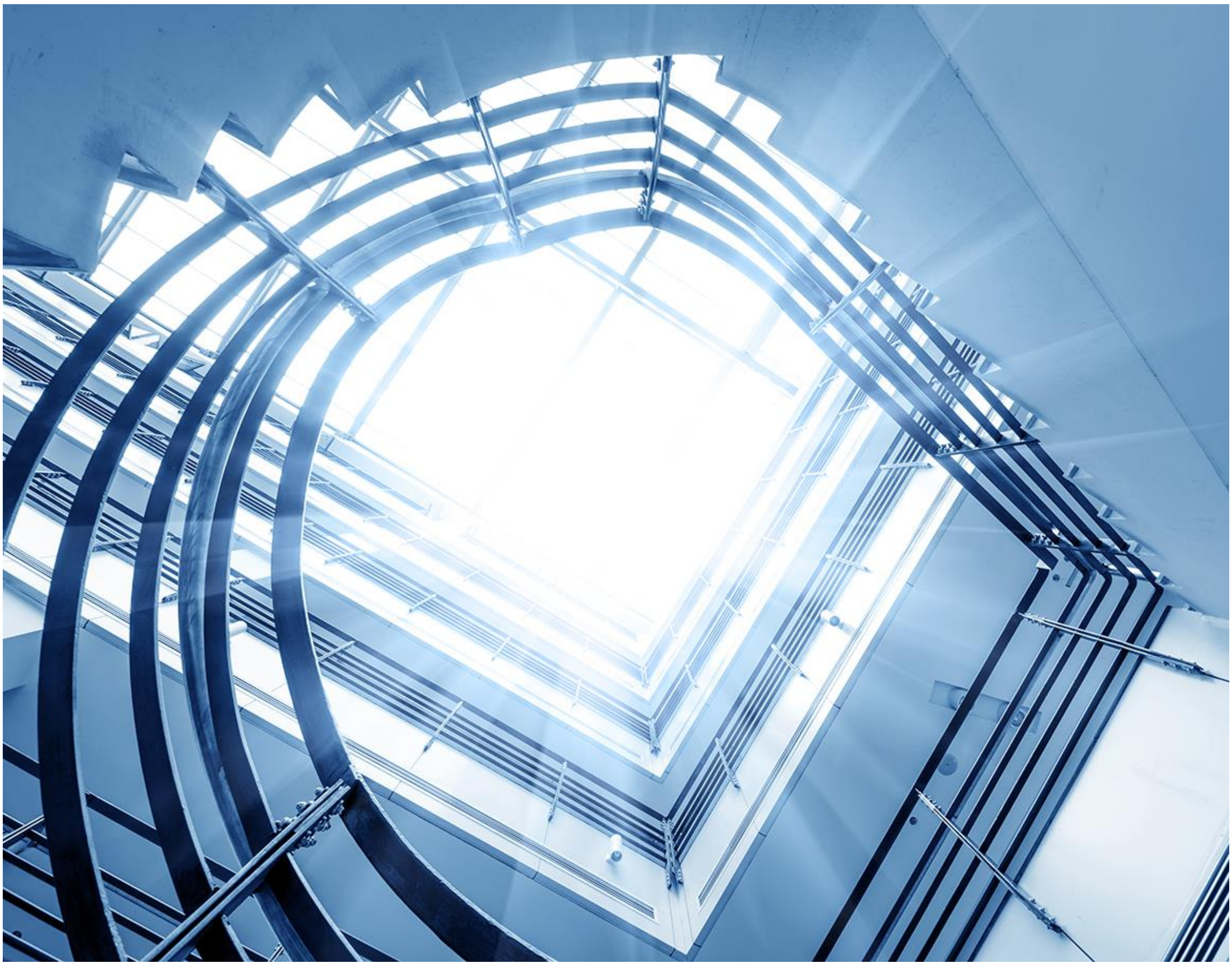
[Source: ACCR media release 14/09/2020]

In Brief | The Treasurer has registered the Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (no 8) 2020 which extends JobKeeper to 28 March 2021 and introduces changes to eligibility requirements to taper support

[Source: Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 8) 2020]

In Brief | COVID-19: The AICD has issued a statement welcoming the six month extension of insolvency relief, but also called on the government to extend both continuous disclosure and misleading and deceptive conduct relief measures

[Source: AICD media release 07/09/2020]



Remuneration

Few Australian companies have reduced executive pay and cuts have been modest? CGlytics has released analysis of announced changes to executive remuneration by ASX 300 companies

Key Takeouts

- CGlytics has released the results of analysis of adjustments to executive pay made by ASX 300 companies as at 1 August 2020. Overall, the report concludes that a relatively modest proportion of companies have disclosed any pay adjustments in response to the pandemic, and that for the 61 ones that have done so, the cuts have been relatively modest.
- Interestingly, the report found that despite the fact that few companies adjusted pay/cuts were modest, overall the proportion of companies where CEO pay is in alignment with the financial performance of the company (measured in terms of total shareholder return) has increased.
- The report suggests that looking ahead, pressure on companies to disclose CEO to worker pay ratios is likely to build, as is pressure to ensure accountability for meeting stakeholder expectations around climate risk and diversity.

CGLytics has released the results of its analysis of the changes made to executive remuneration by ASX 300 companies. The full text of the analysis is here.

Some Interesting Findings

Relatively few companies have announced changes to executive pay because of COVID-19

- As at the end of the first week of August, 61 ASX 300 companies had reported they had made adjustments to CEO and/or director remuneration in response to COVID-19.
- Of this group:
  - Most (55 companies) elected to reduce both CEO and director remuneration. A small minority (5) made cuts to only CEO remuneration.
  - The highest proportion of companies (26%) to announce pay cuts were drawn from the financial sector (this includes real estate, capital markets, diversified financials, banks and insurers). A similar proportion (25%) were companies in the 'consumer discretionary sector' (this includes cars, consumer services, retail and consumer durables and apparel). 20% of companies in the industrial sector (airlines, transportation, capital goods and commercial/professional services industries) announced pay cuts.

Reductions have been modest

- In the majority of cases, reductions were applied to CEOs' base salary rather than to incentive plans. Only 17 companies disclosed reductions to both CEO base salary and short term incentives.
- Of the companies that reported cuts to CEO base salary, most (50% or 26 companies) elected to make reductions of between 10-20%; 42% or 22 companies made reductions of between 20-50% and only 4 companies (8%) made reductions of 70% or more.
- The report comments that in practice, these reductions are small when viewed in the context of overall pay. For example, even reductions of 70%+ amount to no more than a 12.11% reduction in overall average realised pay.
- The report found that pay cuts overall amount to a 1.29% of ASX 100 projected CEOs realised remuneration for FY 20. In the ASX 300 the proportion is slightly higher rising to 2% of projected remuneration for FY 20.

Greater 'alignment' than last year

Despite the relatively modest reductions in pay, the report found that overall the proportion of companies, whose pay structures are in alignment with the financial performance of their organisation (ie in alignment with year-to-date total shareholder returns) increased by 21% across the ASX 300 on 2019. In 2020, executive pay at 41% of ASX 300 companies was found to be in alignment with total shareholder returns (up from 34% in 2019). Likewise, the proportion of ASX 300 companies with pay structures that were 'misaligned' with year to date total shareholder return decreased from 37% in 2019 to 31% in 2020.

Drilling down to the ASX 100, the pattern is similar, though less pronounced. Overall, the report concludes that there was a 13% increase in ASX 100 companies showing alignment in FY 20 and a 3% decrease in f misaligned companies.

The report does not attribute this shift to any single cause, but does suggest that reductions in pay made as a result of the pandemic, could be a contributing factor.

Cause for investor concern?

