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

# Governance News

COVID-19 Special Edition

9 September 2020

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# COVID-19 Key Developments

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## Top Story | COVID-19: Temporary amendments to insolvency laws extended to 31 December 2020

On 7 September The Treasurer and the Attorney General issued a [joint statement](#) announcing that the government plans to extend temporary insolvency and bankruptcy protections for businesses impacted by the COVID-19 pandemic until 31 December 2020.

MinterEllison's Michael Hughes has released an article providing an expert summary of the changes. This can be accessed on our website [here](#).

## Top Story | COVID-19 response - six month suspension of insolvency laws

MinterEllison's Michael Hughes has written a more detailed discussion of the measures announced on 7 September and the implications for business. This can be accessed [here](#).



## Diversity and Inclusion

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### US President Donald Trump has called for executive branch agencies to defund training programs teaching racial sensitivity

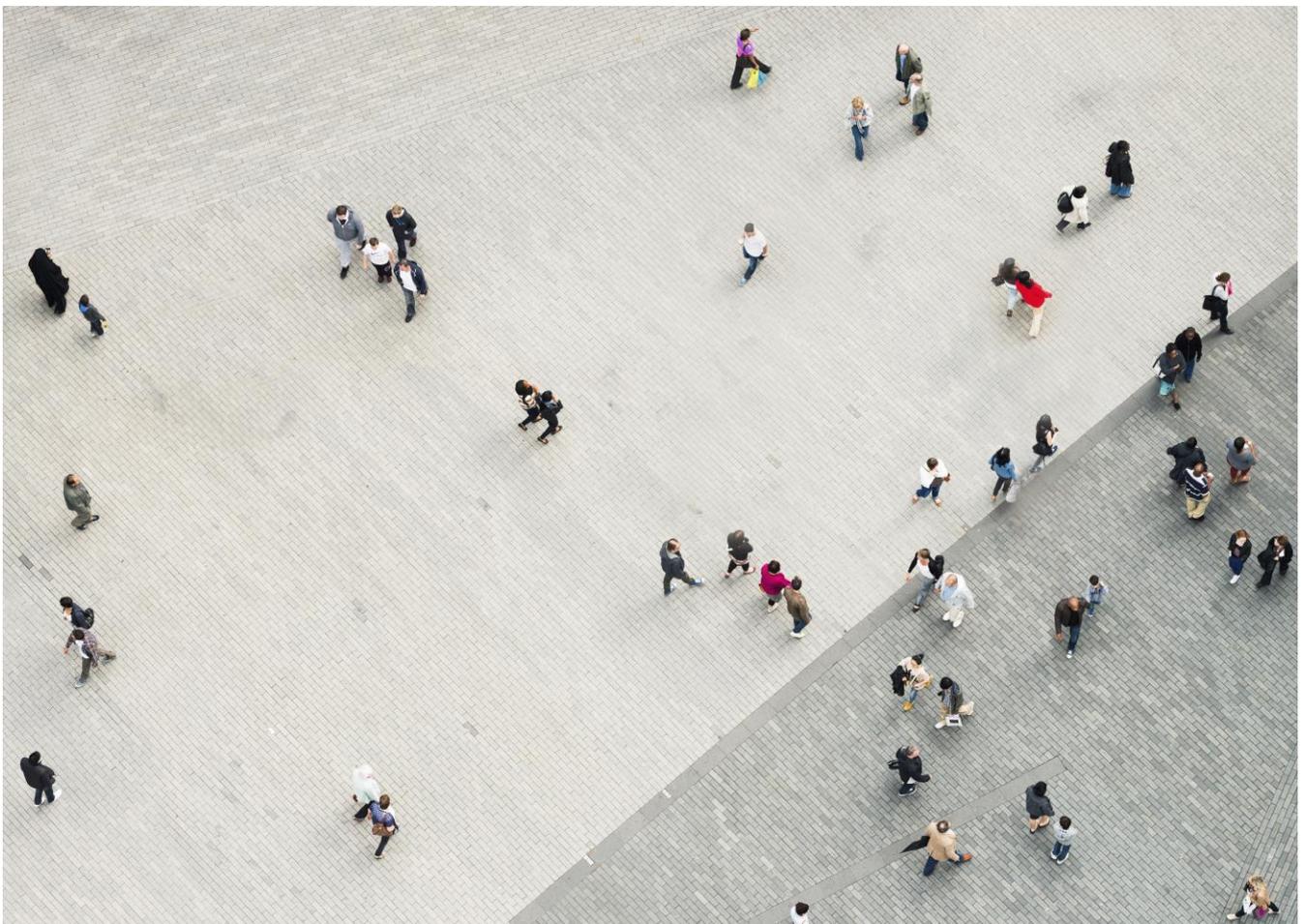
The director of the Executive Office of the President of the United States has issued a memorandum to the heads of executive branch agencies notifying of the President's directive that they 'cease and desist from using taxpayer dollars to fund...divisive, un-American propaganda training sessions'.

Ahead of more detailed guidance on implementing the President's direction, the memorandum asks that agencies immediately review their training programs to identify any program that teaches 'critical race theory', 'white privilege' or 'any other training or propaganda effort that teaches or suggests either 1) that the United States is an inherently racist or evil country or 2) that any race or ethnicity is inherently racist or evil'.

The memorandum states that,

'The President has a proven track record of standing for those whose voice has long been ignored and who have failed to benefit from all our country has to offer, and he intends to continue to support all Americans, regardless of race, religion, or creed. The divisive, false, and demeaning propaganda of the critical race theory movement is contrary to all we stand for as Americans and should have no place in the Federal government'.

[Source: Memorandum for the heads of executive departments and agencies, 04/092020]



## Remuneration

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### BCA CEO Jennifer Westacott says Australian businesses receiving JobKeeper should not be paying executive bonuses and should be 'thinking carefully' about paying dividends

In an interview with the ABC, Business Council of Australia Jennifer Westacott spoke about businesses' view on the roadmap out of the Victorian lockdown and various issues raised in the BCA's pre-budget submission.

#### Some interesting points

##### Payment of dividends and payment of executive bonuses

Among other things, Ms Westacott expressed the view that 'companies should not be paying executive bonuses if they are receiving JobKeeper. It wasn't designed for that. It was designed to keep people working'. On the issue of payment of dividends, Ms Westacott stopped short of saying that companies receiving JobKeeper should cancel dividends but did encourage companies to 'exercise some very careful judgement' on the issue. Ms Westacott commented,

'Dividends is a more complicated thing. Dividends are usually part of a long-run policy of companies to their shareholders. And let's not forget, who are many of the people who receive dividends? Self-funded retirees, mum and dad investors and of course everybody through superannuation'.



#### Scheduled increase in the superannuation guarantee

Asked to comment on whether wages will necessarily rise, should the government proceed with cancelling the scheduled increase in the superannuation guarantee, Ms Westacott said that her view is that any decision should be informed by the findings of the 'inquiry into the superannuation system' which is yet to be publicly released. 'My view is we should wait to see what that inquiry says because if we are going to increase that contribution, we want to make sure that we're putting it into a system that's working, that's functioning, that actually makes sure that people have an adequate, dignified retirement income'.

Ms Westacott added that the question of whether to proceed with the scheduled increase in the superannuation guarantee is a 'really tough' decision. 'On the one hand, we want to make sure that we're building a dignified, adequate retirement income system for Australians. On the other hand, at the moment, any pressure you place on wages is pressure you place on jobs'.

## Lack of policy certainty is deterring investment in the energy sector

Commenting on the position put forward in the BCA's submission that lack of policy certainty is deterring investment in the energy sector, Ms Westacott said that the BCA would support a shift in the government's approach away from underwriting 'hand-picked projects' toward encouraging private investment. Ms Westacott said,

'There's a lot of pent-up investment in the energy sector. Investment that would lower prices, and if we don't lower energy prices, how do we get the economy really going again, and projects that are going to reduce our emissions. So let's prioritise investment in those projects that are going to lower prices, in those projects that are going to lower our emissions so we get our energy system set up for the future. And one of those things is not to underwrite projects and compete with the private sector'.

[Sources: Transcript Jennifer Westacott interview with David Speers, Insiders, ABC 06/09/2020]



## Australia Post board decides to zero-out executive short term incentive payments

Australian Post has issued a short statement confirming executives will receive no short term incentive payments for the FY20. Announcing the board's decision, Australia Post Chair Lucio Di Bartolomeo said that he has 'every confidence in the Executive Team and their commitment to excellent performance in the year ahead'.

[Source: Australia Post media release 02/09/2020]

## Regulators

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### The ACCC has signed a new cooperation agreement with peer competition agencies to coordinate cross-border investigations

The Australian Competition and Consumer Commission (ACCC) has entered into a new cooperation agreement - The Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities – with the US Department of Justice, US Federal Trade Commission, the UK Competition and Markets Authority, the New Zealand Commerce Commission, the Competition Bureau Canada.

The aim of the agreement is to improve 'coordinated and proactive information cooperation and assistance between all parties'. For example through sharing 'intelligence, case theories and investigative techniques' to better coordinate investigations across borders.

The agreement came into effect on 2 September 2020.

[Source: ACCC media release 03/09/2020]



# Corporate Social Responsibility and Sustainability

## How to put purpose into practice: EPI has released a practical guidance for boards

The Enacting Purpose Initiative (EPI) has released a practical guide for boards to assist them in their role in formulating, articulating, implementing and reporting on purpose. The aim of the guide is ultimately to enable boards to translate purpose intent into practice – to link purpose with decisions and outcomes.

