Governance News

COVID-19 Special Edition

23 September 2020

Contents

COVID-19 Key Developments

Top Story | Business Interruption Insurance for COVID-19 UK High Court Guidance

In the midst of the global COVID-19 pandemic, the global insurance market has seen many notifications of loss to businesses due to the disease, interruption to trade, and government-mandated closures. Global bodies are working to determine where cover applies.

The MinterEllison team has prepared an article discussing the UK High Court's decision in Financial Conduct Authority v Arch & Others [2020] EWHC 2488 and what the implications may be in the Australian context.

The full text of the article is available here.

Related news: The FCA has written to insurers calling on them to make arrangements to pay claims as soon as is practicable

Following the decision, The Financial Conduct Authority (FCA) wrote to insurers outlining its expectations around the steps they will implement in light of the decision. Among other things the letter calls on insures to:

> 'consider the steps they can take now to progress claims of the type that the judgment says should be paid. This should include taking all reasonable steps to ensure that all those claims are ready to be paid and settled at the earliest possible opportunity after any relevant appeals'.

The FCA states that where insurers do not meet the expectations set out in the letter the FCA 'will use the full range of our regulatory tools and powers to ensure they do so'.

[Source: FCA Dear CEO letter 18/09/2020]

Top Story | Building corporate resilience in the time of COVID-19: An interview with professional company director Anne Ward

MinterEllison has released a podcast of a discussion between MinterEllison partner, Michael Hughes and Chair of Colonial First State Investments and Red Bubble Anne Ward on corporate resilience and the steps companies may take to build their resilience to enable growth beyond the road to recovery.

You can access the podcast here.

COVID-19: China says COVID-19 should 'launch a green revolution' and has announced it is targeting carbon neutrality 'before' 2060

In a statement at the General Debate of the 75th Session of The United Nations General Assembly, President of the People's Republic of China, HE Xi Jinping announced, among other things, that China will aim for carbon neutrality 'before' 2060 and called on other countries to follow suit.

The President said,

> 'COVID-19 reminds us that humankind should launch a green revolution and move faster to create a green way of development and life, preserve the environment and make Mother Earth a better place for all. Humankind can no longer afford to ignore the repeated warnings of Nature and go down the beaten path of extracting resources without investing in conservation, pursuing development at the expense of protection, and exploiting resources without restoration. The Paris Agreement on climate change charts the course for the world to transition to green and low-carbon development. It outlines the minimum steps to be taken to protect the Earth, our shared homeland, and all countries must take decisive steps to honor this Agreement. China will scale up its Intended Nationally Determined Contributions by adopting more vigorous policies and measures. We aim to have CO2 emissions peak before 2030 and achieve carbon neutrality before 2060. We call on all countries to pursue innovative, coordinated, green and open development for all, seize the historic opportunities presented by the new round of scientific and technological revolution and industrial transformation, achieve a green recovery of the world economy in the post-COVID era and thus create a powerful force driving sustainable development'.
>
> [Source: Ministry of Foreign Affairs of the Peoples Republic of China, Statement by H.E. Xi Jinping President of the People's Republic of China At the General Debate of the 75th Session of The United Nations General Assembly 22/09/2020]

In Brief | COVID-19: Consistent with the government's earlier announcement, the Corporations and Bankruptcy Legislation Amendment (Extending Temporary Relief for Financially Distressed Businesses and Individuals) Regulations 2020 extend temporary insolvency and bankruptcy relief until 31 December 2020

> [Note: On 7 September, the government announced the extension of temporary relief for financially distressed businesses until 31 December 2020. For expert insights into the measures and their implications see: COVID-19:Temporary amendments to insolvency laws extended to 31 December 2020; COVID-19 response - six month suspension of insolvency laws]

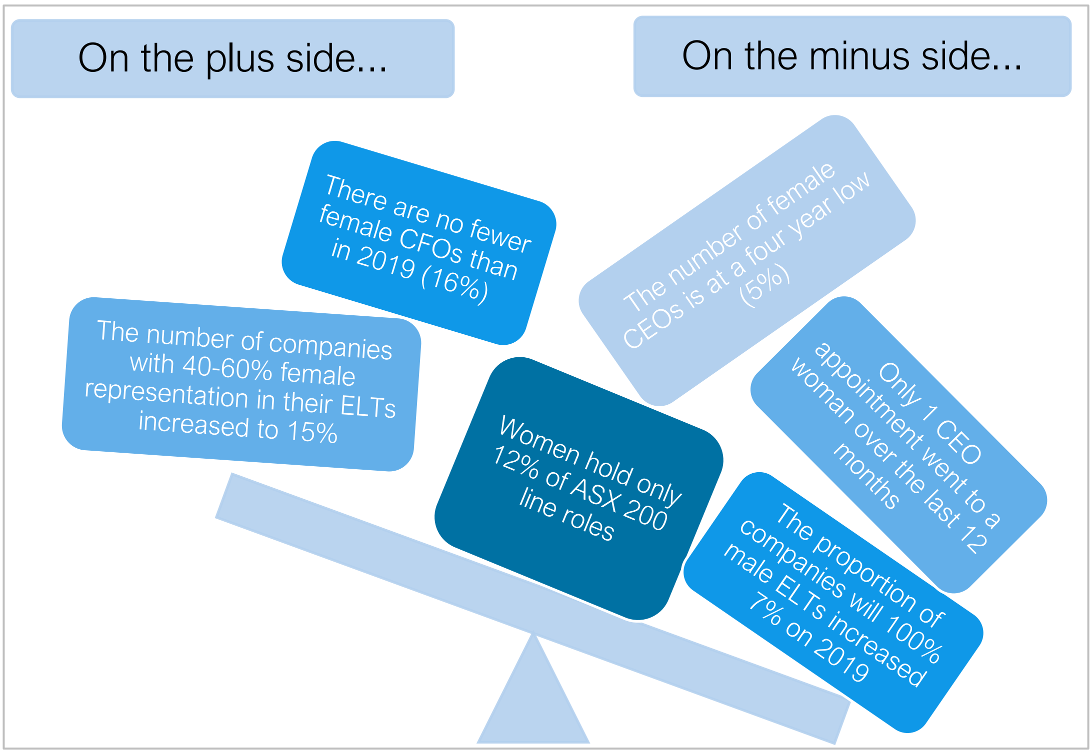
> [Source: Corporations and Bankruptcy Legislation Amendment (Extending Temporary Relief for Financially Distressed Businesses and Individuals) Regulations 2020]

Diversity

Why is there so little progress? CEW report finds only one of the 25 new CEOs appointed to ASX 200 companies was a woman

The 2020 Chief Executive Women ASX200 Senior Executive Census tracks progress towards gender parity (40% women, 40% men, and 40% open) in senior leadership positions in ASX200 companies. The headline finding of the report is that progress has stalled, or in fact slipped backwards on some measures.

Some Key Findings



- **Four year low:** The number of female ASX 200 CEOs has fallen to a four year low of 5%, down from 12% in 2019.
- **Very low appointment rate:** One cause of this is the very low appointment rate. Of the 25 CEO appointment made in the last year, only one female CEO was appointed. This is down from 2 of 50 appointments in 2019.
- **Few women in the leadership pipeline:** The report found that women continue to be underrepresented in the roles from which CEOs are typically recruited. The overwhelming majority (96% in 2020) of CEO appointments are drawn from 'line' roles (ie roles with profit and loss accountability) or from the role of CFO. According to the report, the proportion of women in line roles has remained virtually unchanged over the last four years, and actually went backwards in 2020 to 12% (down from 13% in 2019). 65% of companies have zero women in line roles (9% more than in 2019).
- **A female CEO makes a difference?** The report found that in ASX 200 companies led by women, the proportion of women in ELT line roles was 10% higher than in companies where the CEO is a man.
- **On the plus side, some companies are making progress:** Though the percentage of women in ELT roles across the ASX 200 is only 25%, the number of companies with 40-60% female representation in their ELTs increased to 15% (up from 12% in 2019). CEW CEO President Sue Morphet, and CEW Chair of the Business Engagement Committee Jenny Boddington point to the progress these companies have made as evidence that internal and external structural barriers to achieving gender parity can be overcome.

  They state,

  > 'Previous CEW research shows unconscious bias in recruitment and advancement is significant.   Our research shows that caring for young children and the cost of childcare continue to present powerful financial disincentives to women working full time. But we also know that companies achieving gender balance in leadership roles are overcoming these barriers'.

Wasted opportunity

Commenting on the findings overall, Ms Morphet observes that that failure to prioritise diversity means that companies are not availing themselves of the full spectrum of available knowledge and expertise putting them at a disadvantage. Ms Morphet suggests that in the current environment, taking action to improve diversity in leadership will help position companies for success into the future.

> 'Companies have been forced to think differently about how they operate and what the future looks like as a result of COVID-19 – now is the moment to use every opportunity to improve company results and support strong economic recovery. We need business to unleash the largely untapped resource that highly educated, experienced and capable women are, leading to better performing businesses at a time when every job counts more than ever'.

Suggested practical steps

The report includes a number of suggested actions companies can take to break down barriers to women's leadership progression. These include:

- Embedding diversity into business strategy and decision making
- 'Drive cultural change from the top and role model gender-inclusive leadership' eg through measuring the current culture and implementing measures to prevent sexual harassment.
- Setting realistic diversity targets, and ensuring transparency and accountability for meeting them.
- Reducing gender bias at the recruitment stage by ensuring recruitment and promotion processes are informed by consistent and objective data
- Supporting and investing in female talent
- Enabling flexible working arrangements on an ongoing basis across the workforce, including at senior leadership levels

In addition, the report calls on the government to address systemic barriers to female leadership progression by: 1) delivering accessible early childhood education and care; and 2) strengthening corporate reporting requirements, including publication of company gender pay gap data.

[Source: Chief Executive Women media release 17/09/2020; Report: 2020 Chief Executive Women ASX 200 Senior Executive Census]

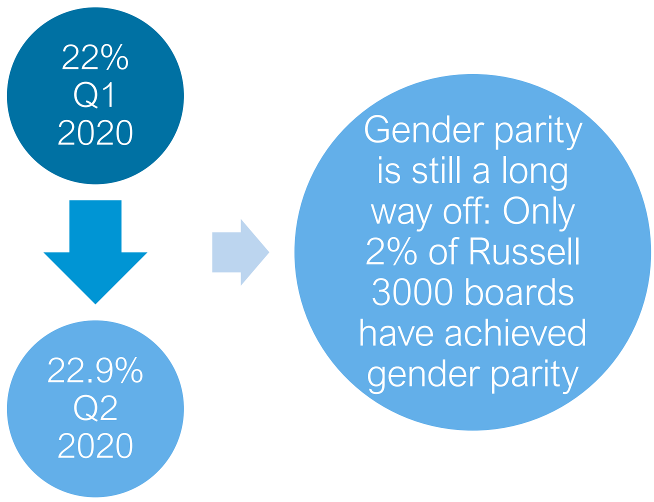
According to Equilar's analysis (sluggish) progress toward gender parity on US boards is continuing, despite the pandemic

Equilar's Q2 Gender Diversity index tracks female board representation on Russell 3000 boards.