The report observes that the relatively modest pay cuts may not be enough to meet shareholder expectations in the current environment, especially for the companies hardest hit by COVID-19 disruption. The report comments,

> 'Despite the appeal of executive pay cuts, they make up a small portion of what executives receive throughout the year. A well-meaning but insignificant percentage of executive pay cuts against their total remuneration can cause concern for shareholders, especially for companies that have resorted to laying off employees and closing stores'.

Emerging issues

The report identifies three areas where companies may face increased pressure going forward.

- Pressure to disclose CEO vs worker pay ratios: The report suggests that in the current uncertain economic environment, and given developments in other jurisdictions including the UK, Australian stakeholders may apply pressure on companies to disclose CEO to worker pay ratios and/or support the implementation of requirements for companies to do so.
- Investors will continue to focus on the connection between CEO pay and the company's overall performance. The report predicts that the shift towards integration of non-financial metrics into CEO pay plans (including ESG metrics) is predicted to continue while pressure for the extension of long term incentive plans over a longer period is predicted to increase.
- Pressure from investors and the community more broadly to meet social expectations continues to build: Stakeholders are increasingly expecting accountability for meeting social expectations eg climate change, gender diversity on boards, and ethnic diversity (especially in light of the Black Lives Matter movement).

[Sources: Harvard Law School Forum 10/09/2020; CGlytics report: Avoiding a first strike during the pandemic an ASX executive remuneration study]

Remuneration planning for 2021: Semler Brossy reflects on how US companies are tackling the challenge of incentivising executives to deliver in the current tough conditions, while also meeting stakeholder expectations

Writing in Harvard Law School Forum, Semler Brossy Consulting Group outlines the way in which companies have adapted executive compensation plans in response to the COVID-19 pandemic and offers observations about the measures already being implemented by some companies, going into 2021, to keep management motivated to deliver in what continues to be a very challenging and uncertain environment.

How companies are tackling the challenge going into 2021

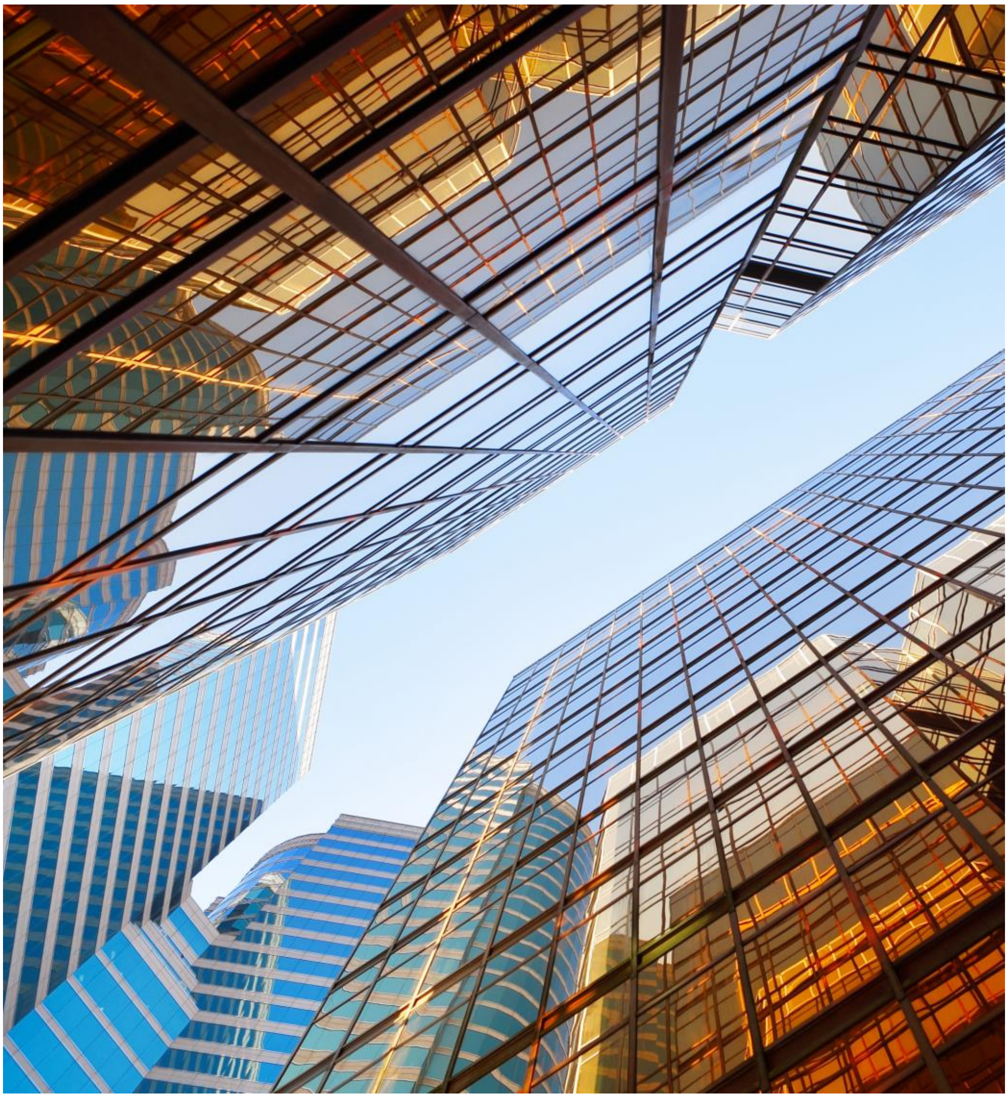
According to Semler Brossy's analysis, companies are building in more flexibility and discretion into executive awards going into 2021. Broadly, companies are tending to make changes in three main areas:

1. setting biannual goals (with lower, capped incentives) to 'provide hope and opportunity of hitting some targets';
2. increasing the weighting on non-financial components in annual plans to between 30 and 50%;
3. adapting goal setting to assess a wider range of performance while also reducing/capping the potential upside of hitting targets.

However, Semler Brossy observes that in some cases, companies have implemented more radical changes for the next fiscal year. For example, FedEx has replaced annual incentive plans with the issue of time-based restricted shares instead.

Semler Brossy considers that in most cases, adopting 'less extreme measures' as outlined above will allow sufficient flexibility to enable companies to adapt/respond appropriately to the current environment. Ultimately, Semler Brossy considers that boards

> 'will want to support discretionary rewards with clear and transparent criteria that are balanced and proportional to the impacts on all stakeholders. For 2021, plans will need to be resilient to continued uncertainty, which may involve both discretionary elements as well as an emphasis on controllable financial results'.



[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 11/09/2020]

A possible way to tackle pay inequality? The case for rethinking and expanding the role of remuneration/compensation committees

A recent paper - Toward Fair Gainsharing and a Quality Workplace for Employees: How a Reconceived Compensation Committee Might Help Make Corporations More Responsible Employers and Restore Faith in American Capitalism – makes the case for reconceptualising the role of remuneration committees/compensation committees within organisations as a means of tackling both the growing disparity between executive pay and worker/contractor pay and as a means of re-focusing companies on EESG (employee, environmental, social and governance) responsibilities.

The case for change

The authors observe that the last several decades the gap between worker pay and executive pay has greatly expanded for a range of reasons. Ultimately, shareholders and executives have received an increasingly large proportion of company profits while the benefits flowing to workers has decreased over the same period.

The authors argue that the resulting financial inequality and insecurity has led to demands for 'serious change' in corporate governance, even to the point of questioning whether capitalism is broken as a system, and for more weight to be given to workers' interests. These demands, they argue, will only get louder going forward.

A suggested way forward: Why not broaden the role of compensation committees?

The article suggests that one practical way of elevating the interests of workers within companies/taking steps to tackle broader issues of inequality, is to rethink, and ultimately to expand the role of compensation/remuneration committees in two key ways.