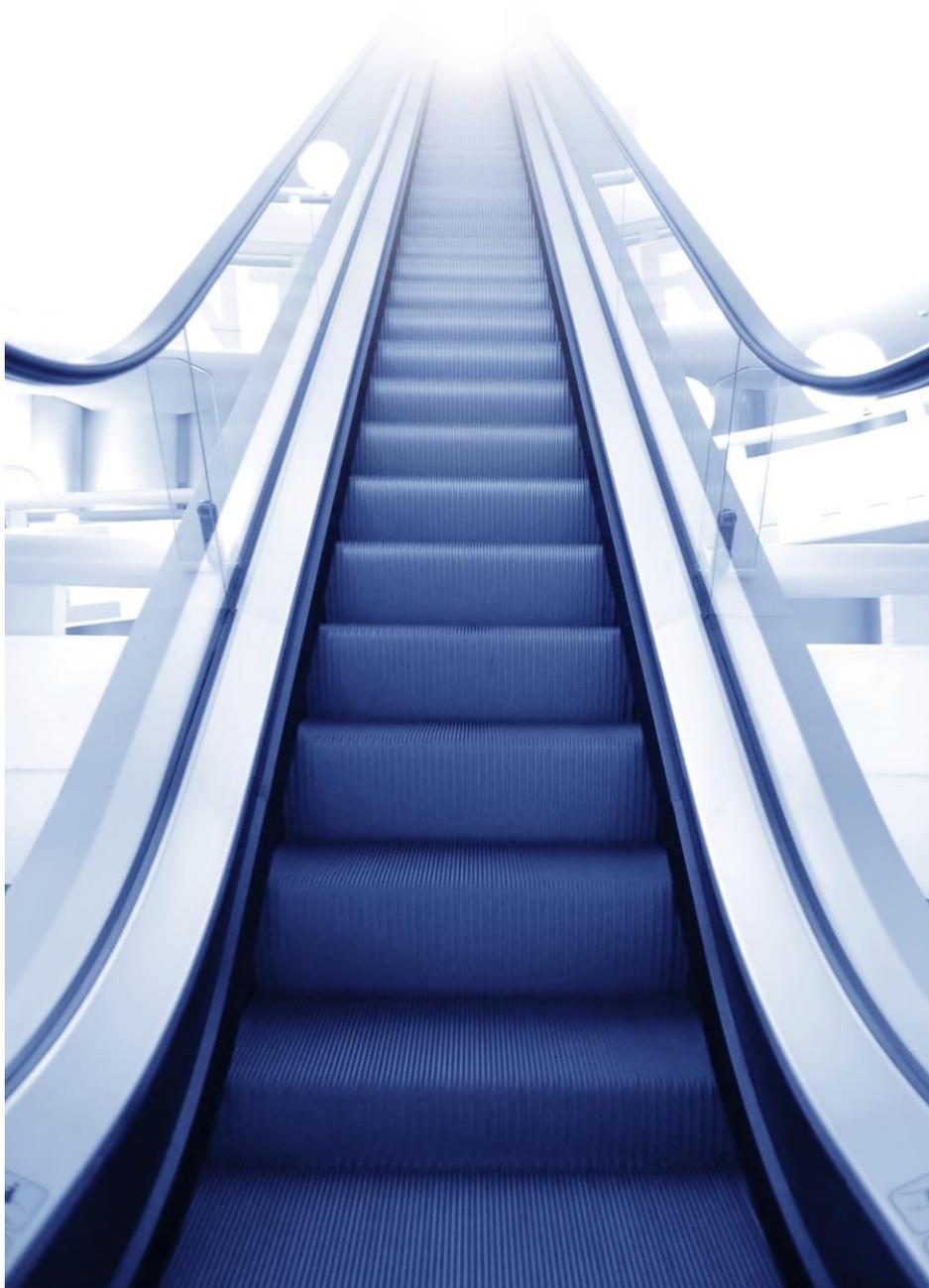
'By following the guidance included in this report...boards and senior executives will be better able to put purpose intent into practice, demonstrating how purpose informs strategic choices and delivers value for a range of stakeholders' the report states.

### Why is guidance on purpose needed?

As distinct from an organisation's mission, values, or culture, the EPI defines purpose as referring to an organisation's reason for existing. Writing in Harvard Law School Forum, Oxford University's Rupert Younger, Colin Mayer, and Robert G Eccles write that understood in this way, purpose 'becomes the most important organizing principle within the organization, informing and guiding strategic decisions and activities'.

However, the EPI observes that in many organisations the concept of purpose is neither understood in these terms nor embedded in decision making or strategy but rather is fairly vague/woolly and theoretical.

'Many organisations today argue that they have articulated their purpose through mission and vision statements, are putting this purpose into practice and have confirmed this through



endorsement of global norms set by multilateral institutions and sustainability reporting. However intent is not by itself enough. Organisations need to identify structured ways to enact stated purpose.'

## A suggested practical framework to enact purpose

The report outlines a practical five part framework – the SCORE framework - to assist organisations to enact purpose effectively and to connect it to actions/outcomes.

The table below provides a brief overview of the five elements of the framework.

FIVE ELEMENTS OF THE SCORE FRAMEWORK	COMMENTARY
Simplify	<p>The EPI calls on organisations to ensure statements of purpose are 'simple enough to be acted upon' by not only by leaders but by 'the entire organisational workforce, the wider supply chain and other connected stakeholders'. The EPI considers that the responsibility of board in this context is to 'challenge management to simplify the complex' and distil the statement of purpose into something precise, that gets to the heart of why the organisation exists.</p> <p>The report states,                      'We encourage board directors to think of simplicity as creating a "golden thread" through the organisation, starting with stated purpose before developing specific and wording around values, mission and vision. Building simplicity from the top delivers a clear "north star" that not only motivates and inspires people, but also helps clarify the strategic choices that need to be made'.</p> <p>Page 18 of the <a href="#">report</a> sets out some tips for approaching this task.</p>
Connect	<p>Purpose should underpin actions within the organisation – it should underpin what the organisation does. To this end, organisational purpose should be a reference point for strategy and capital allocation decisions within the organisation. The EPI considers that the role of board in this context is 'not just to make better decisions, but to ensure that the right governance is in place to deliver purpose as strategy, not marketing. The purpose then becomes embedded in the organisation's mission'.</p> <p>Page 21 of the <a href="#">report</a> sets out some tips for approaching this challenge</p>
Own	<p>Purpose should ultimately be 'owned' collectively by everyone within the organisation and supported by shareholders, and boards should take the lead in ensuring that this is the case.</p> <p>Page 24 of the <a href="#">report</a> sets out some tips for approaching this challenge.</p>
Reward	<p>Delivery against the purpose of the organisation should be linked to and reflected in internal reward systems, including remuneration. The report suggests that both financial and non-financial metrics should be aligned with delivery against the organisation's purpose.</p> <p>Page 27 of the <a href="#">report</a>, includes some tips for approaching this challenges.</p>
Exemplify	<p>To build a sense of common purpose and shared identity leaders should 'bring the purpose to life through clear and compelling communication and narrative strategies'. The EPI writes that 'The narratives should be vivid and uplifting but also authentic in conveying honestly and openly the challenges and failures as well as the successes. They should reveal a willingness of the leadership to accept personal sacrifices in bearing their share of the costs of failure as well as the rewards of success'.</p> <p>Page 30 of the <a href="#">report</a> sets out a number of tips to assist in meeting this challenge.</p>

[Sources: Harvard Law School Forum on Corporate Governance and Financial Regulation 02/09/2020; EPI report: Enacting purpose within the modern corporation: A Framework for Boards and Directors]



# Institutional Investors and Stewardship \_\_

## What does accountability look like? ACSI's appearance before the Juukan Gorge inquiry

Representatives from the Australian Council of Superannuation Investors (ACSI) – ACSI CEO Louise Davidson and ACSI Executive Manager Governance Engagement and Policy, John Edward - appeared before the Joint Standing Committee on Northern Australia inquiry into the Destruction of 46000 year old caves at Juukan Gorge on 28 August. The terms of inquiry are [here](#).

Questions to ACSI centred not only on the specific circumstances of the inquiry, but more broadly on the role of institutional investors in holding companies to account and the effectiveness of engagement as an accountability mechanism. The full text of the transcript of the hearing is [here](#).