According to Equilar, the trend towards increased female representation has not been halted by the COVID-19 pandemic, though progress remains very slow.

For example:

- The proportion of board roles held by women increased from 22% in Q1 2020 to 22.9% in Q2
- The number of all male boards fell from 7.1% in Q1 to 6.6% in Q2



However, gender parity is still a long way off – Equilar found that 97% of Russell 3000 boards have not yet reached gender parity. Two contributing causes are: slow rate of turnover/small number of seats available and the preference for candidates with prior board/executive level experience.

Equilar observes that increased shareholder expectations around not only gender diversity in leadership roles, but ethnic/racial diversity will mean that the issue remains a focus for boards going forward.

The impact of the Californian Bill (AB 979) mandating minimum representation quotas of underrepresented minorities on boards, may also have an impact (as the Bill mandating minimum female board representation requirements on which ABA 979 is based has had) Equilar suggests.

[Source: Equilar blog 15/09/2020]

Australia?

According to the Australian Institute of Company Directors analysis as at 31 July:

- The proportion of women on ASX all ordinaries boards was 25.4%
- The proportion of women on ASX 300 boards was 20.3%
- The proportion of women on ASX 200 boards was 31.3%
- 91 ASX all ordinaries boards had zero female representation.

[Source: AICD media release 19/08/2020]

'Modest progress': ISS data shows that the proportion of ethnically/racially diverse directors on S&P 500 boards is slowly increasing

According to Institutional Shareholder Services (ISS), S&P 500 boards are becoming (very slowly) more ethnically/racially diverse. The proportion of minority directors now stands at 16.8% (up from 13% in 2015).

ISS also found that companies are now paying a premium for racially/ethnically diverse CEOs who are paid on average 10% more than their Caucasian peers. ISS comments that this represents a significant shift from 2015 when racially/ethnically diverse CEOs were typically paid less ($10.9m per annum) than their non-diverse peers ($11m per annum).

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

ING has welcomed the fourfold increase in fathers taking more than two weeks parental leave following a change in the company's parental leave policy, especially in light of the increased pressure on families as a result of the pandemic

ING has welcomed the fourfold increase in fathers taking more than two weeks parental leave, following a change in the company's parental leave policy one year ago, especially in light of the increased pressure on families as a result of the pandemic.

Some interesting findings in ING's follow up report into the impact of the change in policy and the COVID-19 pandemic has had on parents include that:

- Overall, 30% of those surveyed indicated that they are more comfortable to apply for parental leave/flexible working conditions having worked flexibly during the pandemic, than they would have been previously
- Men are more likely to feel comfortable applying for parental leave than their female peers
- 35% of men said that they consider access to parental leave to be essential to expanding their families

ING's head of retail banking Melanie Evans suggested that 'perhaps the silver lining of the pandemic is the fact it has helped improve the understanding of what it's like to juggle work while raising a family in Australia and encouraged more employers to flex according to the needs of working parents and carers'

[Sources: ING media release 21/09/2020; ING Parental leave research report]

Institutional Investors and Stewardship

Stepping up the pressure: BlackRock's stewardship report shows it has increased its overall engagement activity considerably over the past 12 months

BlackRock has released its annual stewardship report covering the period 1 July 2019 to 30 June 2020. The report provides an overview BlackRock's engagement activities and voting actions in each of its five key engagement priority areas: 1) boards quality; 2) environmental risks/opportunities; 3) corporate strategy and capital allocation; 4) human capital management) and 5) compensation to promote long-termism.

The headline message in the report is that BlackRock has stepped up its overall engagement activity across all five areas considerably on previous years, consistent with its commitment to hold companies, and more particularly their leaders to account, for the delivery of long-term, sustainable value.

BlackRock considers ESG to be more critical than ever in the current environment

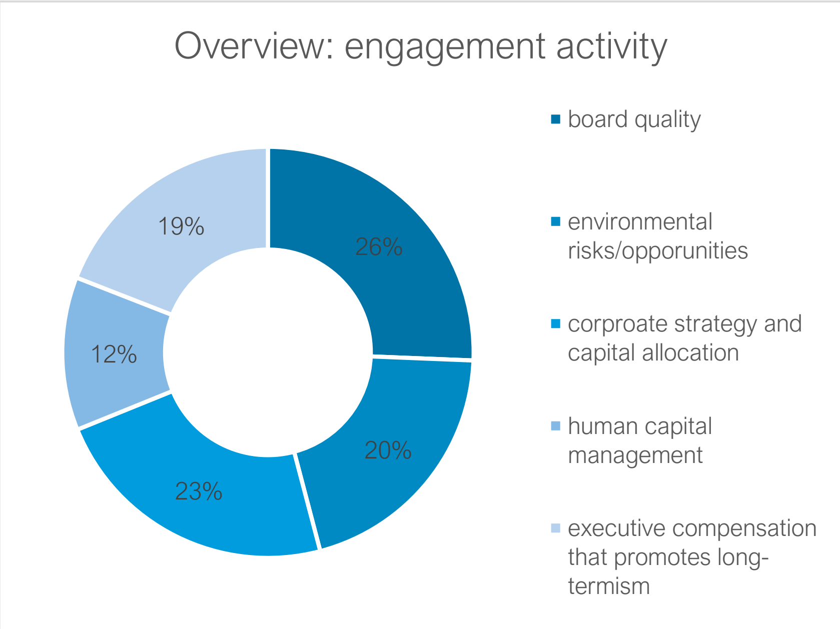
BlackRock writes that it's goal in releasing the report is to provide transparency around the rationale underpinning its engagement and voting behaviour, its record on holding companies to account and to underline to companies its expectation that they continue to focus on ESG, despite the pandemic. BlackRock states,

> 'Our goal is to provide clarity and insight to our clients, the companies they are invested in, and our other stakeholders about our approach to investment stewardship and environmental, social, and governance (ESG) issues of focus. These considerations have never been more critical to long-term investors given the challenges societies face in addressing the immediate impacts on communities and the economy from the COVID-19 pandemic, and more deep-seated issues of racial and social equality, climate change, and economic resilience'.

Some interesting statistics

Engagement activity

- Overall, BlackRock held 3000+ 'in depth' conversations with corporate leadership over the last 12 months (a 50% increase on the previous year).
- There was also a 75% increase in the number of multiple engagements with the same company.
- Overall, engagement on environmental issues increased 299% on 2019, engagement on social issues increased 173% on 2019 and engagement on governance issues increased 49% on 2019.



- Engagement on human capital management issues increased 187%.
- 429 conversations included discussion of the impacts of COVID-19 and over 1000 were focused on corporate strategy, a 52% increase on 2019. BlackRock comments that these conversations revealed that 'many companies' are 'fundamentally re-examining their social and economic contract with their stakeholders, placing them at the heart of their recovery strategy. Increasingly companies share our conviction that a strategy founded upon a clearly articulated purpose will generate sustainable value'.

Voting actions

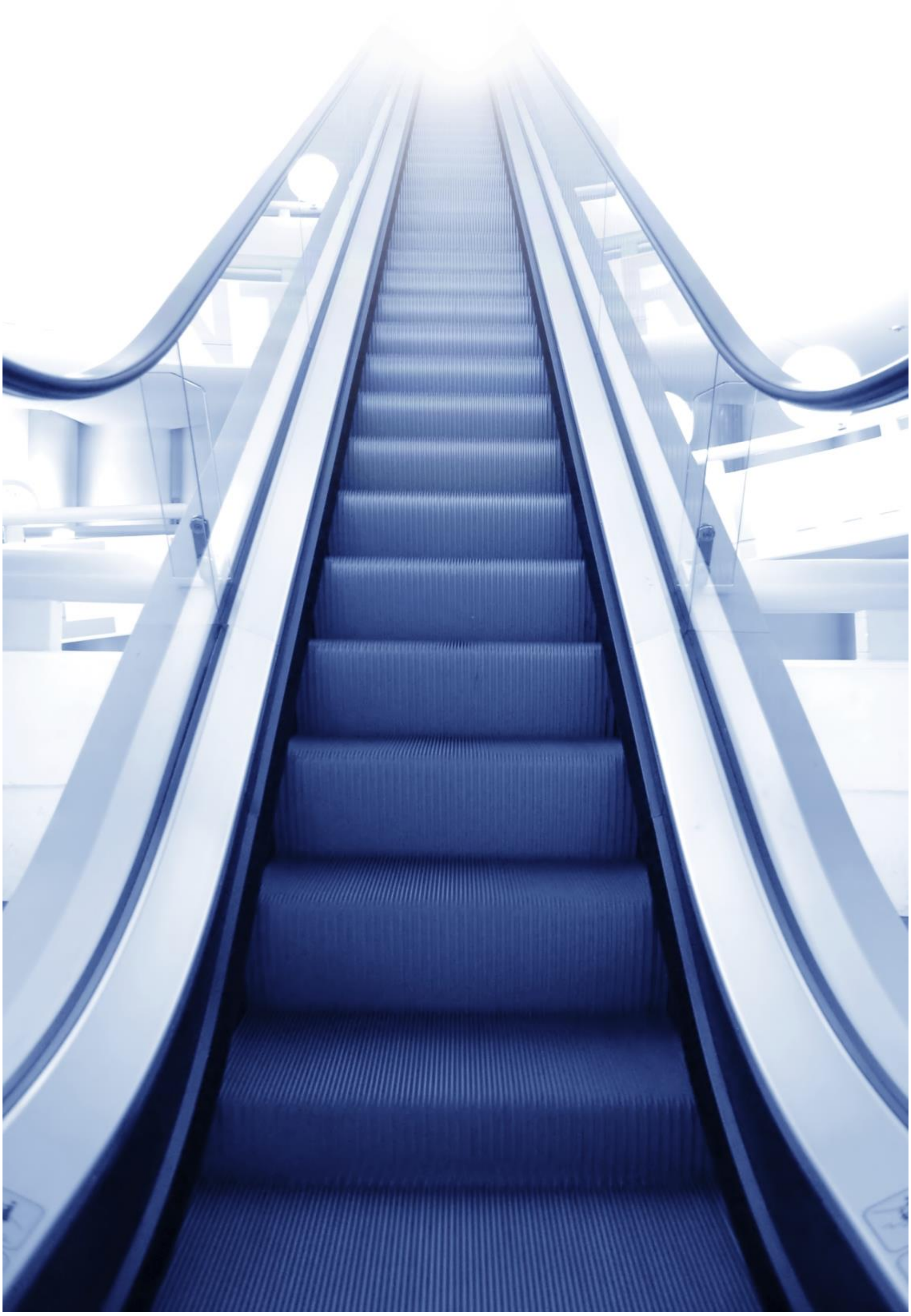
In addition to statistics on engagement activities, the report includes statistics on BlackRock's voting actions over the course of the year.