1. The duties of compensation committees should be expanded to include responsibility for the oversight of management's implementation of compensation throughout the organisation. Committees would be expected to ensure that distribution of profits/benefits is fair and equitable across all levels of the organisation and tasked with ensuring that workers 'receive a fair share when corporate productivity and profitability increases, and analysing what allocation of compensation within the company's workforce will provide the most motivation to encourage corporate success'.

   The authors argue that by looking at/comparing pay levels holistically throughout the organisation with an eye to ensuring fairness and consistency in approach, Committees would have to interrogate and ensure pay decisions are justifiable at every level.

   They write,

   > 'When the board sets top management pay, it will not be able to avoid examining whether the top management's pay makes sense in light of how the company is paying other employees, whether incremental additions to pay will have the most effect if concentrated at the top or spread more widely, and whether the workforce as a whole, and not just top management, is being fairly compensated when the company's productivity and profitability improves'.

   The article sets out a number of practical suggestions as to how this might look in practice.

2. The compensation committee should also oversee compliance with EESG responsibilities eg worker safety, racial and gender equality, sexual harassment and inclusion, training and promotion policies, and company practices in its supply chain to ensure contractors used by the company are treated fairly.

The authors conclude that 'by this evolutionary means that builds on the existing American corporate governance system, important strides can be taken toward making our capitalist system work better for the people most critical to its success: workers'.

[Note: In a similar vein, The UK High Pay Centre has argued for some time that remuneration committees should be reconceptualised to ensure CEO pay awards are fair, proportionate and 'assessed in a way more reflective of the pay of the wider workforce is determined'. See: HPC/CIPD Annual FTSE 100 CEO Pay Review - CEO pay flat in 2019; High Pay Centre/CIPD executive pay survey 2018]

[Source: Strine, Leo and Smith, Kirby, Toward Fair Gainsharing and a Quality Workplace for Employees: How a Reconceived Compensation Committee Might Help Make Corporations More Responsible Employers and Restore Faith in American Capitalism (June 4, 2020). U of Penn, Inst for Law & Econ Research Paper No. 20-37 Harvard John M. Olin Discussion Paper No. 1035, Available at SSRN: https://ssrn.com/abstract=3619273 or http://dx.doi.org/10.2139/ssrn.3619273]

In Brief | The AIST reports that APRA intends to commence a second round of consultation on a revised remuneration standard (CPS 511) before the end of the year

[Source: AIST policy news 10/09/2020]

Diversity

Diversity is a 'systemically important issue': State street is looking for companies to improve their approach in five key areas heading into 2021

Key Takeouts

- State Street says it considers diversity to be 'a systemically important issue across our portfolio' and has called on all companies to disclose more detailed diversity information than they have been doing to date.
- Broadly, State Street expects companies to provide more detailed information in 2021 disclosures around: a) the diversity of both their boards and their broader workforces; b) the steps they are taking to improve diversity within their organisation (including the board); c) how diversity targets are linked to the organisation's long-term strategy; and d) how progress is overseen and measured.
- Boards should expect diversity to be a topic of engagement going into 2021.

Writing in Harvard Law School Forum, State Street Corporations has outlined its expectations of what it expects to see in the way of disclosure around diversity efforts in 2021.

Broadly, State Street expects companies to provide more detailed information about the diversity of their boards and their workforce, as well as to provide more information about the steps they are taking to improve/progress being achieved.

Five key focus areas

State Street expects companies to provide detailed, clear information to shareholders on five key aspects of their diversity efforts. The table below provides a high level snapshot of State Street's expectations.

IMPROVEMENT AREA	EXPECTATION
Explain the strategic importance of diversity within the organisation	▪ Companies are expected to clearly articulate to shareholders the role that diversity plays both in the company's human capital management practices and in the company's broader long term strategy.
Disclose diversity targets/goals	Firms should specify: ▪ the diversity targets in place ▪ how the targets contribute to the achievement of the firm's long term strategy ▪ explain oversight mechanisms ▪ explain how the firm is progressing against them
Disclose the diversity of the workforce and the board	▪ **Workforce diversity:** Firms should disclose metrics on the current levels of diversity (eg racial, ethnic, gender diversity) for all full time employees, broken down by 'industry-relevant employment categories' or levels of seniority. State Street suggests that US companies could use the US equal Employment Opportunity Commission's EEO-1 survey to assist in this. Non-US companies are encouraged to disclose in line with the SASB's guidance and with nationally appropriate frameworks. ▪ **Board diversity:** Firms should also disclose the current diversity of the board.
Disclose a strategy for increasing board diversity and the associated targets	▪ Firms should specify targets and outline their strategy for increasing racial and ethnic representation on the board. The strategy should reference how the board reflects the diversity of the workforce, customers, key stakeholders and the community.

IMPROVEMENT AREA	EXPECTATION
Disclose how the board oversees diversity and inclusion efforts within the company	▪ Firms should also explain the mechanisms through which boards oversee diversity and inclusion efforts within the organisation.

In addition, State Street 'encourages' companies to consider their recruitment and retention practices. These issues, State Street observes will be topics of engagement with companies.

SASB standards

For the nine industries covered by the SASB standards, State Street encourages them to use the SASB framework to guide disclosure.

For industries not covered by the SASB standards, State Street calls on companies to nevertheless be guided by them and by the EEO-1 framework/nationally appropriate standards as applicable on the basis that it considers diversity to be a systemically important issue, relevant to companies in every industry/sector.

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 13/09/2020]

Meetings and Proxy Advisers

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In Brief | ASX has issued a reminder to listed entities that draft notices of meetings (NOMs) provided to ASX need to incorporate amendments made to the listing rules made on 1 December 2019. ASX comments that 'based on the draft NOMs for annual general meetings received so far by ASX from listed entities with a balance date of 30 June 2020, it appears that a number of listed entities are not aware of the changes'

[Source: Listed@ASX 09/20 15/09/2020]

Disclosure and Reporting__

The New Zealand Minister for climate change has announced his government's intention to introduce a mandatory climate related financial disclosure regime

New Zealand Minister for climate change James Shaw has announced the government's intention to introduce new mandatory climate reporting requirements.

According to Mr Shaw's statement:

- The new regime will be based on the Task Force on Climate-related Financial Disclosures (TCFD) framework and operate on a comply or explain basis.
- The External Reporting Board (XRB) will be responsible for the development of the new standard(s).
- The Financial Markets Authority will be responsible for independent monitoring, reporting and enforcement.
- It's estimated that the new requirements will apply to approximately 200 organisations including:
  - All registered banks, credit unions, and building societies with total assets of more than $1 billion
  - All managers of registered investment schemes with greater than $1 billion in total assets under management
  - All licensed insurers with greater than $1 billion in total assets under management or annual premium income greater than $250 million
  - All equity and debt issuers listed on the NZX
  - Crown financial institutions with greater than $1 billion in total assets under management (including the ACC and the NZ Super Fund)
  - Overseas incorporated organisations would also be required to disclose under the new requirements in their New Zealand annual reporting.
- Timing: Subject to approval by parliament, financial entities could be required to make disclosures from 2023.

The purpose of introducing the changes, Mr Shaw states is to 'bring climate risks and resilience into the heart of financial and business decision making. It will ensure the disclosure of climate risk is clear, comprehensive and mainstream'.

Mr Shaw comments that once implemented, the changes will make New Zealand 'the first country in the world to require the financial sector to report on climate risks'.

[Source: NZ Minister for climate change, James Shaw media release 15/09/2020]

New voluntary reporting guidelines to support Australian financial institutions in reporting physical risks released

The Climate Measurement Standards Initiative (a self-described industry-led collaboration between insurers, banks, scientists, regulators, reporting standards professionals, service providers and supporting parties) has released new climate reporting guidelines, tailored for Australian conditions, that are intended to provide banks, financial institutions and insurers with 'consistent scientific and technical guidance' on assessing and more clearly communicating the physical risks of climate change (eg hailstorms, fires, fires etc) on buildings and critical infrastructure.