### Some Interesting Points

- **Institutional investors have an obligation to promote the long term best interests of members through promoting strong ESG practices at the companies in which members invest:** In her opening address to the Committee, ACSI CEO Louise Davidson described ACSI's approach to engagement and the rationale behind it. Ms Davidson explained that ACSI considers that long term institutional investors have an obligation to act in best long term interests of members and that this necessarily includes engaging with companies to promote 'genuine and permanent improvements' in their ESG practices. Ms Davidson said that ACSI considers that 'long-term financial advantage will more likely follow if the entity conducts its business according to proper standards, treats its employees well and seeks to provide financial results to shareholders that, in the long run, are better than other investments of broadly similar risk'. To this end, she said ACSI has been actively engaging with companies on a range of ESG issues - board composition and renewal, director independence, climate risk, social licence to operate and corporate culture – since its inception.
- **The Committee heard that ACSI considers the destruction of the sites to be a 'clear example of an ESG issue that damages a company's social licence to operate'.** 'This includes the impact on Rio Tinto's reputation and its ability to effectively engage with stakeholders that are important to their operations. These impacts arise not only from the time and resources allocated to respond to these issues but, most significantly, the reputation damage that will flow throughout Rio's business, ultimately making it more difficult for them to effectively conduct their operations and to partner with First Nation groups around the globe' Ms Davidson said.
- **ACSI's expectations of 'the social outcomes that corporations should deliver' in the context of their engagement with Indigenous or First Nations peoples:** A number of questions to ACSI concerned this issue, by what means ACSI communicates its expectations to companies and the actions ACSI is able to take in the event that its expectations are not met. Ms Davidson said that ACSI expects 'that companies should be engaging closely with Indigenous communities in the areas that they work, that they should be providing the full suite of information that would be required by those communities to make decisions and that they ought to be supporting those communities in considering any major decisions that need to be made'. In terms of communicating expectations to companies, the committee heard that ACSI primarily does so through meetings and less frequently through writing to companies. Asked what 'sanctions' ACSI is able to apply, should a company fail to meet ACSI's expectations, Ms Davidson said that 'there are a number of tools' available including further engagement with both stakeholders and with the company, and ultimately where this is unsuccessful through adjusting voting recommendations.
- **An expectation that companies go beyond compliance with strict legal requirements:** Asked whether 'there are laws that could be improved to ensure that companies do meet these social expectations that shareholders have' Ms Davidson said that ACSI has an expectation that companies would not 'merely conform to the law, but that they would go above and beyond mere compliance with the law to ensure that their engagement with community is of such a standard that it would not require resorting to the law'.
- **Restitution?** Asked whether there is a 'case of restitution of some significance now to be made in order to get the message across to corporates and to some governments that the desecration of Aboriginal sites is no longer an acceptable modus operandi for the industry' Ms Davidson stopped short of agreeing outright, stating instead that

ACSI's view is that there 'has to be an appropriate level of accountability for what has occurred, and that needs to be demonstrated both within the company and potentially through reparation'.

- **'What does appropriate accountability look like to ACSI?'** Asked to specify what actions ACSI would like to see Rio Tinto take in the circumstances, beyond the measures already announced, Ms Davidson did not specify beyond stating that 'there is a range of additional accountability measures that the company might consider. That might include further financial penalties or it might include demotion or even termination of responsible executives. But our view is that the board is really the responsible entity for making those decisions'. Asked what ACSI expects, 'by way of best practice from the board' Ms Davidson said that ACSI expectation is that the board will 'not only put in place processes to fix what has gone wrong in terms of the future but also to acknowledge the failings that have occurred and to deliver proper accountability around that. We are not going to sit and say whether it should be person A or person B because we don't feel as though we are close enough to understand exactly that at the moment. But what we want is for the board to be really clear about how they are going to take responsibility and be accountable for what has occurred'. This could be communicated through a further public statement from the company. The Committee heard that ACSI is continuing to engage with Rio Tinto following the release of the board's report into the circumstances that led to the destruction of the caves and does not consider the matter to be settled.

[Source: Transcript, Joint Standing Committee on Northern Australia inquiry into the Destruction of 46000 year old caves at Juukan Gorge 28/08/2020]

## 'Corporate governance and board accountability are not luxuries for the good times': Joint FTI consulting and Proxy Insight report finds investors are increasingly willing to voice their dissent through their voting behaviour (despite the pandemic)

### Key Takeouts

- A joint [report](#) from FYI Consulting and Proxy Insight analysed trends in proxy voting at FSTE 350 companies over the past five years.
- Overall the report found that 'the frequency with which companies are experiencing dissent of at least 20% continues on an upward trend, with investor capability and higher standards of corporate governance causing reputational and market-related headaches for a growing number of companies'.
- The report concludes that 'corporate governance and board accountability are not luxuries for the good times. In fact, many investors clearly feel they are even more important in times of crisis'.

A joint report from FTI Consulting and Proxy Insight - [AGM Season 2020 Review & Highlights](#) – tracking trends in proxy voting outcomes at FTSE 350 companies over the last five years, has identified 'a clear increase in the scrutiny placed on public companies and, overall, the role business plays in society' over that time. For example, over the period, there has been a 'marked' increase in the number of resolutions facing significant opposition (20% or more).

According to the report, the trend continued in H1 2020, despite the pandemic indicating that 'corporate governance and board accountability are not luxuries for the good times. In fact, many investors clearly feel they are even more important in times of crisis'.

### Some Interesting Findings

- **The percentage of resolutions and companies facing significant opposition (20% or more opposition) has increased over time:** In 2016, 13.7% of companies faced significant opposition to resolutions. By 2020, this has risen to 21.9%.
- **The UK's largest asset managers continue to be willing to oppose pay resolutions:** Four asset managers (M&G, Aviva, Legal and General and HSBC) opposed more than 20% of remuneration reports they reviewed in 2020.
- **The same 'hot button issues' are likely to attract the most opposition:** Analysis of the top ten most contested resolutions over the past five years indicates that director elections and remuneration are consistently the two areas where 'significant' opposition is most likely. This trend continued in 2020, despite moves by a number of firms to implement temporary pay cuts/executive pay freezes in response to COVID-19. The report comments that 'COVID-19 has arguably made remuneration an even more pressing issue for many shareholders, as wider

social and economic upheaval potentially sharpens stakeholder focus on pay levels'. Expanding on this, Senior Director, Corporate Governance at FTI Consulting, Peter Reilly commented that 'the data aligns with anecdotal evidence that investors view governance as even more important in turbulent times, as it acts as a layer of protection against evolving crises...While there will always be disagreements between companies and their investors, the growing instances of significant opposition points to an increase in the gap between company actions and shareholder expectations, some of which could be alleviated by stronger reporting and more effective engagement.'

- **Holding individual directors to account:** The report also identified that investors are increasingly willing to hold individual board members to account. For example, where Legal and General supported 98.1% of board elections in 2016, it supported only 95% in 2020. The report comments that 'a shift from support of 99.1% of Board elections to 95% would likely translate into significant uptick in opposition to Directors within the FTSE 350 Directors within the FTSE 350'.
- **Investors are broadening their focus beyond large-cap companies:** The report found that investors are increasingly willing to apply pressure on mid-cap as well as large cap companies. For example the proportion of FTSE 250 companies who received significant votes against at least one proposal was higher this year at 23.7% than the proportion of FTSE 100 companies (20.9%).
- **The report found that increased engagement between investors and companies has not translated into reduced levels of opposition,** suggesting that the outcomes of engagements have been unsatisfactory – either because they have 'not been mutual beneficial, or have not been matched by subsequent actions and reporting'. This is attributed in the report both to increased access (by shareholders) to resources to analyse final decisions and to increased expectations around consultation.



[Sources: FTI Consulting media release 02/09/2020; Joint Report FTI Consulting and Proxy Insight: AGM Season 2020 Review & Highlights from FTI Consulting]

## Meetings and Proxy Advisers

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### Top Story | Going virtual this AGM season: MinterEllison releases answers to our most commonly asked FAQs

Coming into the AGM season, the MinterEllison team has released answers to some of our most commonly asked questions about holding virtual or hybrid meetings.

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



### Practical tips on holding virtual meetings: The Governance Institute and the AIRA have released joint guidance

The Governance Institute of Australia and the Australasian Investor Relations Association have released joint guidance on holding virtual meetings, including virtual AGMs. The full text is available [here](#).

The guidance provides a snapshot of the current regulatory/legislative position on holding meetings by electronic means as at 1 September as well as practical tips on (among other things): pre-planning and choice of technology, notice of meeting; use of technology during the meeting itself; and voting and management of questions/answers.

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

## Inching closer? Interim Report recommends modernising Corporations Act meeting, shareholder communication and electronic execution requirements, the Governance Institute has welcomed the recommendations as long overdue

Among the 32 recommendations in the Senate Select Committee on Financial Technology and Regulatory Technology's Interim Report are recommendations that temporary amendments to the Corporations Act 2001 (Cth) (the Act) made because of restrictions imposed due the COVID-19 pandemic, should be made permanent.

[Note: The full list of recommendations is [here](#). Our summary of the recommendations is included in a separate post of this issue of the news under the heading Financial Services below.]

Specifically, the report recommends that the Act be amended to:

- 'allow companies to decide the best format for holding their annual general meetings and other prescribed meetings (whether through virtual meetings, in-person meetings or hybrid meetings), while ensuring the needs of shareholders are taken into account' (Recommendation 1).
- 'enable companies to communicate with shareholders electronically by default, with shareholders retaining the right to request paper-based communications on an opt-in basis' (Recommendation 2).

The Committee observes that,

'Given that the Treasurer's temporary determination will now be in place until mid-2021, this time should be used to prepare permanent changes to the Corporations Act for implementation'.

The report also recommends amending the relevant legislation and regulations to 'allow for the electronic signature and execution of legal documents (Recommendation 3), and to enable the witnessing of official documents 'via videoconferencing or other secure technological means' (Recommendation 4).

Commenting on recommendations the Committee states that,

'changes to enable electronic execution and witnessing of legal documents should be made permanent, and consistent across Australian jurisdictions. This can be done while maintaining similar levels of security as "wet signatures", and would provide significant efficiencies in both time and cost. It will also assist in future scenarios such as during natural disasters, as well as assisting those in regional and remote areas. The committee urges the Australian Government to work with states and territories to amend relevant regulations across jurisdictions to achieve consistency in this area'.