Voting against directors

According to the report, BlackRock voted against or withheld votes from proposals to elect a director/slate of directors on more occasions over the last twelve months than in any previous year, voting against (or abstaining from voting) 5130 times at 2809 companies globally. This represents a 32% increase in the proportion of directors BlackRock voted against on 2018.

Commenting on this, BlackRock makes clear that it considers voting for/against directors to be an important means of signalling concern about a range of issues.

BlackRock states that its voting record over the last twelve months sends a, 'strong signal of concern when companies did not make sufficient progress on issues that are central to value creation. We raised questions on board quality, taking voting against directors



for lack of independence on the board, insufficient board diversity and overcommitment. We also held directors to account for not meeting our expectations on climate risk management or disclosures and for management and compensation policies inconsistent with sustainable long term financial performance.'

Board quality

On the issue of board quality specifically, the top three 'board quality concerns' resulting in votes against directors in 2019-2020 were:

1. lack of director independence (1762 votes against): BlackRock comments 1,000 of these votes 'against' were 'in Asia where controlling state or private shareholders can undermine the independence institutional investors are seeking'.
2. insufficient progress on board diversity (1569 votes against): BlackRock comments that there have been 'significant improvements' in gender diversity in the Russell 1000 and the STOXX 600, though smaller companies and those with more concentrated ownership are lagging. Not only does BlackRock expect progress on gender diversity to continue but it is 'increasingly looking to companies to consider the ethnic diversity of their boards, as we are convinced tone from the top matters as companies seek to become more diverse and inclusive'.
3. director over-boarding (ie overcommitment) (728 votes against, up from 430 two years ago). BlackRock comments that though 'sitting CEOs are reducing their non non-executive commitments, we need to see more progress and focus from non-executive directors'.

Executive remuneration

On the issue of executive remuneration, BlackRock's voting behaviour has altered little since 2019. BlackRock voted against management on 16% of executive pay proposals in 2020 (up 1% on 2019). BlackRock comments that 'looking ahead, we are sensitive to the need for compensation committees to reflect stakeholder matters in pay determinations, particularly when companies have received government support'.

Shareholder proposals

Overall, BlackRock supported 15% of the 1,087 ESG shareholder proposals on which it voted. BlackRock supported:

- 6.3% of environmental shareholder proposals
- 6.8% of 'social' shareholder proposals (this includes shareholder proposals relating to a range of social issues such as reports on pay disparity, requests for enhanced anti anti-bias policies, or reports on human rights policies).
- 17.1% of 'governance' shareholder proposals (ie proposals involving governance issues impacting shareholder rights including: governance mechanisms and related article/bylaw amendments, as well as proposals on compensation, political spending, and lobbying policies).

The report comments that,

> 'There are two main categories of our voting actions: we might vote against directors — or other management proposals — or vote to support a shareholder proposal….we employ votes against directors more frequently since that is a globally avail available signal of concern. ESG shareholder proposals, while often non non-binding and less common outside of the US, can garner significant attention and send a strong public signal of disapproval. BIS may support shareholder proposals that address issues material to a company's business model, which need to be remedied urgently and that, once remedied, would help build long long-term value'.

Enhanced focus on sustainability

- **Push for companies to report in line with TCFD recommendations and the SASB standards:** This year, BlackRock called on companies to report in line with the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD) and the Sustainability Accounting Standards Board (SASB) standards including putting in place 'a plan for operating under a scenario where global warming is limited to less than two degrees Celsius'. The report welcomes the fact that there has been a 'nearly 140% increase in companies publishing

SASB SASB-aligned reports so far in 2020 over calendar year 2019, 2019,of which 40% are based outside the US'.

- **Increased focus on sustainability:** As flagged in the sustainability report released earlier this year (for a summary see: Governance News 22/07/2020), BlackRock has focused its efforts on 244 companies with 'significant climate risk inherent in their business models'. BlackRock took voting action against 53 companies for insufficient progress on climate risk management and put another 191 companies on notice that they are at risk of facing voting action in 2021, if they fail to make progress toward integrating climate risk/sustainability factors into their business management through disclosure aligned with the TCFD and SASB.

Looking ahead to 2021

BlackRock states,

> 'We expect a year of continuing disruption and uncertainty. Yet we remain convinced that companies focused on their purpose, with a credible strategy to deliver for all their stakeholders, will be well well-positioned to create sustainable, long-term value for our clients'.

BlackRock expects that investor and community focus on the material risks to business posed by climate change, social and racial equality, and demographic and technological shifts will continue to intensify going into 2021 and into the future.

BlackRock states that it is currently reviewing its engagement priorities and voting guidelines and will provide more detail in the coming months including 'how we intend to reflect them in our voting actions in the next proxy season'.

BlackRock states that it will be 'engaging with corporate leaders on how they plan to adapt their strategies and business practices to enhance their resilience. And we will be looking to companies to explain the difficult choices they have had to make and how they have balanced the interests of their various stakeholders'.

[Sources: BlackRock 2020 Stewardship Report]

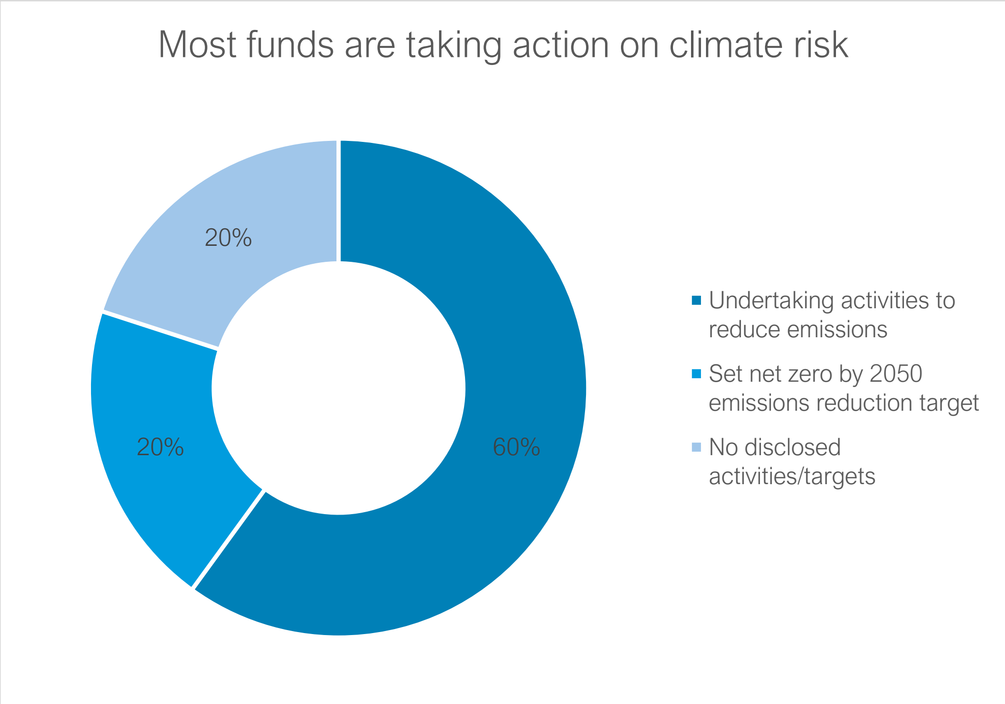
Report finds most of Australia's largest superannuation funds are acting on climate risk, though (as yet) relatively few have set their own zero emissions targets

Key Takeouts

- According to the report, most (80%) of Australia's largest superannuation funds are taking action on climate risk
- In most cases, funds' emissions reductions strategies are centred on engagement with the companies in which they invest (seeking greater disclosure around their management of climate risk and/or encouraging decarbonisation) rather than on setting their own emissions reduction targets.
- The report also identified a shift towards funds increasing investment in clean energy and divesting from fossil fuels.
- Though welcoming the general shift towards driving down emissions by the majority of funds, the report ultimately concludes that the achievement of net zero emissions for the superannuation sector is dependent on more funds setting hard their own net-zero targets for their portfolios.

Climate Works Australia and the Monash Sustainable Development Institute have released a report – Net zero momentum tracker: superannuation sector – assessing the commitments and activities of Australia's largest 20 registrable superannuation entity licensees to evaluate the degree to which they are aligned with achieving net zero emissions by 2050. The report concludes that despite the pandemic, the majority of funds have accelerated their efforts to address climate change risks.

Some Key Findings



- Overall, 80% (16) of superannuation funds reviewed are either undertaking activities to reduce emissions or have set a net zero by 2050 emissions reduction target for their portfolio. Of this group, 20% (4) of funds have set net zero by 2050 targets and the remaining 60% (12) are undertaking various activities to lower emissions (but these are not yet aligned with a net zero by 2050 target).
- Only four funds have yet to set portfolio emissions reductions targets or make other commitments to reduce emissions.
- Full alignment with the net-zero by 2050 target? Only 15% (3) funds' commitments were assessed as 'fully aligned' with the net-zero by 2050 target. The report includes detailed information about the extent to which the disclosed activities/commitments of the funds included in their review are aligned with the net zero target in Figure 1 (p9), Table 1 (10) and Table 2 (11).
- Of the funds included in the review most are pursuing emissions reductions through engagement with the companies in which they invest: 13 are signatories to Climate Action 100+ and 10 are members of the Australian Council of Superannuation Investors (ACSI) and one is a member of the UN-convened Net-Zero Asset Owner Alliance.
- The report also identified a shift towards funds increasing investment in clean energy and divesting from fossil fuels.
- More is needed: Though welcoming the general shift towards driving down emissions by the majority of funds, the report ultimately concludes that the achievement of net zero emissions for the superannuation sector is dependent on more funds setting hard their own net-zero targets for their portfolios. The report states 'by setting targets now, superfunds create the context in which their commitments become realisable. By normalising net zero pledges, they bolster the expectation those pledges will be kept and spur the development of methods for sectoral decarbonisation'.
- Writing in the Conversation, head of Research, Climate Works Australia Amandine Dennis observes that the general shift toward acting on manage climate risk highlighted in the report, is indicative of the extent to which the risks/opportunities associated with climate change are now accepted as financial risks/opportunities. Ms Dennis comments that

> 'Understandably, many funds are hesitant to commit to net zero emission portfolio targets without knowing how those targets might be achieved. But by setting targets, super funds can create a norm that spurs investment in the ways and means to achieve those goals. With the manifestations of that warming becoming ever more apparent, pressure will grow on super funds to make net zero pledges across their entire portfolios – and then to back these pledges with both interim commitments and detailed transition strategies'.
>
> [Sources: Climate Works Australia media release 16/09/2020; Net zero momentum tracker: superannuation sector; The Conversation 16/09/2020]

Shareholder Activism

Shareholders apply pressure on miners over heritage sites

Key Takeouts

- The ACCR has filed resolutions at Fortescue Metals Group (FMG) and BHP calling, among other things, for the miners to adopt a moratorium on undertaking any activity that would 'disturb, destroy or desecrate cultural heritage sites in Australia, to be reviewed annually by the board'; to commit to allowing Traditional Owners to publicly voice any cultural heritage concerns; and to disclose their expectations in relation to any lobbying on cultural heritage issues by any industry association of which they are members.
- Both miners have indicated that they do not support the imposition of a moratorium on activity on the basis that any such moratorium could have the effect of disempowering Traditional Owners (by unilaterally overriding existing agreements).
- ACCR's resolutions will not be considered at the upcoming FMG AGM as the physical documents were not received before the notice cut-off

ACCR files resolutions at FMG, but misses notice period cut-off for providing physical documents due to COVID-19 restrictions

Fortescue Metals Group resolutions: The Australasian Centre for Corporate Responsibility (ACCR) filed two shareholder resolutions at Fortescue Metals Group (FMG) (with the support of the First Nations Heritage Protection Alliance) calling on the company to commit to protect the cultural heritage of Indigenous people.