Announcing the release of the guidelines, Chief Executive Officer of Climate-KIC Australia, convenor of the CMSI Chris Lee said that the guidelines are an important step in improving disclosures.

> 'Consumers will have confidence in the resulting disclosures because they'll be understandable, consistent, comparable and supported by Australia's leading climate experts.'

Some Key Points

- **Developed with input from industry and from key scientists:** Companies and organisations involved in developing the CMSI guidelines include QBE, Suncorp, IAG, RACQ, NAB, Westpac, Commonwealth Bank, HSBC Australia, Munich Re, Swiss Re, Leadenhall Capital Partners, MinterEllison, the Investor Group on Climate Change and Climate-KIC Australia. The guidelines were also developed with input from preeminent scientists from the CSIRO and leading universities.
- **Supporting TCFD disclosure:** Announcing the release of the guidelines CMSI states that they have been specifically designed 'to support the G20 Financial Stability Board's Task Force on Climate-Related Financial Disclosures (TCFD) that made recommendations on disclosing the risks and opportunities associated with climate change and enable stakeholders to better understand the financial system's exposures to climate-related risks'.
  - **Scientific guidelines:** The scientific guidelines consider future climate change risks that are 'chronic and acute for the general insurance, banking and asset owner sectors for the years 2030, 2050 and 2090'. The guidelines cover two scenarios: global warming below two degrees Celsius and global warming below this level. Overall, the modelling shows that the physical risks of climate change will increase under both scenarios, but that the increase in risk is higher under the two degrees+ scenarios.
  - **Financial guidelines:** The are intended 'to provide additional depth and guidance on the financial disclosure of scenario analyses under the TCFD recommendations' and include seven recommendations around how financial entities should approach their reporting. CMSI states that the financial disclosure guidelines aim to develop 'a common interpretation of the TCFD recommendations, considering the decision useful information for users of TCFD and the reporting practices of these sectors' thereby improving the comparability of disclosures.
- **Feedback invited:** The CMSI has called for feedback on the recommendations in the guidelines. Going forward, CMSI plans to 'iterate the recommendations provided in this report in line with further developments in climate science and the application to financial disclosure'.

[Sources: CMSI media release 14/09/2020; Executive summary; Guidelines and climate science guidance]

Five global standard setters commit to working towards a comprehensive shared reporting framework

Five global standard setting bodies - The CDP, the Climate Disclosure Standards Board (CDSB), the Global Reporting Initiative (GRI), the International Integrated Reporting Council (IIRC) and the Sustainability Accounting Standards Board (SASB) - have agreed to work together towards the goal of creating a comprehensive corporate reporting regime for companies.

Existing frameworks provide the basis: The group has released a joint statement outlining their commitment to working together to provide joint guidance on how each of the organisation's frameworks and standards can be 'applied in a complementary and additive way, and a joint vision of how these elements could complement Financial GAAP and serve as a natural starting point for progress towards a comprehensive corporate reporting system'.

The organisations have also committed to an ongoing program of 'deeper collaboration' to ensure the frameworks and standards are interoperable.

The organisations have called for feedback the approach and the ideas in the joint statement.

[Source: CDP media release 11/09/2020; Joint Statement]

Institutional Investors and Stewardship

Investors have welcomed the executive leadership changes announced by Rio Tinto, but (some) have called on the board to go further

Rio Tinto Executive Committee changes announced

Following the destruction of the Juukan Gorge shelters in May 2020, the subsequent release of the Board Review of Cultural Heritage Management (Review) and following engagement with investors, Traditional owners and other stakeholders, Rio Tinto announced that the three executives named in Review: CEO and executive director JS Jacques, CEO Iron Ore Chris Salisbury and Group Executive, Corporate Relations Simone Niven will step down from their positions.

- Mr Jacques will remain until his successor is appointed or until 31 March 2021 (whichever is the earlier date).
- Ms Niven and Mr Salisbury have each stepped down from their roles and will leave the organisation by the end of the year. Rio Tinto executive Ivan Vella will replace Mr Salisbury on an interim basis, following a handover.
- To 'enhance board engagement in Australia' and implement the changes in the board Review, non-executive director Simon McKeon has been appointed as a second Senior Independent Director with immediate effect.

Mr Thompson said that the changes to the executive team demonstrate that Rio Tinto has listened to and taken action to address stakeholders' concerns. He states,

> 'We have listened to stakeholders' concerns that a lack of individual accountability undermines the Group's ability to rebuild that trust [the trust of the Traditional owners] and to move forward to implement the changes identified in the board review'.

Mr Thompson also emphasised that Rio Tinto is committed to ensuring that the destruction of such significant heritage sites never occurs again.

Separation Arrangements

The financial penalties previously announced will be applied and the terms of separation agreements will be 'disclosed as appropriate'.

The Australian Council of Superannuation Investors (ACSI) has issued a statement, flagging that investors will be 'looking closely' at separation arrangements 'with the expectation that any exit won't provide a windfall for executives on their departure'.

[Source: Rio Tinto ASX Announcement 11/09/2020]

Response

Both the Committee inquiring into the destruction of the heritage sites, and investors have welcomed the announcement, though some investors have called on the company to go further.

- The Northern Australia Committee which is conducting an inquiry into the destruction of the heritage sites has issued a statement welcoming Rio Tinto's announcement. Committee Chair, Warren Entsh said, 'The evidence received by the Committee has made clear that the internal culture at Rio Tinto was a significant factor in the destruction of these sites. New leadership, new structures and new operating principles within the company are essential to preventing such catastrophes in the future.' Mr Entsh said that the Committee hopes to meet 'at the earliest opportunity with the outgoing executives to further discuss Rio Tinto's previous evidence to the inquiry and explore the implications of the announced changes at the company'. Mr Entsch also welcomed the commitment made by Mr Thompson, to ensuring that the destruction of such significant heritage sites is not repeated and called on other miners to follow suit.

- The **Australian Council of Superannuation Investors (ACSI)** has also welcomed the announcement but has signalled that engagement with Rio Tinto on the issue will continue. ACSI CEO Louise Davidson said 'Despite a drawn out process, we feel the Board has listened to investors and other stakeholders and taken appropriate steps to ensure executive accountability for the systemic failures that led to the disaster at Juukan Gorge.' However, ACSI considers that there is more to be done before the issue is considered settled. The statement suggests that Rio Tinto has 'the opportunity to address the necessary remediation, cultural heritage and risk processes with fresh eyes' as well as rebuild the relationship with the traditional owners. Ms Davidson said that investors will continue to engage with Rio Tinto 'to understand how the company will manage this transition period. We will also be looking closely at the separation arrangements, with the expectation that any exit won't provide a windfall for executives on their departure'.
- **HESTA:** Prior to the announcement HESTA released a statement calling on Rio Tinto to commission an independent review of all current agreements it has in place with Traditional Owners. HESTA argues that any changes in executive leadership will not address broader issues in Rio's practices/agreements with traditional owners. 'Only a broader review of current practices and the agreements with Traditional Owners will provide certainty to investors that these risks are properly managed by Australia's mining industry with fair outcomes for all'. The statement asks that the board consider commissioning the review at the next board meeting and concludes that 'We [HESTA] have contacted Professor Allan Fels AO who we believe is an appropriate expert to consider matters pertaining to good faith negotiations'.
- **Calls for further action to be taken:** The SMH reports that a coalition of investors has called on Rio Tinto's board to take further steps beyond those already announced, including commissioning an independent review into the causes of the incident.