[Source: Select Committee on Financial Technology and Regulatory Technology Interim Report September 2020]

### Long overdue

In a short statement, the Governance Institute said that it had strongly advocated for the temporary changes to be made permanent and welcomed the Committee's recommendations as 'long overdue'. Governance Institute CEO Megan Motto commented,

'In its current form, the Corporations Act simply does not contemplate the use of technology. These changes are long overdue and would be hugely significant for industry as it grapples with the uncharted waters of 2020 and beyond while trying to map their way to recovery... We are delighted the Committee was persuaded by our submission and our evidence and we look forward to the next steps in this process'.

[Source: Governance Institute media release 04/09/2020]

# Financial Services

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## Top Story | 32 quick wins? The Senate Committee has released its fintech/regtech interim report

### Key Takeouts

- Ahead of final reporting date (16 April 2021) the Senate Select Committee on Financial Technology and Regulatory Technology has released its [interim report](#). The report makes 32 recommendations which Committee Chair Andrew Bragg has described as a 'series of quick wins'.
- Recommendations include (among others): a) making temporary changes to the Corporations Act enabling companies to hold virtual meetings, enabling electronic execution/witnessing of documents and electronic shareholder communication permanent (recommendations 1-4); b) expanding the Consumer Data Right (CDR) to include other financial services, starting with the superannuation sector and then including sectors such as general insurance (recommendation 23); c) establishing a new national body to consolidate regulatory responsibilities in relation to the implementation of the Consumer Data Right (recommendation 19); d) that the government 'foster a culture where superannuation funds invest more widely, including in Australian startups, without undermining the sole purpose test' (recommendation 27); and e) providing the Council of Financial Regulators (CFR) with a competition mandate and establishing a framework for the CFR to report on Australia's external competitive position in financial services (recommendation 13).
- The report makes no formal recommendation about tightening the regulation of buy now pay later providers (BNPL providers) for example, by requiring them to comply with consumer protections under national credit laws National Credit . The report comments, 'Because innovation like BNPL often occurs on the fringes of regulation, it is inappropriate to force each innovation into a one size fits all approach. Industry self-regulation provides an initial framework to protect innovation which can later be backed up by a policy statement or a form of co-regulation (collaboration between industry and government)'.
- Initial response to the report:
  - The Governance Institute has welcomed recommendations to modernise Corporations Act requirements concerning meetings, electronic execution and witnessing of documents and shareholder communication.
  - The FSC and AFIA have each issued separate statements welcoming the report recommendations overall.
  - The Consumer Action Law Centre has expressed disappointment that neither recommends the tightening regulation of BNPL providers or the banning the practice of screen-scraping. As such, CALC considers that the report 'misses the mark'.

### Overview – Recommendations in the Interim Report

Ahead of final reporting date (16 April 2021) the Senate Select Committee on Financial Technology and Regulatory Technology has released an [interim report](#) into how competition in the financial services sector (and beyond), can be improved through supporting technological innovation and streamlining/updating existing requirements to ensure they are fit for purpose. The report also considers whether temporary COVID-19 measures implemented to enable use of technology during the pandemic should be made permanent as well as the potential for Regtech to streamline compliance.

The report includes 32 recommendations which Committee Chair Senator Andrew Bragg described as a 'series of quick wins'. Mr Bragg comments,

'If we are going to compete with Singapore and Tokyo, we first need to get our house in order at home. Much progress has been made but it's time for some recalibration. Government should not be afraid to act like in FinTech and be iterative'.

The final report will deal with 'longer term structural issues'.

The Committee's terms of reference are [here](#). The full list of recommendations in the interim report is [here](#).

## 'Quick wins' in five key areas

The interim report includes recommendations in five key areas:

1. COVID-19 related measures/'technology enablers': Recommendations 1-8 in the report
2. Tax issues: Recommendations 9-12
3. Regulation: Recommendations 13-18 of the report are aimed at 'elevating consideration of competition issues at the regulatory level', recommendations 19-23 concern the Consumer Data Right specifically
4. Access to capital and funding: Recommendations 24-27
5. Fostering a culture of innovation, ensuring skills and training in new technologies are available: Recommendations 28-32

### 1. 'Technology enablers': modernising existing legal requirements to enable use of technology and promoting use of technology

Broadly, recommendations 1-8 in the report, are aimed at permanently modernising existing legal requirements (eg in relation to meetings, electronic execution of documents, shareholder communications and in the medical context, telehealth/eprescriptions) to enable businesses to utilise technology (recommendations 1-7) and to promote the use of regtech by businesses (recommendation 8) which the committee heard 'will become of increasing importance for businesses as a result of the COVID-19 pandemic'.

The recommendations are as follows.

#### Electronic meetings, shareholder communication and execution and witnessing of documents

- Recommendation 1 is that 'the Corporations Act 2001 be amended to allow companies to decide the best format for holding their annual general meetings and other prescribed meetings (whether through virtual meetings, in-person meetings or hybrid meetings), while ensuring the needs of shareholders are taken into account'.
- Recommendation 2 is that the Corporations Act 'be amended to enable companies to communicate with shareholders electronically by default, with shareholders retaining the right to request paper-based communications on an opt-in basis'.
- Recommendation 3 is that the relevant legislation/regulations be amended 'in order to allow for the electronic signature and execution of legal documents'.
- Recommendation 4 is that 'relevant regulations be amended in order to enable the witnessing of official documents via videoconferencing or other secure technological means'.

In a short [statement](#) welcoming the recommendations, Governance Institute CEO Megan Motto commented,

'In its current form, the Corporations Act simply does not contemplate the use of technology. These changes are long overdue and would be hugely significant for industry as it grapples with the uncharted waters of 2020 and beyond while trying to map their way to recovery... We are delighted the Committee was persuaded by our submission and our evidence and we look forward to the next steps in this process'.

#### Telehealth and eprescriptions:

- Recommendation 5 is that 'Medicare telehealth items introduced during the pandemic be made a permanent feature of the Australian healthcare system, with ongoing refinement and review as appropriate'.
- Recommendation 6 is that 'work on implementing eprescriptions in Australia continue as quickly as possible, and that the Australian Government ensure an open and accessible market for eprescription services'.

#### Digital Identity reforms

Recommendation 7 is that 'Digital Identity reforms led by the Digital Transformation Agency be accelerated in order to deliver a national, economy-wide framework for the operation of a federated digital identity ecosystem as soon as possible'.

The report makes clear that in implementing this recommendation 'the government must ensure that the digital identity solutions created under the framework are accessible on an opt-in basis only (rather than being mandated); and should be available in addition to the other forms of identity verification currently in use, rather than replacing those alternatives'.

The Committee considers that the reform would not only deliver 'significant time and cost savings to individuals and businesses' as well as 'opportunities for innovative Fintechs and others working in the digital identify space' but that it will deliver broader benefits,

'the federated digital identity ecosystem would not be to create a single digital identity solution for individuals or businesses to use; rather, it would develop a common set of ground rules for both government agencies and private sector organisations to be able to develop tailored digital identity management products and solutions. This can enable innovation and competition among providers to occur, while ensuring that consumers retain control over which (if any) digital identity providers they choose to engage with'.

## Promotion of the use of regtech to promote compliance eg compliance with obligations under industrial awards

Recommendation 8 is that the government 'explore options to promote the use of Regtech solutions in assisting small and medium-sized enterprises to comply with their obligations under industrial awards'.

The report states that the Committee is supportive of 'any initiatives that would help small business to comply with industrial awards and protect the interests of employees, and considers that Regtech solutions can be of significant assistance in this area'. However, the report stops short of endorsing suggestions around how use of regtech by SMEs in this context could be/should operationalised. The report states that at this stage, the Committee has no 'clear view' on the 'best way forward in balancing the various interests at stake'.

## 2. Tax issues: Clarification and simplification of incentives, streamlining of existing requirements

Chapter 3 of the report focuses on tax issues including the effectiveness of existing mechanisms to incentivise investment in research and development.

Recommendations 9-10 are broadly aimed at clarifying the operation of existing tax incentives:

- Recommendation 9 is that the government provide 'further clarity around eligibility for the Research and Development Tax Incentive to ensure genuine software creation by Australian startups is reliably supported'.
- Recommendation 10 is that the government provide increased certainty around claiming the Research and Development Tax Incentive through issuing guidance in conjunction with the Australian Tax Office. In particular, clear limitations should be placed on the ability for payments to be clawed back retrospectively.

Recommendation 11 is that the government 'through the Council for Federal Financial Relations, simplify payroll taxes across Australian jurisdictions'.

On the issue of the tax treatment of initial coin offerings, the Committee recommends the release of the final Treasury report on Initial Coin Offerings when it is completed' but makes no further recommendation (Recommendation 12).

Recommendation 32 is that government 'explore including eligible outplacement training under the Fringe Benefit Tax exemption provision for eligible startups to improve the regulatory environment and provide benefits to employers and employees impacted by technological advancement'.

## 3. Regulatory issues: 'elevating consideration of competition issues at the regulatory level'

Recommendations 13-18 of the report are aimed at 'elevating consideration of competition issues at the regulatory level', including through giving the Council of Financial Regulators a larger voice.