Resolutions

- Special Resolution (constitutional amendment) seeking to amend the company's constitution to allow ordinary resolutions to be placed on the agenda at a company's AGM.
- Ordinary Resolution (protection of cultural heritage), contingent on the passage of the Special Resolution, seeking that the company:
  - 'Adopt a moratorium on undertaking activities which would disturb, destroy or desecrate cultural heritage sites in Australia, to be reviewed annually by the Board;
  - commit to non-enforcement of any relevant contractual or other provisions that limit the ability of Aboriginal and Torres Strait Islander Traditional Owners to speak publicly about cultural heritage concerns on their land; and
  - disclose its expectations in relation to any lobbying on cultural heritage issues by any industry association of which it is a member'.

Commenting on the resolution ACCR Executive Director Brynn O'Brien said that it is consistent with statements made by the Chair of the inquiry into the destruction of cultural sites at Juukan Gorge. Ms O'Brien states,

> 'Investors simply can't stand by and watch another Juukan Gorge disaster unfold. Chair of the Parliamentary Committee investigating this destruction, the Honourable Warren Entsch MP, has called for a moratorium on cultural heritage destruction by mining companies until the Committee has finished its work. This call is, in substance, an endorsement of the approach recommended in our resolution. As investors, we believe it's necessary that this shareholder resolution receives strong support—or is proactively adopted by FMG's Board—because there is far too much at stake to allow any further destruction of Indigenous cultural sites, as Mr Entsch has also made clear'.

FMG response

- The resolutions will not be considered at the upcoming AGM: In a statement to the market, FMG stated that notice of the resolutions had been received after the cut-off date (physical documents were not received, only scanned copies) and that as such, the resolutions will not be considered at the 11 November AGM. FMG states that it is 'assessing the validity of the notice including whether it complies with the requirements of the

Corporations Act. If the notice is valid the resolutions will be put to shareholders for consideration at the next occurring general meeting following the AGM.'

- FMG opposes imposing a moratorium: FMG states that it is 'proud' of its record of engaging with local Aboriginal people and that it does not support imposing a moratorium of the kind requested on the basis that it would 'disempower local Aboriginal people in the Pilbara and limit the positive contribution the mining industry is making to the state and national economies at a time when it is needed most'.

In a statement responding to this, ACCR Executive Director Brynn O'Brien blamed said the delay in FMG receiving physical documents on COVID-19 restrictions and maintained that FMG 'suffered no prejudice by the short delay' because electronic documents were received before the notice-cut off.

Ms O'Brien commented,

> 'FMG's major competitor and peer, BHP, saw it fit to accept electronic documentation during the pandemic. That FMG has knocked this resolution back on a minor technicality — especially after the international investor outrage heaped on Rio — calls into doubt its interest in dealing with the important issues raised by its shareholders and indeed Aboriginal Traditional Owners.'

[Sources: FMG ASX Announcement 15/09/2020; ACCR media release 10/09/2020; 16/09/2020; Resolutions]

BHP board advises shareholders against supporting the ACCR resolutions

ACCR also filed shareholder resolutions with BHP for consideration at its AGMs on 14 and 15 October.

The two ordinary resolutions focus on two issues: 1) the protection of Indigenous cultural heritage (the resolution is identical to the resolution filed at FMG); and 2) a second resolution on lobbying relating to the COVID-19 recovery.

The second resolution calls on the BHP board to 'undertake, as soon as practicable, a review of advocacy activities undertaken by our company's Industry Associations relating to economic stimulus measures in response to COVID-19. Shareholders recommend that our company suspend, for a period deemed suitable by the Board, membership of Industry Associations where the review demonstrates, on balance, a record of advocacy inconsistent with the Paris Agreement's goals'.

[Source: ACCR 13/08/2020]

BHP's response

BHP's board has advised shareholders to vote against ACCR's resolutions on the basis that 'they are not in the best interests of shareholders as a whole'.

Commenting on the cultural heritage resolution, BHP states it does not endorse a moratorium because it would require the company to unilaterally override agreements already in place with Traditional owners without consultation or agreement. The board considers that this could have the unintended consequence of disempowering Traditional owners. BHP states,

> 'No matter how well intentioned, the Board cannot recommend a vote in favour of a resolution that would have this effect. Nor can the board support a resolution that could have the effect of setting a precedent for such outcomes in the resources sector more broadly'.

The board considers that it is not necessary that for the company to 'commit to non-enforcement of any relevant contractual or other provisions that limit the ability of Aboriginal and Torres Strait Islander Traditional Owners to speak publicly about cultural heritage concerns on their land' because BHP has already confirmed with Traditional Owners that there is no impediment to them speaking publicly about any heritage concerns.

The board also considers that it is not necessary for the company to commit to disclosing its 'expectations in relation to any lobbying on cultural heritage issues by any industry association of which it is a member' because the policy advocacy activities of industry associations of which BHP is a member, is already under regular review.

[Source: BHP ASX Announcement 15/09/2020]

In Brief | Climate Action 100+ has called on the 161 largest GHG emitting companies to commit to net zero business strategies and informed them that their progress will be assessed and used to inform Climate Action 100+ engagement strategies going into 2021

[Source: Climate Action 100+ media release 14/09/2020]

In Brief | Major investor groups representing assets worth over $103 trillion have released an Open Letter calling on companies and auditors to comply with IASB guidance on reporting on climate-related risks in their financial reports

[Sources: IGCC media release 16/09/2020; Open Letter]

In Brief | The SMH reports that Myer shareholder Wilson Asset Management (WAM) has written to the Myer board calling for (among other things) the board to permanently reduce in size and for directors' fees to also be permanently reduced. Reportedly, WAM has asked that Myer publicly respond to the requests

[Source: [registration required] The SMH 22/09/2020]

Corporate Social Responsibility and Sustainability

The Business Roundtable has called on corporate America to take the lead on climate action

Key Takeouts

- The Business Roundtable (BRT) has called on corporate America to lead the transition to a low carbon economy by supporting the 'adoption of a more comprehensive coordinated and market based approach to reduce emissions.'
- This suggested market-based emissions reduction approach should incorporate: a) setting a carbon price; b) 'preserving the competitiveness of US businesses'; and c) ploughing any government revenues generated through a market based mechanism into cushioning the 'societal impact' of the transition by providing assistance to those most negatively impacted.
- Emissions reduction target: The BRT supports a goal of reducing net US GHG emissions by at least 80% from 2005 levels by 2050.

The Business Roundtable (BRT) CEOs have released a paper – Addressing climate change: principles and policies – calling on US businesses to 'lead by example' on transitioning to a low carbon economy by supporting 'a well-designed market-based mechanism and other supporting policies to provide certainty and unleash innovation to lift America toward a cleaner, brighter future'.

Why a new approach is required

The BRT takes as it's starting point: a) the fact that there is 'scientific consensus that the climate is changing and that human activities are contributing to that change'; and b) that the US should adopt 'a credible, durable and comprehensive climate strategy that aims to reduce, avoid and mitigate emissions while increasing resilience and adaptation'.

The BRT considers that the county's progress toward reducing greenhouse gas (GHG) emissions to date has hampered by regulatory complexity, duplication, inconsistency and uncertainty and that a new approach to climate strategy is required. The BRT states,

> 'the existing patchwork of federal and state regulations, tax incentives, subsidies and other policies is inefficient and has negatively affected the long-term investment strategies of many US companies by creating regulatory uncertainty. The existing fragmented policy approach is insufficient to meet the challenges posed by climate change. It is time for a new approach'.

Eleven guiding principles

The BRT's view is that this new approach should be guided by eleven 'core principles'. They are as follows:

1. 'Align policy goals and GHG emissions reduction targets with scientific evidence.
2. Increase global engagement, cooperation and accountability.
3. Leverage market-based solutions wherever possible.
4. Provide for adequate transition time and long-term regulatory certainty.
5. Preserve the competitiveness of U.S. businesses, including avoiding economic and emissions "leakage."
6. Minimize social and economic costs for those least able to bear them.
7. Support both public and private investment in low-carbon and GHG emissions reduction technologies along the full innovation pipeline.
8. Minimize administrative burdens and duplicative policies while maximizing compliance flexibility.
9. Ensure that U.S. policies account for international emissions reduction programs.
10. Advance climate resilience and adaptation.

11. Eliminate barriers to the deployment of emissions reduction technologies and low-carbon energy sources'.

The role of business in driving the transition to a low-carbon economy

The BRT is of the view that business should 'lead by example' both by supporting climate policies to enable the transition to a low carbon economy and by driving the innovation required to reduce emissions. On this basis the BRT calls on business to:

- adopt 'a more comprehensive, coordinated and market-based approach to reduce emissions' by 'at least 80% from 2005 levels by 2050
- support the US government in engaging with its international counterparts and setting policy to drive the collective global action required to ensure global warming is kept 'well below' 2 degrees Celsius above preindustrial levels, consistent with the Paris Agreement.

What would a 'market based mechanism' to drive emissions reduction look like?