[Sources: The Northern Australia Committee media release 11/09/2020; ACSI media release 11/09/2020; HESTA 09/09/2020; SMH 15/09/2020]

FRC to release an 'early reporting review' of the new UK Stewardship Code

To support prospective signatories in meeting the higher expectations set by the new UK Stewardship Code which took effect in January 2020, the Financial Reporting Council (FRC) will publish a Review of Early Reporting detailing reporting expectations, identifying effective examples and highlighting improvement areas.

To coincide with the release of the Review, the FRC will host a webinar and Q&A session on 30 September.

[Source: FRC media release 15/09/2020]

Regulators

The ACCC and APRA have signed an updated Memorandum of Understanding committing them to 'a broader model of engagement'

The Australian Prudential Regulation Authority (APRA) and the Australian Competition and Consumer Commission (ACCC) have signed an updated Memorandum of Understanding (MoU) committing both agencies to 'a broader model of engagement, with a greater emphasis on proactive information sharing and collaboration'.

Among other things, the agreement commits the agencies to:

- a 'proactive approach' to engagement including 'regulator 'senior level liaison meetings (including between the heads of the agencies); mechanisms to share perspectives and expertise on relevant issues; and, where appropriate, staff secondments and training'
- to sharing 'to the extent possible, information relevant to competition in the financial system, or the financial or prudential soundness of regulated financial institutions, with each other'

The two agencies have worked closely together throughout the pandemic on issues including, resolution planning and authorisations on anti-competitive arrangements in the financial system.

Announcing the agreement ACCC Chair Rod Sims said the updated agreement will allow the agencies to 'continue to share intelligence and insights and work closely together to achieve good outcomes for Australians, including ensuring the impacts of COVID-19 on the financial sector are managed in a pragmatic and sensible way'.

[Sources: APRA media release 15/092020; Memorandum of Understanding]

ASIC's approach to compliance with notices to produce and legal privilege

The Australian Securities and Investments Commission (ASIC) has released a statement welcoming the clarity provided by two recent Federal Court decisions concerning entities' obligations to comply with ASIC notices to produce documents and claiming legal professional privilege.

On the issue of complying with ASIC notices to produce documents, ASIC says that the decision in Australian Securities and Investments Commission v Maxi EFX Global AU Pty Ltd [2020] FCA 1263 clarifies that:

- ASIC is able to require the production of specified documents in a person's 'possession' ie to produce documents in their custody or under their control for the purposes of an investigation.
- That the volume of documents required is not an automatic indication that the notice is too board. Rather, the 'relevance of documents called for is a matter for ASIC to determine by reference to its investigation'.
- Non-compliance with a notice because of the work/expense involved in complying is not a reasonable excuse.

On the issue of claiming legal privilege, ASIC says that the decision in Australian Securities and Investments Commission v RI Advice Group Pty Ltd [2020] FCA 1277 confirms that:

- Legal privilege claims need to be able to be clearly substantiated in order to be upheld.
- Producing a document to ASIC without claiming legal professional privilege can be a waiver of privilege.
- Those wishing to disclose a document to ASIC while maintaining a legal professional privilege claim over it should follow the instructions contained in the notice and seek ASIC's formal agreement.

ASIC states that the actions demonstrate ASIC's willingness to enforce compliance with notices where required.

[Source: ASIC media release 11/09/2020]

US regulators should be building climate risk into their mandates and into their regulatory activities? CFTC subcommittee report calls for immediate action to mitigate the impacts of climate risk on the US financial system

The US Commodity Futures Trading Commission (CFTC) Climate-Related Market Risk Subcommittee of the Market Risk Advisory Committee has released a report - Managing Climate Risk in the US Financial System – the central message of which is: a) that the climate related risks pose 'serious emerging risks to the US financial system' and; b) that financial regulators need to 'move urgently and decisively to measure, understand and address' these risks.

The report includes 53 far-reaching recommendations to mitigate the risks to financial markets posed by climate change.

Announcing the release of the report, CFTC Commissioner Rostin Behnam said that it is intended to provide a roadmap for action - to enable policymakers, regulators, and stakeholders to 'begin the process of taking thoughtful and intentional steps toward building a climate-resilient financial system that prepares our country for the decades to come'.

The report has been unanimously endorsed by the CFTC subcommittee that produced it and it appears on the CFTC website. However, the NY Times quotes an unnamed CFTC official as commenting that the report does not represent the official view of the CFTC as the entire Commission has not voted to endorse it.

The full text of the report is here. A full list of recommendations is included at p123 of the report.

Some interesting recommendations

Incentivising change

Recommendation 1 of the report is that the United States should establish a price on carbon. The report describes this as 'the single most important step to manage climate risk and drive the appropriate allocation of capital'.

Integration of climate risk into broader risk management/governance practices and frameworks

Recommendation 4.7 is that financial services firms should be required to integrate climate-related financial risks into their existing risk management and governance frameworks, and ensure there is adequate oversight (including by means of clearly defined oversight responsibilities in the board of directors).

Regulators

A number of recommendations are aimed at establishing 'systemic risk oversight' of climate-related risk. These include recommendations that:

- All relevant federal financial regulatory agencies should incorporate climate-related risks into their mandates and develop a strategy for integrating these risks into their existing monitoring/oversight functions (Recommendation 4.1)
- The Financial Stability Oversight Council (FSOC) should incorporate climate-related financial risks into its existing oversight function, including its annual reports and other reporting to Congress. (Recommendation 4.2)
- US regulators should join international groups convened to address climate risks, including the Central Banks and Supervisors Network for Greening the Financial System (NGFS), the Coalition of Finance Ministers for Climate Action, and the Sustainable Insurance Forum (SIF). The US should also work to ensure that climate risk is on the agenda of G7 and G20 meetings and bodies, including the FSB and related committees and working groups. (Recommendation 4.6)
- Financial authorities should consider integrating climate risk into their balance sheet management and asset purchases, particularly relating to corporate and municipal debt. (Recommendation 4.10)
- State insurance regulators should require insurers to assess how their underwriting activity and investment portfolios may be impacted by climate-related risks and, based on that assessment, require them to address and disclose these risks. (Recommendation 4.12)
- Regulators should run a pilot climate risk stress testing program. This pilot program should include institutions such as agricultural, community banks, and non-systemically important regional banks. (Recommendation 4.8). Regulators should also prescribe a consistent and common set of broad climate risk scenarios, guidelines, and assumptions and mandate assessment against these scenarios. (Recommendation 6.6)

Disclosure

Among other things, the report recommends that regulators should mandate disclosure of Scope 1 and 2 emissions by listed entities. Going forward, 'as reliable transition risk metrics and consistent methodologies for Scope 3 emissions are developed, financial regulators should require their disclosure, to the extent they are material'. (Recommendation 7.6)

Other recommendations include:

- Clarification by financial regulators of the definition of materiality for disclosing medium- and long-term climate risks, including through quantitative and qualitative factors, as appropriate. (Recommendation 7.2)
- The review and updating of SEC's 2010 Guidance on climate risk disclosure to achieve greater consistency in disclosure to help inform the market. Regulators should also consider rulemaking, where relevant, and ensure implementation of the Guidance. (Recommendation 7.5)

[Sources: CFTC media release 09/09/2020; Full Report: Managing Climate Risk in the U.S. Financial System]

Financial Services

Top Story | Reframing chapter 7 of the Corporations Act? The ALRC has been tasked with reviewing the legislative framework for corporations and financial services regulation, final report due 30 November 2023

Key Takeouts

- The ALRC review will focus on three key areas: 1) the use and design of definitions in the Corporations Act 2001 (Cth) and Corporations Regulations; 2) the legislative design and hierarchy of the Corporations Act; and 3) restructuring/reframing Chapter 7 of the Corporations Act.
- Interim reports will be prepared on each of these three topics on a progressive basis from 30 November 2021.
- The final report is due 30 November 2023.