- Recommendation 13 is that the government 'provide the Council of Financial Regulators (CFR) with a competition mandate as advice to the government and that the CFR regularly report on competitive dynamics in the Australian financial services market'.

- Recommendation 14 is that the government 'establish a framework for the Council of Financial Regulators, supported by Austrade, to regularly consider and report on Australia's external competitive position in financial services, including measuring technology adoption and innovation'.
- Recommendation 15 is that the government 'establish a market basis for determining the success of Australia's financial regulators in supporting a pro-innovation and pro-competition culture in financial services'. The Committee suggests that this could take the form of giving ASIC and APRA 'clear Key Performance Indicators' to increase their focus on supporting competition and innovation in the market. The Committee suggests that the UK model used to measure regulator performance 'may be helpful in this regard'.

## Self-regulation

The report does not recommend tightening regulation of newcomers, including regulation of buy now pay later providers, but rather advocates self-regulation as the best means of fostering innovation and competition in the sector. 'The committee considers that in many instances, industry self-regulation can be an efficient way for innovative products in the financial services sector to emerge, while ensuring adequate protections for consumers' the report comments.

- Recommendation 16 is that the government 'establish a culture of innovation and competition in financial services by supporting self-regulation where innovative products emerge, whilst ensuring strong consumer protection'.
- Recommendation 18 is that 'if the ACCC finds poor industry adherence to its best practice guidance for foreign currency conversion services and international transaction fees, the development of a market code of best practice to promote integrity and transparency within the foreign exchange market should be considered'.

## BNPL providers

Commenting specifically on the Buy Now Pay Later sector, the Committee comments that

'The development of an industry code of practice in the Buy Now Pay Later (BNPL) sector is an example of where industry is working constructively to respond to stakeholder concerns and seek to achieve appropriate regulation that benefits consumers...Because innovation like BNPL often occurs on the fringes of regulation, it is inappropriate to force each innovation into a one size fits all approach. Industry self-regulation provides an initial framework to protect innovation which can later be backed up by a policy statement or a form of co-regulation (collaboration between industry and government)'.

## Access to the New Payments Platform (NPP)

The report acknowledges the 'strong concerns raised' around access arrangements and functionality offered by the New Payments Platform (NPP) and that a range of options is available improve access to the NPP for Fintechs and smaller market participants. However, the Committee stops short of recommending that any of these measures be taken up 'at this time' in light of the RBA's Payments Systems Board planned formal review into access arrangements and functionality planned for 2021.

Rather Recommendation 17 is intended to increase transparency around the progress of NPP capability upgrades with a view to driving wider access to the platform. Recommendation 17 is that the 'New Payments Platform Australia regularly report on implementation progress of the NPP roadmap in order to drive wider access to the platform'. The report suggests that this report could be delivered quarterly to 'give full visibility as to the progress of the NPP as it matures'.

## Consumer Data Right

Recommendation 19-23 of the report relate to the initial roll-out of the Consumer Data Right as well as to the (possible) future expansion of the scheme to the superannuation and general insurance sectors.

- Recommendation 19 is that the government 'establish a new national body to consolidate regulatory responsibilities in relation to the implementation of the Consumer Data Right'. The report suggests that in the first instance this new body would 'take on regulatory and operational responsibility for the Consumer Data Right' and that over time other functions could be added.

- Recommendation 20 is that the 'Australian Competition and Consumer Commission, or the new proposed national Consumer Data Right (CDR) body, finalise the rules for intermediary and third party access to CDR banking data by late 2020, and enable intermediaries to enter the CDR ecosystem as soon as possible thereafter'.
- Recommendation 21 is that the government 'work with the banking industry to establish and implement targeted campaigns to educate consumers on the Consumer Data Right and the opportunities that Open Banking provides'.
- Recommendation 22 is that the 'government maintain existing regulatory arrangements in relation to digital data capture'. That is, the Committee did not recommend that the practice of screen-scraping be banned, through the report comments that this should 'continue to be monitored'.
- Recommendation 23 is that the government 'expand the Consumer Data Right to include other financial services, starting with the superannuation sector and then including sectors such as general insurance'.

#### Possible expansion into superannuation and insurance

- 'Open Super': The report comments that 'given the technical infrastructure already in place and the ongoing work on data availability in the superannuation sector, the CDR should be expanded into superannuation as soon as possible'. In terms of the scope of the proposed expansion, the Committee is of the view that both customer-level data and product reference data should be included in the scheme. The Committee also comments that superannuation funds should automatically be accredited to receive Open Banking data.
- Expansion into general insurance? The report comments that the government should both 'flag its intention to expand the CDR into insurance' and 'provide an indicative timeline in which this may be possible'.

### 5. Improving access to capital

Recommendations 24-27 are aimed at improving access to capital to promote the growth of innovative businesses including Fintechs and Regtechs.

- Recommendation 24 is that the government 'amend the Early Stage Innovation Company and Early Stage Venture Capital Limited Partnerships qualification criteria to widen access to startups and investors'
- Recommendation 25 is that the government 'implement a Limited Partnership Collective Investment Vehicle and a Corporate Collective Investment Vehicle regime to drive inbound capital investment for Australian startups'.
- Recommendation 26 is that government 'consider incentives to encourage collaboration between large businesses and startups'.
- Recommendation 27 is that the government 'foster a culture where superannuation funds invest more widely, including in Australian startups, without undermining the sole purpose test'.

### 6. Promoting a culture of innovation, skills/training

The report states that the 'government should play a proactive role in encouraging growth opportunities for innovative firms' including through: 'appropriate procurement policies' and enabling 'X-tech firms to solve policy challenges set by government'.

- Recommendation 28 is that the government should 'undertake a stocktake to better understand the costs and complexity for small businesses, including Fintechs and Regtechs, in Commonwealth Procurement'.
- Recommendation 29 is that the government 'consider holding event-based challenges or initiatives [eg hackathons] to enable innovative Fintechs and Regtechs to solve policy and service delivery challenges

#### Establishment of a National Agtech Advisory Council

Recommendation 30 is that the 'Australian Government create an Agricultural Technology (Agtech) Advisory Council to advise on Agtech policy in a consolidated manner'. The Committee considers that 'the Agtech sector would benefit from a national leadership group to provide guidance and leadership on Agtech policy matters in a consultative and consolidated manner'.

## Skills and training

The Committee heard that ensuring workers have the necessary skills and knowledge to transition to new technologies will be increasingly important and will require lifelong skills training. Workers will need to regularly update their skills/training through completion of micro-credentials throughout their working lives.

- Recommendation 31 is that the government 'work with industry to ensure reskilling of workers affected by economic change and the availability and accessibility of micro credentials for those seeking to join the FinTech and Regtech industries'
- Recommendation 32 is that the 'government explore including eligible outplacement training under the Fringe Benefit Tax exemption provision for eligible startups'.

[Source: Select Committee on Financial Technology and Regulatory Technology Interim Report 02/09/2020]

## Initial response – industry associations have welcomed the findings, consumer advocates have raised concerns

- **Financial Services Council (FSC):** In a statement welcoming the recommendations overall, FSC CEO Sally Loane said the Committee's 'draft recommendations provide a forward-thinking framework to better enable technological transactions as well as streamline tax and regulatory requirements to support Australia's economic recovery'. In particular the FSC singled out the recommendation to develop a Corporate Collective Investment Vehicle. Ms Loane commenting 'This is a long standing Government commitment which has yet to be implemented and something the FSC has advocated for over a long period'.
- **Australian Finance Industry Association Limited (AFIA):** In a statement, welcoming the recommendations overall, AFIA CEO Diane Tate highlighted in particular, the report's support of self-regulation of innovative companies as the best approach. Ms Tate commented that 'AFIA is particularly pleased that the Senate has recognised that the work AFIA is doing with our BNPL members on a world first BNPL Code of Practice is an example of where industry is working constructively to respond to changes in market conditions and community expectations...AFIA strongly supports industry codes as an important part of the regulatory framework. Self regulation is key to advancing good industry practices, ensuring competition and innovation is accompanied by appropriate protections that deliver good customer outcomes, and ensuring the industry is being clear about what it stands for. Industry codes also help educate customers, stakeholders and others about the products, services and technologies offered as well as drives good cultural outcomes across the industry.
- **Consumer Action Law Centre (CALC):** In a statement, CALC expressed disappointment that the report does not recommend tighter regulation of the BNPL sector, and more particularly recommend that BNPL providers be required to comply with consumer protections under national credit laws. CALC also expressed disappointment that the report does not recommend prohibiting the practice of screen-scraping which exposes consumers' information to 'misuse, identify theft and forces Australians to breach the terms and conditions of their banking services. Allowing this practice to continue will lead to two digital economies: one where digital-haves use the safer Consumer Data Right regime and another where digital have-nots are forced to use unsafe screen scraping practices. And it will be the increasing numbers of financially vulnerable Australians who will suffer the results' Financial Rights' Policy and Advocacy Officer Drew MacRae said.

[Sources: FSC media release 02/09/2020; CALC media release 03/09/2020; AFIA media release 02/09/2020; Governance Institute media release 04/09/2020]

## Responsible lending: Appearing before the Standing Committee on Economics ANZ and CBA were asked for their views on the operation of existing laws/guidance and the need for reform

Appearing before the Standing Committee on Economics on [4 September](#) representatives from ANZ and the CBA were questioned by the Committee about their views on the status/operation of responsible lending obligations and the possible need for reform to remove barriers to lending (among other issues).