The BRT does not 'endorse any specific market based mechanism' to reduce emissions on the basis that there are several different approaches which could be effective. However, the BRT considers that any such market based approach should include:

- Putting a price on carbon to 'provide an effective incentive to reduce GHG emissions and mitigate climate change' eg through the development/deployment of new technology. 'Establishing a clear price signal is the most important consideration for encouraging innovation, driving efficiency, and ensuring sustained environmental and economic effectiveness' the BRT states.
- 'Preserving the competitiveness of US businesses': The BRT calls on policy makers to ensure US businesses are not at a disadvantage from carbon pricing policies that may be implemented outside the US; and 'remain alert to the prospect of economic activity and associated emissions shifting to less-regulated jurisdictions'. The BRT suggests that 'rebates, allowances and/or border adjustments could be considered as policy challenges'.
- Any government revenue generated as the result of implementing a market based mechanism to reduce emissions should be ploughed back into supporting those most negatively impacted by the transition and used to fund policies supporting economic growth. The BRT suggests that federal funding for research, development and demonstration of GHG reduction technologies should be doubled.

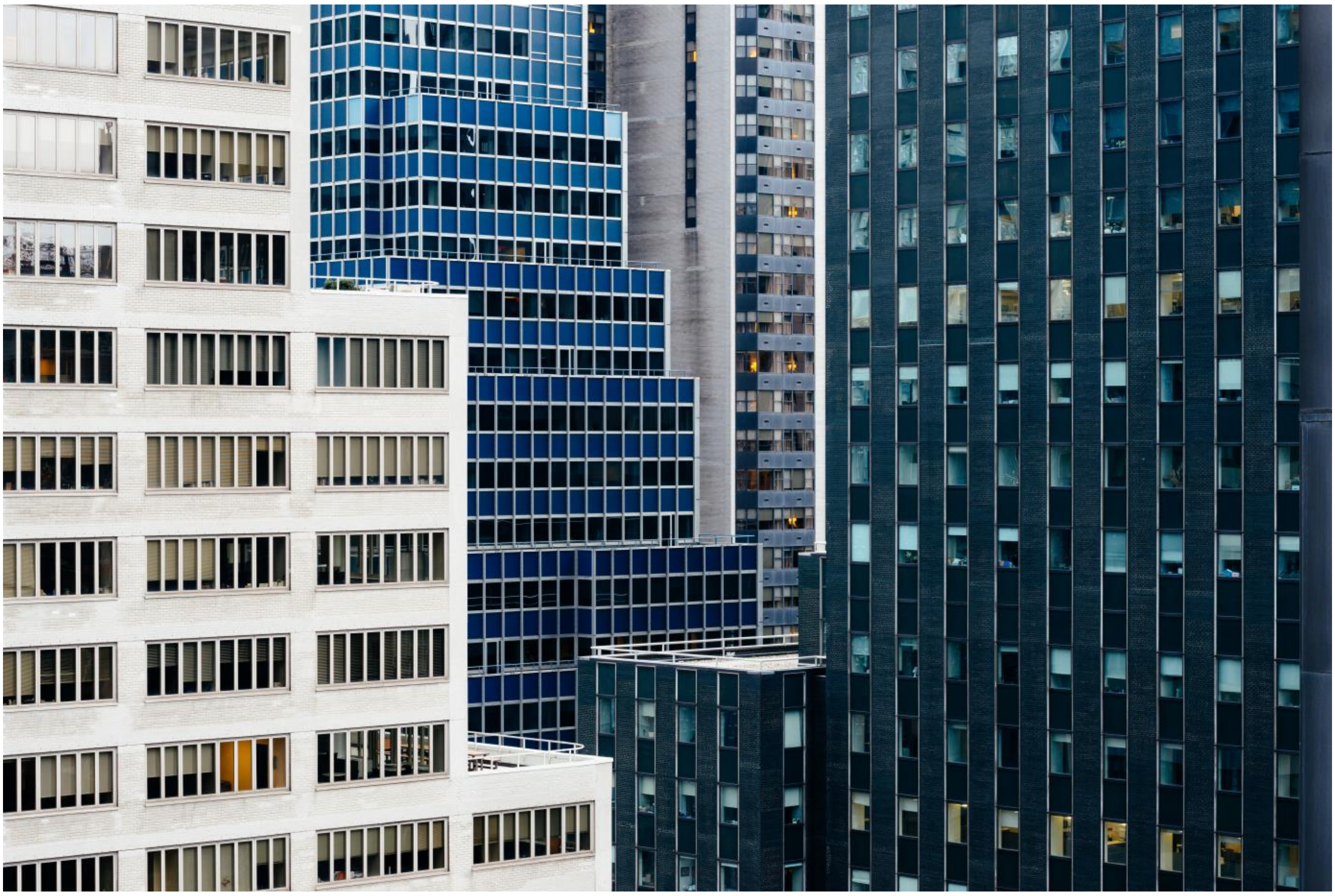
Supporting policies/actions

The BRT's paper includes a list of other but related actions/approaches that the group considers 'necessary to meet the scope of the climate challenge'. These include the following.

- Substantial government and private sector investment in 'transformative' technology to enable the 'rapid deployment at scale of low-emissions and carbon-removal technologies'. The BRT considers investment critical to both limiting global emissions in line with the Paris Agreement and to maintaining a 'robust and growing' US economy. Specifically the BRT's view is that the current level of federal funding for advanced energy innovation and climate related research should be doubled and that research, design and development programs be better coordinated and more tightly focused. In addition, the private sector should be incentivised to invest.
- Continued focus on driving energy efficiency: Coupled with investment in new 'transformative' technologies, the BRT advocates continued investment in energy efficiency technologies to improve the efficiency of energy use, distribution and production. 'Policies should encourage and incentivize continued improvement in energy efficiency in buildings, equipment, appliances, transportation and manufacturing as well as in the electricity sector. Governments and businesses should demonstrate leadership by committing to improve energy efficiency and low-carbon technologies in their supply chains, buildings and fleets' the BRT states.
- Investment in reinforcing infrastructure to withstand the increasingly severe impacts of the changing climate: The BRT advocates building in consideration of climate risk (the fact that severe weather events are likely to increase both in frequency and severity) into the planning, design and construction of new infrastructure projects and investing in reinforcing existing infrastructure to better withstand severe weather and rising sea levels. 'The federal government has a responsibility to lead by example given the great potential for damage to federal facilities and infrastructure, threats to national security, impact on the federal budget, and potential impact on the US economy overall' the BRT states.

- **Investment in energy infrastructure:** Massive public and private investment will be required to produce energy and also to transport both energy and captured carbon to where it will be needed or stored. The BRT gives the example of the roll out of electric vehicles. The BRT further suggests that streamlining current federal permitting processes will be necessary to speed the process.

  [Sources: BRT media release; BRT paper: Addressing climate change: principles and policies]



Regulators

Top Story | COVID-19 has not put the brakes on ASIC's enforcement activity: ASIC has released its latest enforcement for H1 2020

Key Takeout

- A comparison of the data on ASIC's overall enforcement activity over the last six months of 2019 (in REP 660) with ASIC's activity in the first six months of 2020 (REP 666) shows that the regulator has actually increased its activity in some areas despite the COVID-19 pandemic.

Some key takeaways from ASIC Report 666 ASIC enforcement update January to June 2020 (REP 666)

The Australian Securities and Investments Commission (ASIC) has released its enforcement activity report for the period 1 January 2020 to 30 June 2020 outlining ASIC's key enforcement actions during the last six months.

In his foreword to the report, ASIC Deputy Chair Daniel Crennan outlines the adjustments ASIC has made to its enforcement priorities and approach in light of the COVID-19 pandemic and reiterates the regulator's commitment to continuing its enforcement work and building its capability despite the disruption.

Mr Crennan states,

> 'As I have emphasised since the Royal Commission, ASIC has a clear resolve and the Office of Enforcement is delivering on the public's expectation that we hold wrongdoers to account'.

COVID-19 has not put the brakes on ASIC's enforcement activity

A comparison of the data on ASIC's overall enforcement activity over the last six months of 2019 (in REP 660) with ASIC's activity in the first six months of 2020 (REP 666) shows that the regulator has actually increased its activity in some areas despite the COVID-19 pandemic.

For example, ASIC commenced and concluded more investigations in the first half of 2020 than it did in the last six months of 2019. Likewise, more compensation/remediation was paid back to consumers and investors over the past six months than during the previous period.

The table below provides a comparison of some of the key statistics drawn from the two reports.

ENFORCEMENT RESULTS	COMPARISON H1 2020 VS H2 2019
Prosecutions	▪ 46 fewer criminal charges were laid in H1 2020 (233 criminal charges were laid) than in the last six months of 2019.
Civil penalties	▪ The courts imposed $12 m in civil penalties in H1 2020 (down 900k on the amount imposed in H2 2019) ▪ The number of civil penalty cases reported as currently before the courts is similar across the two periods: 23 in H1 2020 and 22 in H2 2019. However, the number of cases commenced decreased from 9 in H2 2019 to four in H1 2020.
Bannings	▪ The number of directors banned from directing companies decreased from 29 in H2 2019 to 20 in H1 2020. ▪ The number of individuals restricted/prohibited from providing financial services/credit increased from 48 in H2 2019 to 54 in H1 2020.

ENFORCEMENT RESULTS	COMPARISON H1 2020 VS H2 2019
Infringement notices, compensation and court enforceable undertakings	▪ There was a significant uptick in the amounts of both infringement penalties and remediation/compensation paid for consumers in H1 2020 as compared with the previous period. ▪ In H1 2020 $536,000 was paid in infringement penalties (up from $70,000 in H2 2019). ▪ In H1 2020, $160m was paid in compensation and remediation for consumers/investors (up from $22.2m in H2 2019).
Investigations	▪ ASIC commenced and completed significantly more investigations during H1 2020 than it did in the last six months of 2019. ▪ In H1 2020, ASIC commenced 99 investigations and completed 62. ▪ In H2 only 60 investigations were commenced and 40 were completed.

Enforcement results 1 January 2020 to 30 June 2020

AREA	KEY RESULTS H1 2020 VS H2 2019
Corporate Governance	▪ ASIC recorded 23 corporate governance related results during the period (down from 25 in the previous period July to December 2019). The majority (11) were administrative actions against auditors, seven involved 'other governance misconduct', two involved director misconduct and two involved insolvency related misconduct. ▪ As at 1 July 2020, ASIC had 17 criminal and 11 civil corporate governance matters still before the courts. The majority of these being actions against directors (13 criminal actions and 5 civil actions). In contrast as at 1 January 2020 ASIC had 14 crminal and 17 civil actions in progress, the majority of which (11 of 14 criminal actions and 9 of 17 civil actions) were actions against directors.
Financial Services	▪ In the six months between 1 January 2020 and 30 June 2020 ASIC recorded 54 financial services related results (down from 55 in the previous period). The majority, consistent with the last period, concerned 'other financial services misconduct'. ▪ As at 1 July 2020, ASIC had 11 criminal and 49 civil actions still before the courts. This is a slight decrease on the last period. As at 1 January 2020, ASIC had 14 criminal and 58 civil actions still before the courts.
Markets	▪ ASIC recorded 11 market related results in the six months to June, up from seven in the pervious period. ▪ As at 1 July 2020, ASIC had 11 criminal matters (4 involving insider trading, 4 involving 'other market misconduct' and 3 involving market manipulation) and 6 civil matters (4 involving continuous disclosure and 2 involving 'other market misconduct') still before the courts. In contrast, as at 1 January ASIC had 10 criminal and 12 civil matters still before the courts.
Small Business	▪ ASIC recorded 130 small business related results during the period, down from 190 in the previous period.