The government has directed the Australian Law Reform Commission (ALRC) to conduct a review of the legislative framework for corporations and financial services regulation in line with the Hayne Commission's recommendations to simplify the legislative/regulatory framework.

Announcing the review, Attorney General Christian Mr Porter said:

> 'The government is asking the ALRC to undertake a review of the legislative framework for corporations and financial services regulation to identify ways to make it more adaptive, efficient and navigable for consumers and regulated entities. The review will provide a principled blueprint for a more efficient, navigable and adaptive legislative framework for corporations and financial services regulation that would allow industry and consumers to more easily understand their rights, obligations and the intent and effect of the law.'

Terms of reference

The three stage review will consider what changes to the Corporations Act 2001 (Cth) and Corporations Regulations 2001 (Cth) could be implemented to 'simplify and rationalise the law'. The ALRC has been asked to focus and to provide separate interim reports on three areas.

- **Design and use of definitions:** The ALRC has been asked to consider 'The use of definitions in corporations and financial services legislation, including: the circumstances in which it is appropriate for concepts to be defined, consistent with promoting robust regulatory boundaries, understanding and general compliance with the law; the appropriate design of legislative definitions; and the consistent use of terminology to reflect the same or similar concepts'.
- **Legislative design and hierarchy:** The ALRC has been asked to consider 'The coherence of the regulatory design and hierarchy of laws, covering primary law provisions, regulations, class orders, and standards, to examine: how legislative complexity can be appropriately managed over time; how best to maintain regulatory flexibility to clarify technical detail and address atypical or unforeseen circumstances and unintended consequences of regulatory arrangements; and how delegated powers should be expressed in legislation, consistent with maintaining an appropriate delegation of legislative authority'.
- **Reframing of Chapter 7:** The ALRC has been asked to consider 'how the provisions contained in Chapter 7 of the Corporations Act 2001 (Cth) and the Corporations Regulations 2001 (Cth) could be reframed or restructured so that the legislative framework for financial services licensing and regulation: is clearer, coherent and effective; ensures that the intent of the law is met; gives effect to the fundamental norms of behaviour being pursued; and provides an effective framework for conveying how the law applies to consumers and regulated entities and sectors'.

In conducting its review the ALRC is asked to consult widely with regulators, industry and other stakeholders and to have regard to existing reports, inquiries and any associated government responses to these including, among others, the Hayne Commission's Final Report and the government's response. The ALRC has also been asked to consult widely with regulators, industry and other stakeholders.

Terms of reference are here.

Reporting timeline

The due date for the final report is 30 November 2023.

Interim reports will be provided progressively from 30 November 2021 as follows:

- Interim report (Use of definitions): 30 November 2021
- Interim report (Regulatory design and legislative hierarchy): 30 September 2022
- Interim report (Reframing Chapter 7 of the Corporations Act): 25 August 2023

[Sources: Attorney General Christian Porter media release 11/09/2020; ALRC media release: Review of the Legislative Framework for Corporations and Financial Services Regulation; Terms of Reference]

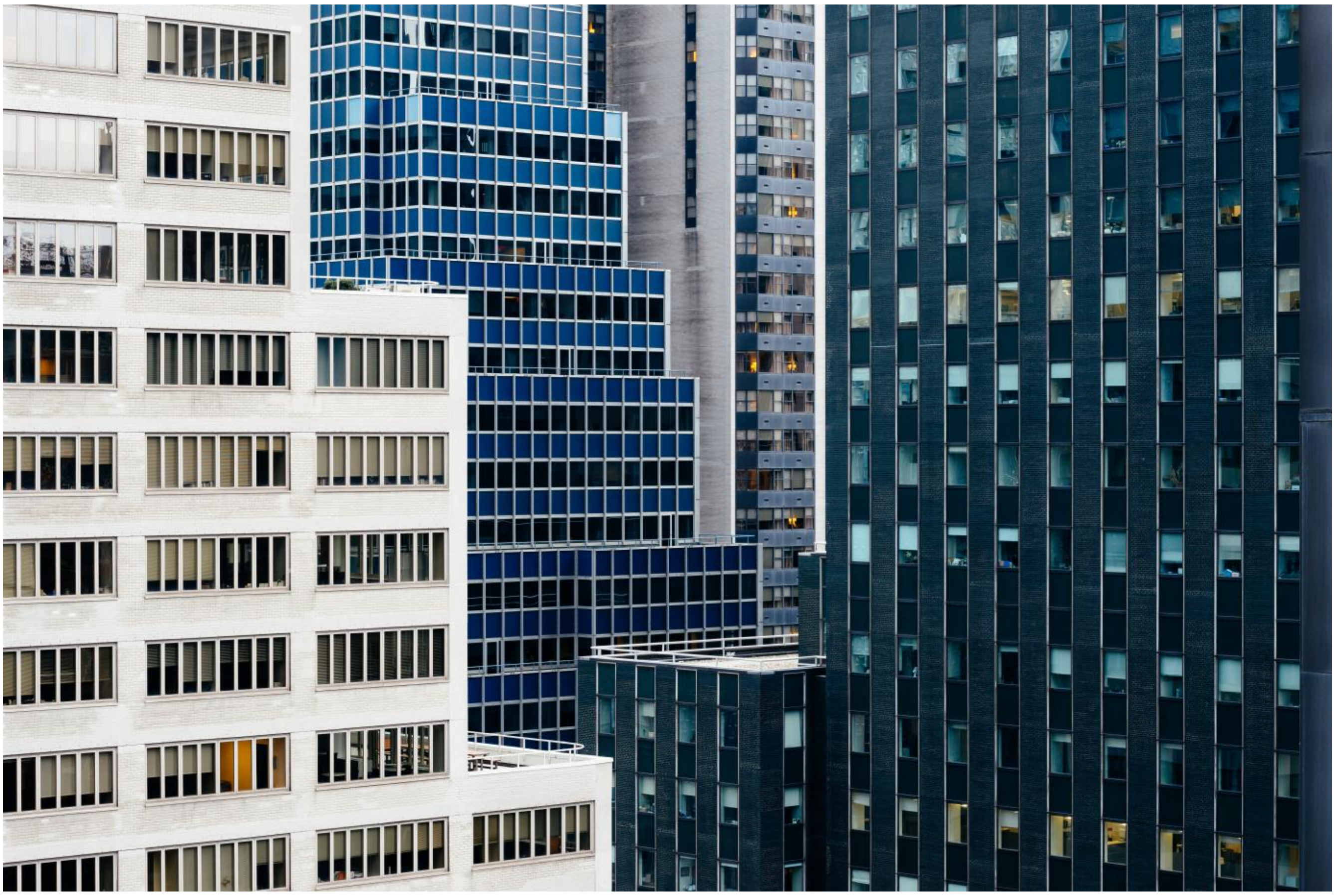
Related News: ALRC review into Judicial Impartiality

Separately the ALRC has also been tasked with conducting a review into judicial impartiality. The review will consider whether, and if so what, reforms to the laws relating to impartiality and bias as they apply to the federal judiciary are necessary or desirable.

The Terms of Reference for the review are here.

Timeline: The final report is due Sept 2021.

[Sources: Attorney General Christian Porter media release 11/09/2020; ALRC media release: Review of Judicial Impartiality; Terms of reference]



COVID-19: So far funds have paid out $33bn under the government's early release of superannuation scheme, the data indicates that the number of applications coming through continues to slow

The Australian Prudential Regulation Authority (APRA) has released industry-level and fund-level data on the early release of superannuation scheme for applications received during the period 20 April (inception of the scheme) to 6 September.