[Note: The Australian Securities and Investments Commission has [confirmed](#) that it will not appeal the responsible lending test case, the 'Wagyu and Shiraz decision' (the full text of the decision is here: [Australian Securities and Investments Commission v Westpac Banking Corporation \[2020\] FCAFC 111](#). Our summary is [here](#).). ASIC also said that it will review its updated regulatory guidance RG 209 (Credit licensing: responsible lending conduct) and will consider what implications the Federal Court decision

has for that guidance. ASIC stated at the time that 'Any reform of the National Consumer Credit Protection Act (National Credit Act) to clarify further the enforcement of those principles is ultimately a matter for the Federal Government and Parliament']

## **Responsible lending: Are responsible lending obligations and/or guidance putting a brake on lending?**

On the issue of responsible lending, both lenders were asked for their views on whether existing responsible lending laws create barriers to lending, and/or whether existing guidance operates, to makes it more difficult for them to approve loans. In putting this question, Committee Chair Tim Wilson observed that RBA Governor Philip Lowe had previously been critical of existing guidance.

ANZ CEO Shayne Elliott said that he 'broadly' shares the views of the RBA Governor to the extent that 'technical issues' with the guidance (though the guidance is helpful) are still being worked through. However, Mr Elliott made clear that he does not consider that either the guidance or responsible lending obligations 'are restricting our ability to go about doing our job well and prudently in supporting customers...I don't see it as a barrier to us supporting the economy, in terms of what this committee would be interested in, and making sure that we're out there and able to lend to the right segments of the economy'.

CBA CEO Matt Comyn said that the CBA considers the guidance to be 'clear'. Mr Comyn said, 'We certainly feel confident about the interpretation of the guidance that's there. We've engaged, as have other institutions, fulsomely with ASIC. It has been clarified. It is much more comprehensive and robust than it had been in the past'.

## **Possible 'adverse impacts': Increased costs/extended loan approval times?**

Both lenders were asked to comment on whether responsible lending obligations ultimately increase both the time needed to assess loans and the costs of doing so.

ANZ CEO Shayne Elliott acknowledged that there is considerable cost associated noting as well that ANZ has become progressively 'more cautious' since responsible lending obligations were introduced in line with shifting expectations and to accommodate the 'grey' area around what is required for compliance. 'The more the line can turn from grey to black the better, and the closer we can get to the original intent. We are all for greater transparency, greater clarity and greater guidance from our regulators' he said.

Mr Elliott also observed that regulatory complexity and lack of alignment between regulatory approaches/expectations is also a factor in this context.

'I'll give you an example. ASIC, quite helpfully, have said, "By the way, if Jason has a loan with you and its principal and interest and he wants to turn it into interest only, you don't have to go through a responsible lending review, because the total amount being borrowed hasn't shifted." Okay; fine. That's good; that's really clear. However, APRA say that converting from principal and interest to interest only is what they call a credit-critical event, and it requires us to do essentially a soup-to-nuts review of that lending relationship. So we're also trying to navigate that, and then, without going into detail, AFCA have a slightly different approach again to their definition of responsible lending. So part of it is the navigation between the various agencies and their interpretations, which are all, on their own, not unreasonable, but we are stuck in the middle having to navigate those.

Ultimately, Mr Elliott said that 'What we're asking for is clarity, alignment and coherence of these [requirements]. By the way, I get no sense from our regulators that they disagree. But they are encumbered by the laws that they're asked to uphold'.

Asked the same question by the Committee, Mr Comyn said that compliance with responsible lending obligations has ultimately 'increased the workload on financial institutions in the assessment of loans' and that this has necessitated very significant investment to ensure that loan decisions are able to be made as quickly as possible and in line with responsible lending obligations. Mr Comyn observed that 'The time that that takes [to assess a loan] varies across institutions. I think it's less about the supply of credit and more about the process'. Mr Comyn observed that for institutions who have not automated, for example, expense verification and liability verification (as the CBA has done), the time taken to assess loans could be considerable and that this is 'causing frustration across both customers and particularly property developers'.

## Are more people being 'locked out' of loans than previously?

Asked to comment on how many more customers are being 'locked out' of loans, because of 'new responsible lending laws' than previously, Mr Comyn said that 'it's very hard to estimate' but that in his view it's less a question of responsible lending obligations themselves, and more a matter of the associated compliance processes taking time and causing frustration to customers as well as a function of lenders taking a more cautious approach in the current economic environment.

'Typically the frustration, to the extent that there is some, manifests around the time taken and perhaps the intrusiveness, from the customer's perspective, of the information that they're required to provide—the level of expense verification and interrogation. I think that is much more of a factor.' Mr Comyn also observed that in light of the current economic uncertainty, all institutions will be taking 'a more conservative view about people's income' and 'discounting unstable sources of income'.

Mr Comyn said that there 'is an abundant supply of credit available in Australia, by international standards, in terms of borrowing capacities and what individuals and multiple parties can borrow against'.

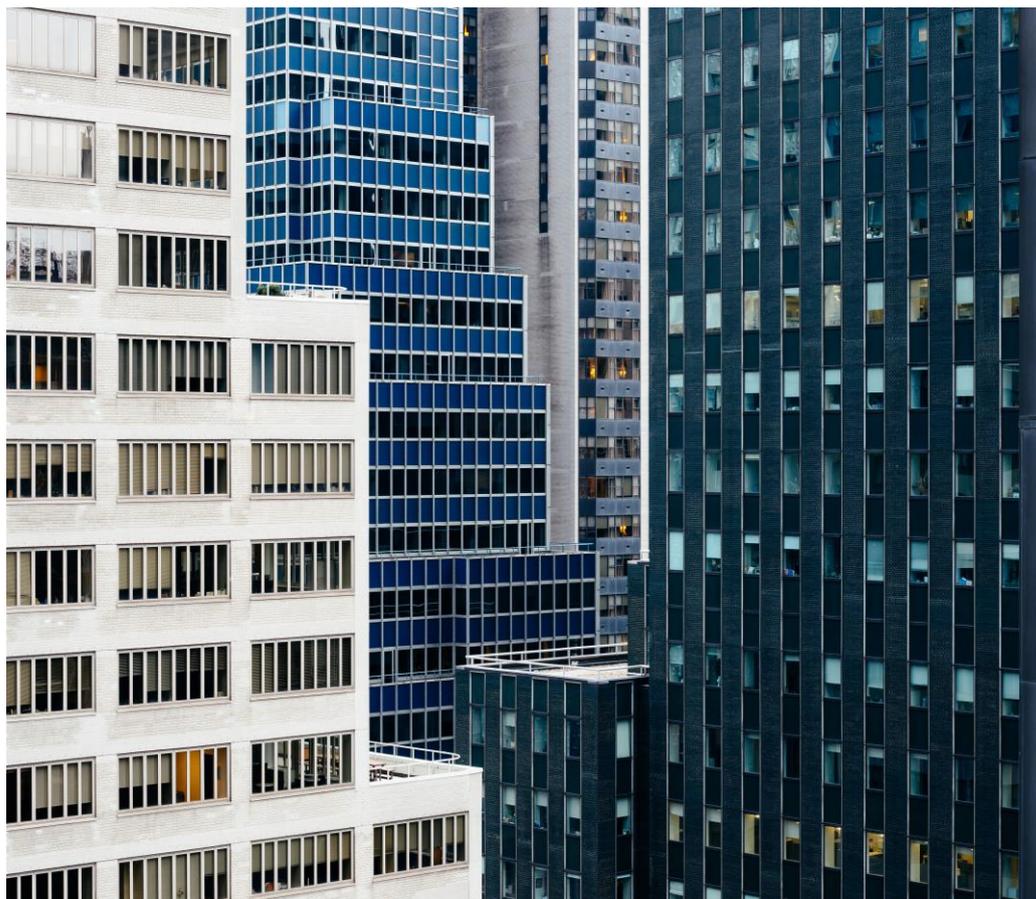
### Does more 'burdensome' regulation benefit larger banks with more sophisticated systems?

A number of questions to Mr Comyn concerned the issue of whether responsible lending obligations advantage existing and larger lenders.

Committee Chair Tim Wilson suggested that more 'burdensome'

regulation operates in practice to benefit larger players, with more sophisticated systems, noting that there appears to have been a 'drift' towards the CBA picking up mortgages from other players over the past few months. Mr Comyn said that the CBA's mortgage book has grown 4½% over the past year but did not comment on whether larger/more established banks are at an advantage.

Asked subsequently by Committee member Jason Falinski whether responsible lending obligations have 'become, through no fault of your own, a capacity for current providers of credit in the market to ensure that they have an advantage over people trying to enter the market. You have both data and systems in place to be able to do those processes very quickly, whereas new entrants to the market wouldn't have any of those leads. Is that an unfair statement?' Mr Comyn said that he 'wouldn't characterise it in that way, simply because I don't think it's a distinction between existing or new entrants. I think it is simply a case of the process having changed over time around responsible lending, particularly as it relates to housing'.



## The BNPL sector

A number of questions to CBA focussed on the investment the lender is making in Klarna and CBA's views on the sustainability of the buy now pay later (BNPL) sector.