AREA	KEY RESULTS H1 2020 VS H2 2019
	▪ As at 1 July 2020, 168 small business related criminal prosecutions were still in progress (up from 162 in the previous period).

Update: Progress on actioning the referrals/case studies considered by the Hayne Commission

The report includes a brief update on ASIC's progress towards actioning the referrals/case studies considered by the Hayne Commission. According to the report, over the last six months ASIC has 'completed many of the outstanding investigations into referrals and case studies' and this has resulted in the commencement of four civil penalty cases. The report also notes the 'very significant civil penalties' imposed on two financial institutions' imposed by the courts over the past six months.

[Sources: ASIC media release 22/09/2020; ASIC Report 666 ASIC enforcement update January to June 2020 (REP 666); ASIC Report 660 ASIC enforcement update July to December 2019 (REP 660)]

Financial Services

Loan deferrals: Successful implementation of banks' plans to manage the end of loan deferrals/resumption of loan payments remains a 'critical risk' that needs to proactively managed says APRA

Key Takeouts

- APRA's review of banks' plans to manage the end of loan deferrals has identified several examples of 'better practice' that the regulator would like all banks to consider following.
- APRA expects ADIs to proactively monitor all aspects of the implementation of their 'in order to identify and respond to any material issues that may arise'. The letter states that 'any such issues should be immediately shared with APRA and the Australian Securities and Investments Commission (ASIC)'.
- APRA observes that some plans referenced the early release of superannuation scheme. The letter reminds banks that they 'should have appropriate controls in place to ensure that if they are informing borrowers about their ability to access superannuation, they are not providing unlicensed financial product advice and are ensuring compliance with requirements for giving financial product advice'.

On 22 September, the Australian Prudential Regulation Authority (APRA) wrote to authorised deposit taking institutions, to notify them that it has completed its review of their plans for the assessment/management of loans with repayment deferrals. APRA considers that the 'successful implementation of these plans remains a critical risk for both ADIs and borrowers' and the letter identifies several examples of 'better practice' identified through the course of the review which APRA would like all ADIs to follow.

Examples of 'better practice' identified in the course of the review

FOUR KEY AREAS	EXAMPLES OF 'BETTER PRACTICE'
Governance and oversight	▪ Regular operational reporting: To enable timely escalation of issues and support oversight of progress against the implementation plan by the board/board committee, better practice provided for regular operational reporting to senior management.
Customer engagement and contact strategies	▪ APRA observes that most plans both: a) allowed sufficient time to contact customers ahead of the expiry of their loan deferral; and b) considered the treatment of loans for uncontactable customers. ▪ In terms of contacting customers, better practice included multiple contact attempts in multiple ways over a period of up to six weeks prior to deferral expiry. ▪ In circumstances where the customer is uncontactable but the bank has determined that loan repayments will be resumed with no contact, APRA considers that better practice is to closely monitor loan performance and implement 'additional contact strategies' where payments are subsequently missed.
Credit assessment processes:	▪ APRA observes that 'as expected, plans included clear and well-articulated credit assessment processes in circumstances where the borrower requires additional assistance; restructured, extend the deferral or hardship/default. ▪ APRA considers that better practice: – incorporates 'strong quality assurance processes and controls around customer conversations and credit assessment decisions to ensure consistency in customer outcomes'

FOUR KEY AREAS	EXAMPLES OF 'BETTER PRACTICE'
	– includes 'appropriate controls to detect system and process errors and ensure that borrowers receive assistance in a manner that is consistent with that which has been presented and offered to them'.
Credit management and resourcing:	▪ APRA observes that in many cases, additional resourcing to implement the plan was based on 'best estimates' of the resourcing required with scope for adjustment to occur. ▪ APRA considers that better practice plans incorporated 'strong operational reporting capability, with regular oversight by Executive Management, and supported by contingency plans for identification, training and allocation of additional resources at short notice, should the need arise'.

Early access to superannuation

APRA observes that some plans referenced the early release of superannuation scheme. The letter reminds banks that they 'should have appropriate controls in place to ensure that if they are informing borrowers about their ability to access superannuation, they are not providing unlicensed financial product advice and are ensuring compliance with requirements for giving financial product advice'.

Notification to APRA and ASIC

The letter states that APRA expects that ADIs to 'exercise appropriate governance and monitoring over all aspects of the plan's implementation, in order to identify and respond to any material issues that may arise'. The letter goes on to say that 'Any such issues should be immediately shared with APRA and the Australian Securities and Investments Commission (ASIC)'.

[Source: APRA letter to authorised deposit taking institutions: Review of treatment of loans impacted by COVID-19 22/09/2020]

Funds must be 'true to label': ASIC directs funds to refer to ASIC's guidance on product labelling following a recent surveillance which identified concerns with the labelling practices of 16 funds

Following concerns about the accuracy of product labelling practices and the potential for fixed income products that are not 'true to label' to mislead investors, the Australian Securities and Investments Commission (ASIC) undertook a targeted surveillance of 37 managed funds operated by 20 responsible entities to assess the appropriateness of the product labels used by the funds and to 'assess whether the funds were described and promoted in manner that reflects the underlying assets in terms of risk and liquidity'.

Two significant areas of concern

Concerns were identified with the labelling practices of 16 funds from 13 responsible entities. Two 'significant concerns' were:

1. **Product labels across 14 'cash' funds were found to be confusing or inappropriate.** ASIC states that 'some funds that were labelled as "cash funds" had asset holdings more akin to a bond or diversified fund, which have significantly higher risk and less liquidity compared to a traditional cash fund. This was especially prominent in funds that use words such as "cash enhanced" and "cash plus" in their labelling'.
2. **The redemption promises made were inconsistent with the underlying liquidity of a fund:** In a small number of funds ASIC found that the liquidity of the underlying assets did not support the short redemption terms offered to consumers, meaning that investors may not be able to redeem their investments when they anticipated they would be able to do so. Commenting on this, ASIC Deputy Chair Karen Chester said, 'Inappropriate labelling of a fund can mislead investors into believing that the fund is much safer or more liquid than it actually is. Put simply, a fund should not use terms such as "cash" or "cash enhanced" unless its assets are predominantly in cash and cash equivalents'.

Corrective actions and next steps

- Following the review, ASIC sought corrective action from 13 responsible entities where significant concerns were identified as a result of which: seven responsible entities voluntarily changed/proposed to change the names of nine funds to accurately reflect the product composition; one responsible entity is proposing to change the asset allocation of the fund to reflect its name; three responsible entities have undertaken/committed to undertake a review of their funds; and one responsible entity would up the fund having withdrawn the misleading promotional materials on its website.
- ASIC states that its engagement with some entities is continuing that that it will continue to monitor the outcomes and consider appropriate further action if required.
- ASIC directs investors who have exited managed funds and who believe they suffered financial loss as a result of confusing/inappropriate labelling to contact the fund's responsible entity in the first instance and/or make a complaint to the Australian Financial Complaints Authority.

Ensuring funds are 'true to label' is a legal obligation

Commenting on the findings overall, ASIC Deputy Chair Karen Chester emphasised the importance of ensuring funds are 'true to label'. Ms Chester said,

> 'Managed investment products are not prudentially regulated or government-guaranteed, so it is paramount that consumers are not misled about the level of risk associated with a particular product.' Responsible entities must ensure their products are "true to label" and the redemption terms offered to investors are supported by and consistent with the underlying liquidity of the fund's assets. Funds should be "true to label". This is not a nice-to-have. It's a must-have for responsible entities in meeting their legal obligations to their investors, especially in times of market volatility'.

Guidance on ensuring funds are 'true to label': ASIC directs funds to refer to ASIC's Regulatory Guide 168 Product Disclosure Statements (and other disclosure obligations) for guidance on labelling and disclosure requirements.

[Source: ASIC media release 22/09/2020]

AFCA is consulting on proposed rule changes to ensure a smooth transition when the SCT ceases operations at the end of the year

The Superannuation Complaints Tribunal (SCT) is due to cease operations at the end of the year. Ahead of this, the Australian Financial Complaints Authority (AFCA) is consulting on proposed changes to the AFCA rules to enable AFCA to consider:

- any complaints currently with the SCT that have not been resolved prior to its ceasing operations
- any matters that are before the Federal Court on appeal from the SCT 'that have not been finalised prior to the SCT ceasing its operations and require remittal back to be determined again or finalised according to the Court's decisions'.

AFCA also proposes to make two 'minor technical changes' to the rules to 'clarify which Australian Bureau of Statistics reports are used to index AFCA's monetary limits, and to correct a reference to legislation'.

Timing and next steps: The deadline for submissions is the 16 October. AFCA anticipates that the final amendments will be released by January 2021, subject to ASIC review and approval.

[Sources: AFCA media release 21/09/2020; Consultation paper including draft amendments to the Rules; Consultation paper including draft amendments to the Rules]

How well are general insurers implementing InsurTech? APRA says it will be discussing InsurTech developments with insurers as part of its regular supervisory engagement to ensure appropriate risk management and governance controls are in place

Key Takeouts

- APRA's survey of the extent to which general insurers are adopting/planning to adopt InsurTech has confirmed that InsurTech is an 'important and growing trend among general insurers in Australia'
- In light of this, APRA says that it 'will proactively monitor technology developments to understand InsurTech's potential impact on authorised insurers'.
- This work will contribute to the reviews and further development of prudential standards, guidance and information papers including: CPS 220 (Risk Management), CPS 231 and CPG 231 (Outsourcing), CPS 232 and CPG 232(Business Continuity Management), CPS 234 and CPG 234 (Information Security), CPG 235 (Managing Data Risk), and the information paper: Outsourcing involving cloud computing services.
- Topic of engagement: APRA says that it will discuss InsurTech developments with entities as part of regular supervisory engagement, 'to ensure that associated risk management governance and controls address the implementation of any InsurTech initiatives'.