- Total payments made since the inception of the scheme have taken an average of 3.3 business days to process, with 95% of payments made within five business days.
- The volume of applications continues to slow: Over the week to 6 September, superannuation funds received 49,000 applications (down from 52,000 applications the previous week).
- Of the applications received in the week to 6 September, 27,000 were initial applications bringing the total number of initial applications received to date to 3.2 million since inception of the scheme.
- 21,000 applications received in the week to 6 August were repeat applications, bringing the total number of repeat applications to 1.2 million since the inception of the scheme.
- Over the week to September, superannuation funds made payments to 48,000 members (down from 51,000 the previous week) worth $360 million.
- Funds have made approximately 4.3 million payments since the inception of the scheme worth a total of $33 billion. This figure represents 98% of applications received since inception of the scheme.

[Source: APRA media release 14/09/2020]

COVID-19: ASBFEO has called on the government to defer the scheduled increase to the superannuation guarantee and cut tax as a means of taking pressure of struggling small businesses

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) Kate Carnell has written to the Treasurer calling for the government to implement two measures to take financial pressure off small businesses.

ASBFEO wants the government to:

- Defer the scheduled increase to the superannuation guarantee for two years; and
- Halve the 15% tax on compulsory employer superannuation guarantee contributions during the same period.

According to ASBFEO's statement, Ms Carnell considers that 'the combined measures offset each other, to ensure workers end up with a similar superannuation amount as they would have under the scheduled increase'.

Ms Carnell in quoted as stating,

> 'Many small businesses are already struggling to stay afloat as a result of the COVID-induced recession and cannot afford to pay higher costs. These increased costs would put small business owners under even more financial strain, placing jobs and businesses at risk. It is equally important to safeguard the long-term financial future of Australians through superannuation. Our modelling shows our proposed tax cut would cost the government no more than $6 billion per year and would also support struggling small businesses and help the millions of Australians who used the early access to superannuation program to start restoring their long-term super balance'.

[Source: ASBFEO media release 11/09/2020]

An alternative to BNPL: NAB has launched, and separately CBA has announced its intention to launch, interest free credit cards. CHOICE has welcomed the development as a 'step in the right direction'

- NAB has announced the launch of a no-interest credit card. Customers are able to access up to $3000 of credit for a flat monthly fee which replaces all other fees/charges. The monthly fee is only charged if the card is used. NAB's states that 'Unlike Buy Now Pay Later services, NAB StraightUp Card offers a continuing line of credit, is available to use anywhere Visa is accepted, has no late payment fees, and allows customers to repay balances over a longer period of time'.
- Separately CBA announced plans to launch a broadly similar interest free credit card by the end of the year.

In a statement, welcoming NAB's announcement, CHOICE Banking Policy Expert Patrick Veyret said welcomed NAB's announcement as a step in the right direction. 'While this product won't be right for everyone, it's a lot simpler to understand than most credit cards. Importantly, this new card will be subject to responsible lending laws, unlike buy-now, pay-later products like Afterpay that have been designed to exploit legal loopholes.'

[Sources: NAB media release 09/09/2020; CBA media release 10/09/2020; CHOICE media release 10/09/2020]

In Brief | AUSTRAC has fined State Street Bank and Trust Company for over $1.24 million for failure to report international funds transfers

[Sources: AUSTRAC media release 16/09/2020]

In Brief | APRA has written to ADIs outlining its response to its consultation on capital measures and reporting requirements for loans impacted by COVID-19

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

In Brief | The BCCC has issued guidance clarifying the circumstances in which member banks may rely on the temporary exemption for meeting complaints handling timelines under the Banking Code introduced because of COVID-19

[Source: BCCC guidance 11/09/2020]

Corporate Misconduct and Liability

QLD legislates to make underpayment of wages by employers a criminal offence

The Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020 (QLD) was passed on 9 September. The Bill was granted assent on 14 September. Broadly, the legislation has two main aims:

- to criminalise a range of underpayments/non-payments by employers (eg unpaid penalty rates; unpaid hours or underpayment of hours; unpaid superannuation) as stealing under the Criminal Code (and to increase the maximum penalties available)
- to make it easier for workers to recover unpaid wages: Wage recovery matters, including the small claims wage recovery procedure for matters of not more than $20,000 under s 548 of the Fair Work Act 2009, will fall under the Industrial Magistrates Court's jurisdiction.

In a statement welcoming the passage of the legislation, QLD minister for Industrial Relations Grace Grace said that the laws were needed to address systemic issues.

> 'These new laws recognise that the current framework is not doing the job – something needs to change to stop rampant wage theft. Stronger penalty and deterrence measures are needed for those who commit wage theft, particularly where it is deliberate and systematic and part of an employer's business model.'
>
> [Source; QLD Minister for Industrial Relations Grace Grace media release 10/09/2020; Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020]

Top Story | A suggested framework to move the dial on workplace sexual harassment: MCC report calls on corporate Australia to take rapid action

Key Takeouts

- The report proceeds on the basis that the corporate Australia's current approach to sexual harassment has failed and that urgent change is necessary.
- The report provides a suggested five part framework and accompanying tools and resources to assist organisations to rapidly transform and improve the way they deal with workplace sexual harassment.
- The suggested framework advocates: 1) making prevention of sexual harassment and early intervention a leadership accountability; 2) addressing sexual harassment as a workplace health and safety issue; 3) putting in place clearly defined principles for transparency and confidentiality for dealing with high profile complaints; 4) creating a 'speak up' culture in which everyone within the organisation is informed, empowered and expected to speak up/act on sexual harassment in the workplace; and 5) ensuring that people impacted are listened to, respected and supported.

Overview

Male Champions of Change (MCC) has released a report - Disrupting the System – Preventing and responding to sexual harassment in the workplace – providing a suggested framework and accompanying tools and resources to assist organisations to rapidly transform and improve the way they deal with workplace sexual harassment.

The central message in the report is that generally speaking, corporate Australia's current approach to the issue has failed, that improvements in every aspect of the way in which sexual harassment in the workplace is dealt with are required, and that the changes cannot 'take time' but must be implemented with urgency.

The approach in the report was developed over a two year period and informed by the findings of the Respect@Work national inquiry into sexual harassment in the workplace and by extensive consultation experts in dealing with harassment complaints as well as with people impacted by sexual harassment.

Context

MCC observes that the report is being released at a time when community expectations globally towards sexual harassment and assault have shifted, and following the release of the landmark Respect@Work report which both mapped out the scale of the issue in Australian workplaces and made recommendations for urgent change.

Despite the fact that Australia is in the midst of a health crisis, the MCC considers that the need to address sexual harassment is no less urgent.

The release of the report also follows a number of high profile executive departures and criticism in the media concerning the way in which corporate Australia tends to deal with the issue. The report is prefaced with a statement acknowledging that there is scope to improve, and committing leaders to driving that improvement.

> 'We are sharing this resource not because we are perfect or consider our teams are immune to sexual harassment. But as a coalition, we intend to be visible leaders in setting new standards, building new and better systems, and accelerating the pace of change. This is a guide for future approaches, recognising that the starting point for each organisation will be different'.

Moving the dial: What should organisation's be aiming for?

Page 25 of the report includes a graphic encapsulating the shift in the mindset, systems and processes required to achieve genuine change.

In essence, the message is that corporate Australia's current approach is focused on compliance, minimising reputational damage and legal liability. For example, leaders are focused primarily on compliance and cases are 'quietly managed', likewise boards/executive are primarily focused managing legal liability and protecting corporate reputation.

The report advocates shifting this focus to instead be on prevention, early intervention and on reducing the number of people impacted.