The Committee heard that CBA has worked with Klarna to 'deliberately to set aside a set of standards for ourselves which, in some cases, differ from other buy-now pay-later providers' including 'thorough know your customer checks' and 'checking credit-reporting bureaus for evidence of any outstanding liabilities to make sure from our perspective that we believe it's responsible, even though responsible lending doesn't apply to this particular sector'.

On the question of the sustainability of the BNPL model CBA Deputy CEO David Cohen said that 'it remains to be seen... There are reasons why customers are using buy now pay later, insofar as access to credit goes—even though it's not referred to as credit it certainly looks a lot like credit to me. It's very effective and customers enjoy it. That's why you've seen such a large increase in buy now pay later as a function of the broader market. What level it continues to grow at remains to be seen'.

## Next public hearing

Representatives from Westpac and the NAB are set to appear before the Committee on [11 September](#).

[Source: Transcript, House of Representative Standing Committee on Economics, Australia's four major banks and other financial institutions: four major banks inquiry, public hearing 04/09/2020]

## Six month loan assessments commence: Banks embark on the 'largest ever customer contact process in the industry's history'

The Australian Banking Association (ABA) has released a [statement](#) flagging that banks are set to embark on the 'largest ever customer contact process in the industry's history' as they commence contacting 'at least' 450,000 customers whose temporary six month loan deferrals are set to expire in September and October.

According to the ABA of the 900,000 loans that had payments deferred because of the pandemic a relatively small proportion (13%) had already resumed repayments as at the end of July.

The ABA's statement includes a timeline for contacting the customers yet to resume repayments.

- 80,000 mortgages are due to be assessed by the end of September and 180,000 by the end of October.
- 65,000 business loans to small and medium businesses will be assessed by the end of September, and 40,000 by the end of October.

Loan deferral customers contacted by the banks will be presented with a range of options including:

- resuming repayments when their deferral period expires where this is feasible. According to the ABA, of the 900,000 loans that have had payments deferred, 13% had already resumed repayments as at the end of July.
- working with lenders to restructure or vary their loan, including temporarily switching to interest only payments for a period or extending the term of the loan
- a further four month deferral period, following an assessment of the customers circumstances. The ABA states that 'this will not be automatic'.

For those customers who are unable to pay their loan in the longer term, 'tailored assistance that addresses their needs' will be provided.

ABA CEO Anna Bligh said that the scale of the program has necessitated banks taking on additional staff to ensure that communication is effective. Ms Bligh said,

'The loan deferral measure offered to customers by Australia's banks has led to the largest ever customer contact process in the industry's history, with an additional 5000 new or redeployed staff working to ensure customers understand their options... Customers know what's best for them. It's the bank's job to set out all

the options and implications and ensure customers have the information and the time to make the right decision to suit their needs'.

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

## COVID-19: So far funds have paid out \$32.6bn 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 30 August.

- 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 30 August, superannuation funds received 52,000 applications (down from 59,000 the previous week).
- Of the applications received in the week to 30 August, 31,000 were initial applications bringing the total number of initial applications received to date to 3.1 million since inception of the scheme.
- 21,000 applications received in the week to 30 August were repeat applications, bringing the total number of repeat applications to 1.2 million since the inception of the scheme.
- Over the week to 30 August, superannuation funds made payments to 51,000 members worth \$0.38 billion (down from \$0.57 billion the previous week).
- Funds have made approximately 4.2 million payments since the inception of the scheme worth a total of \$32.6 billion. This figure represents 98% of applications received since inception of the scheme.

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

## Entirely affordable? ASFA has called on the government to proceed with scheduled increase to the superannuation guarantee

The Association of Superannuation Funds of Australia (ASFA) has [called](#) on the government to proceed with the scheduled increase in the superannuation guarantee, arguing that doing so is the only way to 'provide workers with a pay rise next year and help to address the structural imbalances that continue to occur between fat profits and flat wages'.

Citing Australian Bureau of Statistics National Accounts data showing that increases in total corporate profits during the June quarter have not been matched with increases in worker salaries/wages, ASFA CEO, Dr Martin Fahy said that increasing the superannuation guarantee would be affordable for the majority of companies, and serve to benefit employees.

'Once again we see clear evidence that the share of income accruing to business is ballooning while hard pressed workers face the bleak reality of weaker wages for longer. At \$1 a day per employee, the increase in superannuation is affordable for the majority of businesses and is now critical to allow workers to catch up, given they haven't seen a significant wage rise in years, and with little possibility of higher wages on the horizon.'

[Source: ASFA media release 02/09/2020]

## Industry Super Australia calls for the legislated increase in the superannuation guarantee to go ahead

Industry Super Australia (ISA) has released the results of [analysis](#) into the long-term impacts of the early release of superannuation scheme on retirement incomes and age pension entitlements. The report argues that

'without replenishing early release amounts total retirement incomes will be significantly lower and the long-term age pension costs borne by taxpayers could be more than twice the present value of the withdrawn early release amounts, the analysis shows. The promised super guarantee increase must proceed as legislated to help rebuild workers' retirement balances, as the spike in age pension expenditure would likely be funded by higher taxes'.

[Sources: Industry Super Australia media release 02/09/2020; Report: ISA Briefing Note: Long-term costs of the COVID early release of super scheme]

## COVID-19: Business interruption test case fast-tracked to the NSW Court of Appeal

The Insurance Council of Australia has issued a statement confirming that the business interruption test case seeking clarification around the operation of pandemic exclusions in business interruption insurance policies has been escalated to the Court of Appeal for hearing on 2 October.

ICA CEO Andrew Hall said,

'ICA legal representatives and the plaintiffs' solicitors provided a joint motion that the combined test case be moved to the NSW Court of Appeal and expedited. After reviewing the pleadings and the joint motion, Justice Hammerschlag determined the case was of sufficient importance that it should be moved. The ICA is pleased the case will be heard by the Court of Appeal on an expedited basis. The pandemic and resulting uncertainty have had a devastating impact on Australia, so we are pleased the test case hearing is progressing as quickly as possible, and a judgment can be delivered that provides greater clarity to customers, insurers and regulators in the treatment of pandemic-related claims'.

Mr Hall went on to reiterate that 'globally, insurers generally regard pandemics as uninsurable risks' and most insurers have 'never contemplated coverage for pandemics' in business interruption insurance policies.

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

### Related news: UK business interruption test case

The UK Financial Conduct Authority (FCA) brought a similar test case (which was heard at the end of July) with the aim of resolving uncertainty about insurers' liability for certain business interruption insurance policies. The FCA notes that Lord Justice Flaux 'expressed a hope that judgment would be available by the middle of September, although he made clear that this was not a binding indication'.

An overview of the proceedings, including trial transcripts is available on the FCA's website [here](#).

## ASIC has commenced proceedings in the Federal Court against an AFS licensee for alleged breaches of the best interests obligations under the Corporations Act

The Australian Securities and Investments Commission (ASIC) has commenced proceedings in the Federal Court against Dixon Advisory and Superannuation Services Ltd (Dixon Advisory) for alleged breaches of the best interests obligations under the Corporations Act 2001 (Cth).

### ASIC's case

ASIC's action relates to financial advices provided by Dixon Advisory to eight 'sample [retail] clients' between 2 September 2015 and 31 May 2019.

Broadly, ASIC alleges that in providing financial product advice to each of the clients that was personal advice within the meaning of s 766B(3) of the Corporations Act, Dixon Advisory representatives:

- did not act in the best interests of the client (in contravention of section 961B)
- did not provide advice that was appropriate to their clients' circumstances (in contravention of section 961G)

- did not give priority to their clients' interests when provided the advice in circumstances where the representatives knew/ought to have known that there was a conflict between the clients' interests and the interests of Dixon Advisory/entities associated with Dixon Advisory (in contravention of section 961J).

## Relief sought

ASIC is seeking declarations of contraventions and pecuniary penalties and costs against Dixon Advisory.

ASIC is also seeking orders that Dixon Advisory implement 'appropriate systems, policies and procedures' to ensure representatives comply with best interests obligations and that Dixon Advisory provide expert independent confirmation of compliance.

Further details of the allegations and the relief being sought are in the [Concise Statement](#) and [Originating Process](#).

## Response

In a statement acknowledging ASIC's action, Evans Advisory confirmed that it intends to defend the proceedings.

[Sources: ASIC media release 04/09/2020; Evans Dixon Ltd 04/09/2020]

## FASEA is consulting on proposed changes to recognition of prior learning requirements

FASEA is consulting on draft amendments to the Corporations (Relevant Providers Degrees, Qualifications and Courses Standard) Determination 2020 that would enable some advisers to be credited with additional 'recognition of prior learning'.

The draft amendments include:

- approval of historic degrees
- approval a number of current degrees and bridging courses
- approval of credit for coursework to attain a professional designation
- recognition of two credits for existing advisers who have completed both a relevant degree and a post graduate relevant degree

The deadline for submissions is 16 September 2019.