The Australian Prudential Regulation Authority (APRA) has released the results of a survey of 36 APRA-authorised general insurers to gauge:

- the extent to which they are already using InsurTech (ie insurance technology) and the extent to which they are planning to invest in it over the next three years
- insurer's understanding of the operational and strategic risks associated with implementing InsurTech

Some Key Findings

Use of InsurTech

- Very few insurers (5.5% or 2 of the 36 insurers surveyed) have no plans to invest in InsurTech over the next three year period.
- The majority are already using or planning to use InsurTech: 80% of insurers are either already using InsurTech or are in the process of developing/investing in it. Over half of this group are collaborating with or partnering with local or international providers.
- Insurers consider that InsurTech will deliver a number of benefits including delivering operational efficiencies and enabling delivery of better customer service, improved pricing, and enhanced management of risk.
- APRA found that currently use of InsurTech is concentrated in the Domestic Motor and Householders lines of business (65% of participants indicated that they had used in the last 12 months) and that use in other insurance lines is low by comparison.
- APRA found that insurers are most heavily investing in/planning to invest in the following three forms of InsurTech:
  - Big data (technology that can identify trends in large/varied data sets). APRA found that this is currently the most widely adopted technology. Primarily it's being deployed in pricing, underwriting and underwriting.
  - Software as a Service (SaaS) (a form of cloud computing where providers host applications and make them available to customers via the web). This technology is primarily being used in a sales context.
  - Artificial Intelligence (eg in the forms of chatbots), again this is primarily being deployed in a sales context.
  - In addition, the survey found that there is likely to be a small increase, in the use of telematics (a subset of Internet of Things (IoT) technology whereby devices are used to collect, receive, store and transmit data over a network). At the moment, this technology is being used less than the big data, SaaS or AI, but APRA's data indicates that insurers plan to use it primarily in the context of product design, pricing, underwriting and sales going forward.

Operational and strategic risks associated with the adoption of InsurTech

The survey found that insurers are aware of the operational and strategic risks associated with the adoption of InsurTech. For example, survey respondents nominated the potential impact of high upfront costs and the potential impact on profits as a strategic risk of implementing new technology. On the operational side, insurers were aware of the heightened security and privacy risks (among others) of adopting the new technology.

Next steps

- In light of the survey findings, APRA says that going forward it will 'proactively monitor technology developments to understand InsurTech's potential impact on authorised insurers'.
- APRA says that it will discuss InsurTech developments with entities as part of regular supervisory engagement, 'to ensure that associated risk management governance and controls address the implementation of any InsurTech initiatives'.
- This work will contribute to the reviews and further development of various prudential standards, guidance and information papers to ensure they address the additional risks associated with use of InsurTech including: CPS 220 (Risk Management), CPS 231 and CPG 231 (Outsourcing), CPS 232 and CPG 232(Business Continuity Management), CPS 234 and CPG 234 (Information Security), CPG 235 (Managing Data Risk), and the information paper: Outsourcing involving cloud computing services.

[Source: APRA Insight - Issue Three 2020: Insights from APRA's 2020 InsurTech Survey]

COVID-19: So far funds have paid out $33.3bn 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 13 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 13 September, superannuation funds received 42,000 applications (down from 49,000 applications the previous week).
- Of the applications received in the week to 13 September, 25,000 were initial applications bringing the total number of initial applications received to date to 3.2 million since inception of the scheme.
- 18,000 applications were repeat applications, bringing the total number of repeat applications to 1.2 million since the inception of the scheme.
- Over the week to 13 September, superannuation funds made payments to 46,000 members worth $340 million.
- Funds have made approximately 4.3 million payments since the inception of the scheme worth a total of $33.3 billion. This figure represents 98% of applications received since inception of the scheme.

[Source: APRA media release 21/09/2020]

Allocations in debt capital markets transactions: ASIC report 668 sets out the regulator's expectations of licensees

The Australian Securities and Investments Commission (ASIC) has released a report - ASIC report 668 Allocations in debt capital market transactions (REP 668) – summarising the findings/observations of a thematic surveillance of allocations in debt capital raisings from 2018 to 2020 and outlining examples of poor practice as well as what ASIC considers to be better practice.

The report builds on ASIC's previous work to improve conduct in capital raising transactions, including the better practices in Report 605 Allocations in equity raising transactions and guidance in Regulatory Guide 264 Sell-side research.

Announcing the release of the report ASIC Commissioner Cathie Armour said,

> 'All licensees should review ASIC's findings and consider whether their controls for the allocation process in DCM [debt capital markets] transactions – including policies, procedures and monitoring – are appropriate and sufficiently robust.

ASIC's expectations

The table below provides a high level snapshot of ASIC's expectations of licensees (and in some cases issuers) in relation to each of the focus areas covered in the report.

ASIC comments that the better practices in the report align with the principles in the final report of the International Organisation of Securities Commissions (IOSCO) Conflicts of interest and associated conduct risks during the debt capital raising process), relating to allocations.

FOCUS AREA	ASIC'S EXPECTATIONS/BETTER PRACTICE
Licensee engagement with the issuer in relation to a potential DCM transaction: how licensees manage their regulatory obligations	**Licensees:** ASIC expects licensees to 'ensure that the objectives of issuers are their primary focus in DCM transactions, while complying with licence obligations'. More particularly, ASIC expects licensees to: ▪ have policies/procedures in place covering the lifecycle of DCM transactions ▪ document 'the issuer's expectations about the role of the licensee in managing the debt securities offering, including disclosing and managing conflicts of interest, communications and updates, and decision making' ▪ 'adequately demonstrating the interests of issuers are the primary focus when conducting DCM transactions' ▪ Issuers: ASIC encourages issuers to engage with licensees throughout the transaction, , including understanding how conduct risks are managed and ensuring the allocations are consistent with their objective'
Market practice for pre-offer investor engagement: how licensees meet their regulatory obligations including managing inside information	**Licensees:** ASIC observes that 'pre-offer activities to gauge interest for a potential DCM transaction can give rise to conduct risks that need to be carefully managed'. ASIC expects licensees 'at a minimum' to: ▪ 'have robust policies and processes to actively identify upcoming DCM transactions, inside information and the range of financial products this may affect, and to ensure all relevant parties are wall-crossed ▪ ensure that pre-offer communications are accurate and not misleading or deceptive, and ▪ ensure that the licensee's compliance and supervision functions are actively monitoring pre-offer engagement activities'.
Allocation recommendations: how licensees develop their allocation recommendations for issuers	**Licensees:** ASIC observes that 'licensee allocation recommendations must be consistent with issuer objectives and preferences'. ASIC expects licensees to have policy/procedures in place outlining their process for managing allocation recommendations that: ▪ 'require issuers' allocation objectives and preferences to be the primary consideration and maintain records of transactions, including allocation recommendations and decisions' ▪ 'avoid or manage potential conflicts of interest' ▪ 'consider a range of factors to ensure a fair and efficient allocation process', and d) 'are discussed with issuers before the commencement of a mandate and are available to investors'.
Messaging during the offer phase: how	**Licensees:** ASIC expects licensees 'at a minimum' to:

FOCUS AREA	ASIC'S EXPECTATIONS/BETTER PRACTICE
licensees provide timely, accurate and not misleading or deceptive to investors	▪ ensure that messages to investors are 'appropriate in scope and timing and are accurate and not misleading or deceptive' ▪ 'take all reasonable steps to identify inflated bids, including using their knowledge of the bidder's capacity and previous transaction behaviours—and exclude these from the publicised book size' ▪ 'when publicising book size, either disclose the amount of JLM interest included in the current book size or disclose the book size excluding JLM interest and make this clear. **Issuers:** ASIC encourages issuers to 'provide sufficient and meaningful information on final allocations to investors, including any allocations to JLM interests'.
Allocations to parties connected to licensees: how licensees manage conflicts of interest arising from bids by, and allocations to, parties connected to licensees, including related disclosures to issuers and investors.	**Licensees**: ASIC expects licensees to have robust policies/procedures in place to ensure: ▪ conflicts of interest are identified and either managed effectively or avoided ▪ 'the issuer and investors are notified that parties connected to the licensee are likely to bid, and may receive allocations' ▪ 'effective information barriers for bids by any parties connect to the licensee. These bids are to be treated consistently with similar types of investors, including the scope and timing of information provided to them' ▪ 'JLM trading bids are characterised as JLM interest' ▪ 'recommendations of allocations to parties connected to the licensee are in the issuer's interests and not their own. The issuer is provided with a reason for such recommendations' ▪ 'for oversubscribed issues, ensure priority is given to the investor's interests where there is a conflict with JLM interest and allocation recommendations to JLM interest are appropriately scaled back or avoided where possible'
Engagement with the issuer during bookbuild and allocations	**Licensees:** ASIC expects licensees to: ▪ agree the approach to the bookbuild with the issuer, having regard to the issuer's requirements and the licensee's policies and procedures before the transaction ▪ 'take all reasonable steps to identify inflated bids, including knowledge of the bidder's capacity and previous transaction behaviours—and to highlight any such bids in the bookbuild information provided to issuers' ▪ 'provide issuers with real-time transparency of the bookbuild information including conditional interest and time of bids' ▪ 'inform issuers of actions which can influence the outcome of the transaction, and obtain and document issuers' preferences and decisions on the key terms of the issue and allocations' ▪ 'ensure that issuers are provided with the identity of all investors before making allocation decisions' ▪ 'ensure that information provided to the issuer is accurate and not misleading or deceptive'.
Compliance and supervision: the oversight arrangements licensees have in	**Licensees:** ASIC expects licensees facilitating DCM transactions to: ▪ 'ensure that DCM transactions are always properly and demonstrably supervised' ▪ 'ensure they are complying with their regulatory obligations on an ongoing basis' ▪ 'clearly articulate and document the role of compliance in DCM transactions in all key stages, including the allocation process'

FOCUS AREA	ASIC'S EXPECTATIONS/BETTER PRACTICE
place for their role in DCM transactions	▪ 'identify, control or avoid and disclose conflicts of interest regularly assess adherence to the issuer's allocation requirements and the licensee's allocation policy' ▪ 'effectively monitor conduct in DCM transactions for compliance with related policy and procedures' ▪ 'have meaningful consequences for individuals who breach a licensee's internal policy and procedures' ▪ 'consider the heightened risks of prolonged remote working arrangements—for example, handling of inside information and inappropriate use of personal communication or technology devices' ▪ 'ensure their internal audit function regularly assesses the effectiveness of DCM policies, the related control framework and oversight arrangements, including completion of in-depth reviews, where warranted'.

Ongoing focus areas for the regulator

ASIC identifies the following as continuing areas of focus:

- Pricing (and related risk management transactions) in DCM transactions: ASIC states that it will 'continue to test selected transactions to determine trading activities that licensees are engaging in ahead of, or in conjunction with, DCM transactions'.
- Management of information, conflicts of interest and control rooms: ASIC states that it is in the process of undertaking a separate review to assess the adequacy of the arrangements licensees have in place for managing conflicts of interest and confidential information in their wholesale markets businesses (including the role of control rooms).
- ASIC states that it will 'continue to review DCM transactions to test market practice and see how the better practices in this report are being applied by licensees. Similarly, we will continue to undertake periodic reviews of equity capital raising transactions to see how firms are following the better practices set out in REP 605'.