Commenting on the shift in thinking required, Chair of Manufacturing Australia James Fazzino, said,

'Up until now, sexual harassment has largely been considered as a workplace grievance process focused on resolving – usually as quietly as possible - individual cases. If you think about it instead as ensuring a physically and psychologically safe workplace for all staff, the approach you take to the issue changes significantly. Workplace occupational health and safety systems provide a good model to replicate or adapt to more effectively prevent and respond to sexual harassment'.

The suggested framework in the report and the other resources included in it are aimed at supporting organisations to achieve this shift in approach.

New approach to communication and transparency around claims

A key aspect of the suggested approach put forward in the report is a shift in the approach typically adopted toward those impacted by harassment and in the way in which organisations communicate about high profile sexual harassment.

The report advocates the adoption of seven principles of communication aimed at ensuring due process in the management of claims, while also ensuring that: a) those impacted are able to speak freely about their experience (where they choose to do so); and b) that where allegations are substantiated, those responsible for the behaviour are unable to 'leave quietly' with no acknowledgement as to reasons for their departure.

The report suggests that the principles are both a 'prevention mechanism and a practical guide' to communication. The principles are as follows:

1. A commitment to be transparent with internal and external stakeholders about the fact that sexual harassment claims exist within the organisation
2. A commitment to protect the identify of those involved during the investigation process
3. Asking those involved in any workplace investigation to keep the investigation confidential while it is underway (with the exception of seeking export counselling/support)
4. Once the investigation is concluded, organisations will not restrict the complainant’s right to speak.
5. Organisations may elect to identify the offender where allegations are substantiated and there is a legitimate public or stakeholder interest in doing so

6. A commitment to be transparent about the outcomes of investigations where allegations are substantiated and to be transparent about any financial settlement reached with an (alleged) offender, where they elect to depart the organisation.
7. Where a financial settlement is reached with a complainant, the fact of the settlement will be disclosed to relevant stakeholders, together with the restrictions it imposes but not the amount.

Pages 44-48 of the report provide detailed explanation of the reasoning underpinning these principles and examples of potential language organisations could employ to communicate each.

A suggested way forward: Commitment to change in five key areas

Sex Discrimination Commissioner Kate Jenkins is quoted as stating that the approach and the changes advocated in the report address a number of recommendations from the National Inquiry,

> 'By openly acknowledging the prevalence of sexual harassment and taking action to address its systemic drivers, leaders have the unique power to ensure their workplaces are safe, respectful and inclusive. Their employees and the community expect no less from them'.

The table below provides a high level snapshot of the five key areas in which change is required and some of the suggested actions for leaders to take in each area to drive the change.

FIVE KEY AREAS WHERE CHANGE IS NEEDED	SUGGESTED ACTIONS FOR LEADERS
Make prevention of sexual harassment and early intervention a leadership priority	The report suggests a number of steps CEOs/leaders can take to elevate prevention and early intervention as a leadership priority. Crucially, the report makes clear that boards need to do more/give the issue more focus than they are currently doing. Commenting on this issue, outgoing CEO of Cbus David Atkin observed that though creating a safe working environment has long been a board responsibility, their focus hasn't necessarily included sexual harassment. 'We want to see this oversight [board oversight] extended to include robust management of sexual harassment as a key indicator of culture, safety and leadership capability. These are all material issues for Boards to be aware of' he said. Suggested steps for leaders include: ▪ Establishing and communicating a gender equality strategy and action plan and 'striv[ing] for gender balance in the workforce'. ▪ Taking active steps to ascertain how sexual harassment manifests within their own organisation and industry as well as the risks and impacts. ▪ Clearly stating that eradicating sexual harassment is a leadership priority. ▪ Ensuring that every employee (including those with high status) are aware that sexual harassment will not be tolerated. ▪ Setting expectations and providing support to enable leaders to address issues appropriately. ▪ Requiring regular internal reporting to the board on sexual harassment incidents. The report suggests that existing safety metrics could be used as a basis for reporting on sexual harassment. Suggested metrics are included in the report at p98. ▪ Requiring external reporting (in annual reports) on sexual harassment incidents. A suggested example disclosure is included at p99 of the report. ▪ Modelling appropriate behaviour and addressing disrespectful and/or unlawful behaviour in the moment and empowering others to do so.
Address sexual harassment as a workplace health and safety issue	Building on/related to the elevating sexual harassment as a leadership priority is integrating sexual harassment into workplace health and safety policies, procedures and training. Suggested steps for CEOs/leaders to take include: ▪ Articulating that the prevention of sexual harassment is a leadership and workplace health and safety issue for example, by issuing a leadership statement. The report includes an example at p72.

FIVE KEY AREAS WHERE CHANGE IS NEEDED	SUGGESTED ACTIONS FOR LEADERS
	▪ Ensuring a risk assessment has been undertaken ▪ Ensuring that the consequences for different types of behaviour are clear ▪ Demonstrating that the organisation is willing to apply appropriate consequences where appropriate to do so, by ensuring that where disciplinary action is taken/consequences are applied, the outcome is shared. For example through sharing aggregated and anonymised case studies.
Establish clearly defined principles of transparency and confidentiality for high profile sexual harassment claims	As discussed above, a key aspect of the report is a shift in the approach companies typically take to communication around sexual harassment claims. In terms of the actions leaders can take on this issue, and in addition to adopting and endorsing clear principles around confidential and transparency covering communication with the parties involved, the media and the organisation, the report suggests that leaders should: ▪ ensure the principles around communication are well understood within the organisation to support prevention efforts and to act as a deterrent to poor behaviour ▪ amend current approaches to non-disclosure agreements to ensure complainants are not silenced and that there is 'some transparency and disclosure to employees, stakeholders and the community'. ▪ share internal updates on sexual harassment within the organisation
Creating a 'speak up' culture: 'Inform, empower and expect everyone to speak up and take action on sexual harassment in the workplace'	The report calls on leaders to: ▪ Ensure there is a common framework/well-understood language within the organisation for identifying, raising and responding to all forms of sexual harassment ▪ Create a workplace environment that is safe for people to speak up ▪ Integrate into leadership communications, policy and practice an expectation that speaking up/acting to address sexual harassment is expected of everyone and in many circumstances in a workplace health/safety obligation.
Ensure those impacted by harassment are respected, empowered and listened to	A key message in the report , and key to the shift in approach, is the need to move towards a person-centred approach. Building on all the previous steps, the report calls on leaders to: ▪ Develop and implement new standards for the use of non-disclosure agreements. ▪ Build capability of internal teams to respond appropriately to people impacted by sexual harassment. ▪ Establish person-centred, safe and supportive reporting, investigation processes and responses.

[Sources: MCCC media release 09/09/2020; MCC Report: Disrupting the System – Preventing and responding to sexual harassment in the workplace]

Other News

Top Story | Agribusiness holds huge potential – Expert insights into trends and investment opportunities in Australia's Agribusiness sector

MinterEllison has released a report - Ahead of the Harvest: 2020 – 2022 - analysing trends and investment opportunities in Australia's Agribusiness sector. The headline message in the report is that Australian agribusiness holds huge potential.

The sector has strong foundations for attracting investor capital. Key aspects generating investor confidence include Australia's Free Trade agreements, infrastructure development and transparent, high standards of governance. Australia produces what the world increasingly wants: safe and healthy food, and clean and green farmed goods.

Today, the country's Agribusiness sector is valued at AU$60 billion. The Australian Department of Agriculture, Water and the Environment projects that it will grow to AU$100 billion by 2030. The report identifies some of the areas where we expect to see this growth.

The full text of the report is here:

In Brief | Federal Budget date confirmed: The government is set to hand down the 2020-21 Budget on Tuesday 6 October 2020. Budget documents will be available via www.budget.gov.au from 7.30 pm on 6 October

[Source: Treasurer Josh Frydenberg media release 11/09/2020]

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