[Source: FASEA media release 02/09/2020; Draft proposed amendments]

## In Brief | APRA data shows ADI profits have fallen 23.5% on last year. APRA comments that 'despite ongoing challenges to profitability, bank financial positions remain sound due to strong capital and liquidity levels, support through various policy measures and signs of reduced risk appetite in residential mortgage lending'

[Source: APRA media release 08/09/2020]

# Risk Management

## Cybersecurity, Technology and Privacy

### Cybercrime is 'the most significant threat' facing Australian individuals/businesses according to the ACSC's latest annual cybercrime report

#### Key Takeouts

- The Australian Cyber Security Centre's (ACSC) responded to 2,266 cyber security incidents and received 59,806 cybercrime reports during the period 1 July 2019 to 30 June 2020
- The highest proportion of reported incidents involved commonwealth, state and territory governments (35.4% of reported incidents overall). Almost as many incidents targeted 'Australia's critical infrastructure sectors' eg electricity, water, health, communications and education (35% of incidents).
- The report comments that though fraud is the most common category of cybercrime reported (39.86%), ransomware poses the highest threat given that ransomware attacks require 'minimal technical expertise' coupled with the potential of ransomware attacks to 'cripple' core business functions.
- The report comments that many threats could be avoided or 'substantially mitigated' through better cybersecurity practices. For example through implementing the ASD's Essential Eight security controls and, through minimising the human error factor.

The Australian Signals Directorate's (ASD) Australian Cyber Security Centre (ACSC) has released its annual report outlining key cyber threats and statistics over the period 1 July 2019 to 30 June 2020.

#### Some Interesting Findings

- The ACSC considers cybercrime to be 'the most significant threat' facing Australian individuals/businesses in terms of overall volume and impact to individuals and businesses'. The report comments that the actual cost in dollar terms is difficult to quantify, because cybercrime is not always reported. However, the Australian Competition and Consumer Commission's (ACCC) Targeting Scams 2019 report, identified Australians lost over \$634 million to scams in 2019.
- The report found that 'malicious cyber activity against Australia's national and economic interests is increasing in frequency, scale, and sophistication'. The report attributes this increased risk to both the fact that malicious actors are becoming more adept and to the increasing use of new technology platforms and interconnected devices and systems which increase vulnerability to attack.
- Overall, the average number of cybercrime reports received per day over the period was 164 (one report every ten minutes). In total, ACSC responded to 2,266 cyber security incidents and received 59,806 cybercrime reports.
- Commonwealth, state and territory governments reported the highest number of incidents (35.4% of reported incidents overall). The report attributes this to the 'close working relationship' between governments and the ACSC and to governments willingness to report incidents.
- Incidents impacting 'Australia's critical infrastructure sectors' eg electricity, water, health, communications and education represented around 35% of the incidents responded to by the ACSC.
- Top three most common types of incident reported were: 1) 'malicious email' (phishing and spear phishing emails) (27%); 2) 'compromised system' (ie incidents where an adversary has accessed or modified a network, account, database or website without authorisation) ranked next most common (24.4% of incidents); and 3) 'citing report/indicator sharing' ranked third (17% of incidents).
- Pandemic-related scams: Between 10 and 26 March 2020, the ACSC received 45+ COVID-19-related cybercrime/security incident reports. The ACCC's Scamwatch received over 100 reports of pandemic-related scams. The report comments that malicious actors were able to rapidly adapt their phishing methods to take advantage of the pandemic.
- The three most common categories of cybercrime reported were: 1) 'fraud' (39.86%) eg investment, shopping or romance scams; 2) identity theft/misuse of personal information (32.4%); and 3) 'cyber abuse' (22.5%). The

report comments that though fraud is the most common category, ransomware poses the highest threat given that ransomware attacks require 'minimal technical expertise' coupled with the potential of ransomware attacks to 'cripple' core business functions.

- Severity of incidents reported: The ACSC categorises incidents on a scale of Category 1 (the most severe), to Category 6 (the least severe). During the period, the majority of incidents were categorised either as either moderate (Category 5: 36.5%) or substantial (Category 4: 33.3%). There was only one incident during the period, on 19 June 2020, that was identified as a category 1 incident as it involved the targeting of Australian governments and companies 'by a sophisticated state based actor'.
- The report comments that many threats could be avoided or 'substantially mitigated' through better cybersecurity practices. For example through implementing the ASD's Essential Eight security controls and, through minimising the human error factor. The report comments that 'many of the methods used by cybercriminals to steal personal and financial information can be easily mitigated through measures such as not responding to unsolicited emails and text messages, implementing multi-factor authentication and never providing another party with remote access to your computer. It is critically important that individuals and businesses understand the cyber threat and are taking active steps to mitigate the risks'.

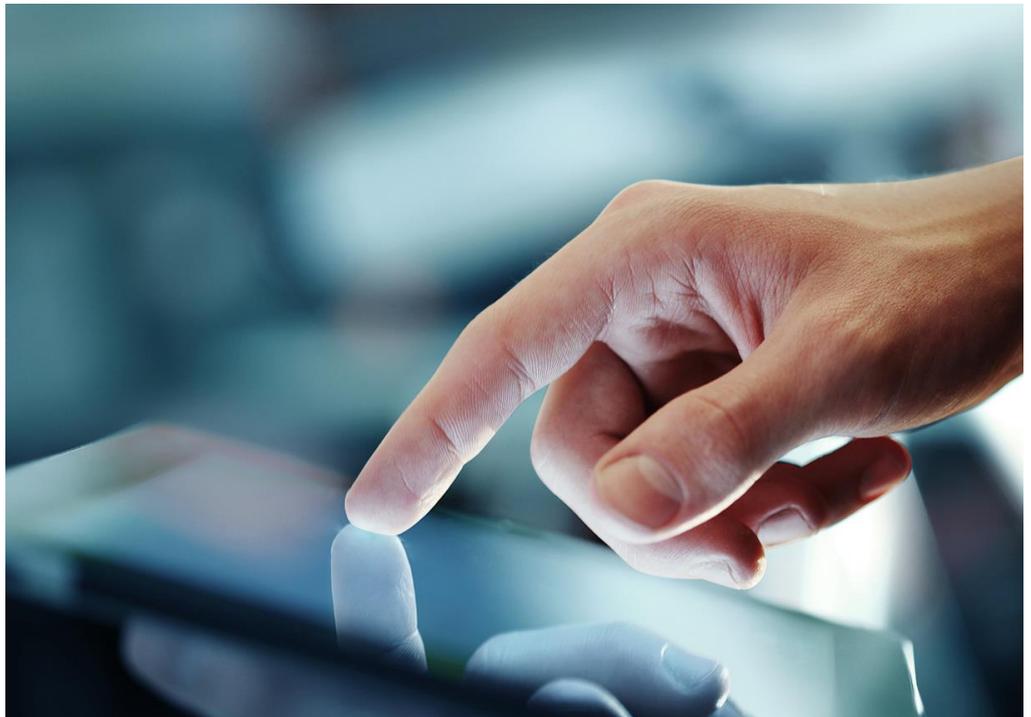
[Source: ACSC Annual Cyber Threat Report July 2019 to June 2020]

## Service NSW issues statement confirming 186,000 customers' personal information was exposed in a cyber- attack earlier in the year, customers 'at risk' are now being contacted

Service NSW has issued an update on its investigation into a cyber-attack targeting 47 Service NSW staff email accounts that commenced four months ago. According to the statement, Service NSW is now in the final stages of its analysis of the incident.

The statement confirms that:

- 3.8 million documents (738 gigabytes of data) were stolen during the attack.
- 186,000 customers have been identified as having 'data in the breach'.
- Service NSW is now 'working to notify' these customers.
- 'At risk' customers will be notified by hardcopy letter. The letter will include important information about the specific individual data accessed during the breach as well as 'clear steps to resolve any issues plus an individual case manager if needed'.



The statement goes on to confirm that the 'criminal attack' is being investigated by the NSW policy and a review is being undertaken by the auditor general of Service NSW's practices and systems. The review includes reviewing cyber security defences, practices, systems and education. In addition, Service NSW states that it has 'accelerated' its cybersecurity plans and the 'modernisation of legacy business processes to keep customer information as safe as possible'.

[Source: Service NSW media release 07/09/2020]

## Climate Risk

**In Brief | It's happening now: IAG has released updated modelling showing that climate change is already affecting the frequency and location of extreme weather events in Australia, and that the frequency of such events is set to increase into the future. IAG intends the information to be used to enable businesses, governments and the community to understand and plan for the impacts**

[Sources: IAG media release 09/09/2020; Report Summary; Full text of the report: Severe weather in a changing climate - 2nd edition]

## Other Developments

### **New Bill proposes to substantially 'update' AML offences and strengthen penalties**

The Crimes Legislation Amendment (Economic Disruption) Bill 2020 proposes to introduce a range of measures to both: a) 'improve and clarify Commonwealth arrangements targeting the criminal business model' and b) ensure that 'law enforcement has suitable tools to detect illicit financial flows through effective information-gathering, confiscate relevant assets and prosecute responsible individuals'.

Proposed measures include:

- Expanding and updating Commonwealth money-laundering offences 'to address the behaviour of modern money laundering networks and remove unnecessary obstacles to securing convictions and appropriate sentencing outcomes'
- clarifying the operation of the Proceeds of Crime Act (POC Act) in various ways for example, by clarifying that the Act permits courts to make orders confiscating the value of a debt, loss or liability that has been avoided, deferred or reduced through criminal offending.
- strengthening information-gathering powers including through introducing increased penalties for non-compliance
- expanding the Official Trustee in Bankruptcy's powers to deal with property, gather information and recover costs

The Bill was introduced into the House of Representatives on 2 September and referred to the Senate Legal and Constitutional Affairs Legislation Committee for report by 10 November 2020.

[Source: Crimes Legislation Amendment (Economic Disruption) Bill 2020]

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