[Sources; ASIC media release 22/09/2020; ASIC report 668: Allocations in debt capital market transactions]

In Brief | ASFA has issued a statement congratulating the government on the success of the one-off superannuation guarantee amnesty: 'In combination with the additional integrity measures legislated early last year, it will help get more money in people's superannuation accounts for their retirement where it belongs' ASFA states

[Source: ASFA media release 21/09/2020]

Risk Management

Top Story | $2.9m fine for misleading conduct relating to disclosure of personal information

In August, the Federal Court hit HealthEngine, Australia's largest online medical booking service, with a $2.9 million fine for misuse of personal information.

The MinterEllison team have released an article breaking down what happened in the case and drawing lessons for organisations that collect personal information from customers and seek their consent for later uses and disclosures of that information.

The full text of the article can be accessed here.

FinCen has announced a review of AML programs following a largescale leak of historical suspicious activity reports

The US Financial Crimes Enforcement Network (FinCEN) released a statement on 16 September acknowledging the 'unlawful' disclosure of a raft of suspicious activity reports (SARs) – reports that financial institutions, and those associated with their business, are obliged to file with FinCEN where they suspect money laundering/fraud - and other government documents.

FinCEN states that it

> 'is aware that various media outlets intend to publish a series of articles based on unlawfully disclosed Suspicious Activity Reports (SARs), as well as other sensitive government documents, from several years ago. As FinCEN has stated previously, the unauthorized disclosure of SARs is a crime that can impact the national security of the United States, compromise law enforcement investigations, and threaten the safety and security of the institutions and individuals who file such reports. FinCEN has referred this matter to the US Department of Justice and the US Department of the Treasury's Office of Inspector General'.

The International Consortium of Investigative Journalists (ICIJ) has since released a statement confirming the scope of the leak and giving a number of examples from various jurisdictions of the issues reported and financial institutions involved. The ICIJ and other media outlets have also published a number of articles about the issues/entities involved.

Calls for tighter AML controls

The Institute of International Finance (IIF) has released a statement, calling for reform of the global AML framework. IIF President and CEO Tim Adams states,

> 'The findings of today's reports once again emphasize the need to pursue intelligence-led changes for financial crime risk management - driven by meaningful improvements to public-private sector cooperation and cross-border information sharing, coupled with the use of technology - to enhance the global anti-financial crime framework…I hope these findings spur urgent action from policymakers to enact needed reforms. As noted in today's reports, the impacts of financial crime are felt beyond just the financial sector – it poses grave threats to society as a whole'.

The IIF calls on policy makers to revisit the IIF white paper 'The Global Framework for Fighting Financial Crime' which provides the 'common-sense recommendations' to improving the legal, regulatory framework, and risk management.

Separately, in the US Elizabeth Warren and Bernie Sanders have both reportedly (Buzzfeed News, ICIJ) called for tougher AML oversight and regulation.

[Sources: FinCEN media release 01/09/2020; ICIJ media release 20/09/2020; IIF media release 20/09/2020]

Consultation on proposed rule-making

FinCEN has launched a consultation seeking feedback on proposed regulatory amendments to impose a new requirement for all financial institutions that are subject to anti-money laundering requirements (AML requirements), to be required to maintain an 'effective and reasonably designed' anti-money laundering program.

'Effective and reasonably designed' programs would:

- require firms to assess and manage risk as' informed by a financial institution's own risk assessment process, including consideration of AML priorities to be issued by FinCEN consistent with the proposed amendments';
- provide for compliance with Banking Secrecy Act requirements;
- provide for the reporting of information with a 'high degree of usefulness to government authorities'

Timing: The deadline for comments is 16 November 2020.

[Sources: FinCEN media release 16/09/2020; Proposed rulemaking: Anti-Money Laundering Program Effectiveness 17/09/2020]

Insolvency and Restructuring

In Brief | PPSA consultation: In response to recommendations from the 2014 Statutory Review of the PPS Act, the Attorney General's Department has released a discussion paper seeking feedback from industry on the 'practical impact of the Personal Property Securities Act 2009 on the trading of financial products'. The closing date for submissions is 16 October 2020

[Source: Discussion paper: Industry consultation on financial products and the Personal Property Securities Act 2009 (Cth)]

Other News

The government is consulting on a second tranche of reforms to the FIRB framework, the Property Council of Australia has raised concerns that the proposed changes to fees will discourage institutional investment in commercial property

Following consultation of the exposure draft of the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020 from 31 July 2020 to 31 August 2020, Treasury has released exposure drafts of the Foreign Investment Reform (Protecting Australia's National Security) Regulations 2020 and the Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020 for consultation.

The draft regulations are intended to give further effect to reforms to the foreign investment framework announced by the government on 5 June 2020 (you can access our summary here).

The deadline for submissions is 2 October.

Exposure draft regulations (Protecting Australia's National Security) – some key points

Monetary thresholds to determine if an action is a significant or notifiable action

As part of the government's response to the COVID-19 pandemic, the existing monetary thresholds that determine whether an action is a notifiable action or a significant action were temporarily adjusted to zero.

The draft Regulations propose that the monetary thresholds will be reinstated from 1 January 2021, indexed at the rates the thresholds would have otherwise been had the amendments in response to the Coronavirus not been made.

The explanatory memorandum states that this timing will ultimately be dependent on 'the impact of the Coronavirus on the economy and whether there is an ongoing risk that foreign investment in Australia could occur in ways that would be contrary to the national interest'.

National security

Exemption certificates: The government previously consulted on proposed changes which would establish a new national security test. This test would: a) require mandatory notification of 'notifiable national security actions'; and b) allow certain actions not already captured under the proposed amendments Foreign Acquisitions and Takeovers Act 1975 to be 'called in' for screening on national security grounds.

To reduce the regulatory burden on foreign investors, the draft regulations propose to create two new types of exemption certificates that will enable a foreign person to seek an exemption certificate to undertake a program of actions or kinds of actions that would otherwise meet the definition of: a) 'notifiable national security action' (proposed new section 43BA); and b) 'reviewable national security action' (proposed new section 43BB). The explanatory memorandum states that this will measure will enable up-front approval to be given for a program of investments without the need to seek separate approvals.

It's proposed that the new exemptions will be available from 1 January 2021.

Clarification of where exemptions will apply to reviewable national security actions/notifiable national security actions

A number of existing provisions in the Principal Regulations provide for exemptions to the Act. Proposed amendments in the draft Regulations clarify where these exemptions will apply to reviewable national security actions or notifiable national security actions.

Time limit on the exercise of the 'call in' power

It's also proposed that as part of the broader reforms, the Treasurer will be able to 'call in' for review actions that are reviewable national security actions or actions that have not been notified. The draft Regulations impose a ten year time limit (ie ten years from when the action is taken) on the availability of this 'call in' power. If the Treasurer does not commence a review within ten years, he/she will not be able to later 'call-in' the action, even if a national security risk later emerges.

Streamlining 'less sensitive investment'

Tightening the definition of foreign government investor: The draft Regulations propose to tighten the definition of 'foreign government investor' so that it will not apply where 'no foreign government has or could be perceived to have influence or control over the investment or operational decisions of the entity or any of its underlying assets'. According to the explanatory memorandum this will mean that a number of entities that are currently classified as 'foreign government investors' will no longer meet the definition and instead, will be considered to be private foreign investors. This will enable them to access the higher monetary thresholds available to that class of investors.

It's proposed that the new definition will apply to actions taken on/after 1 January 2021.

Other proposed amendments

To 'improve the integrity' and simply the existing foreign investment framework the draft Regulations propose to among other things:

- 'narrow the scope of the moneylending exemption where foreign money lenders obtain an interest in a national security business or national security land under a moneylending agreement; as a significant or notifiable action an interest in land acquired by a private investor as a result of obtaining a right in an exploration tenement unless the land is national security land'
- revise the definition of 'Australian media business' to 'better reflect the broader means of communication by which media is accessed'
- exempt the acquisition of revenue streams of mining and production tenements from being a significant or notifiable action
- 'remove the exemption that applies to investments that are transferred by will to a foreign person so that a person may require approval from the Treasurer'

It's proposed that these (and other technical amendments) will apply to actions taken on or after 1 January 2021.

Exposure Draft Regulation (Fees Imposition)

The drat Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020 set out the proposed fees for particular actions/notices given or issued under the Foreign Acquisitions and Takeovers Act 2015.

It's proposed that the draft Regulations will apply to fees that become payable on or after 1 January 2021.

Public information session on the proposed changes

Treasury will hold a public information session on the proposed changes at 11am-12pm on 29 September. Registrations to attend the session close on 25 September.

[Sources: Treasury Consultation; Exposure Draft Regulations (Protecting Australia's National Security); Explanatory Statement; Exposure Draft Regulation (Fees Imposition); Explanatory Statement]

The Property Council of Australia has expressed concern that proposal will serve to discourage institutional investment in commercial property and has urged the government to revise the proposal

In a statement, the Property Council of Australia expressed concern that the proposed increase in foreign investment application fees would serve to discourage institutional investment in commercial property. The statement reads,

> 'The exposure draft of the Foreign Investment Review Board (FIRB) fee structure released today represents dramatic increases of up to fourfold for larger transactions with fees based purely on the size of the assets, not on the complexity involved with their assessment. An investment with complex national security aspects

> will be charged the same level of fees for a relatively straightforward commercial property investment by a well-known and reputable institutional investor'.

Property Council of Australia Chief Executive, Ken Morrison expressed concern that the proposed fee regime does not distinguish between commercial property and national security assets (eg ports) which will make investment in 'vanilla investments' (eg office buildings, shopping centres etc) less attractive to investors. Mr Morrison commented,

> 'These pension funds, life companies and other pooled saving vehicles represent the highest quality institutional capital around the globe. Why would we make it less attractive for them to invest in Australia, particularly when we will need this investment to kickstart new job-generating projects? If the government is going to overhaul foreign investment rules to deal with national security issues, it doesn't make sense to deter the world's safest, highest quality investments into uncontentious commercial property assets'.

The Property Council has called on the government to 'urgently revise this proposal to ensure the cost of extra security assessment is born by transactions which do require this extra focus. The last thing our economy needs is to make it unnecessarily harder for get job-creating, economy-boosting investment proposals to get the green light'.

[Source: Property Council of Australia media release 18/09/2020]

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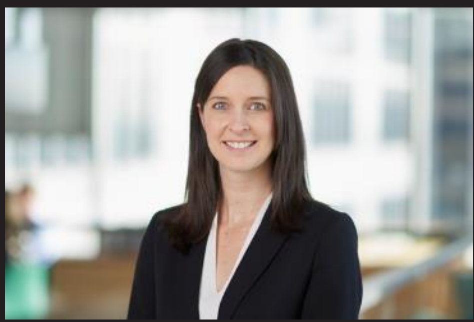

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