Governance News

Weekly wrap up of key financial services, governance, regulatory, risk and ESG developments.

11 August 2021

Contents

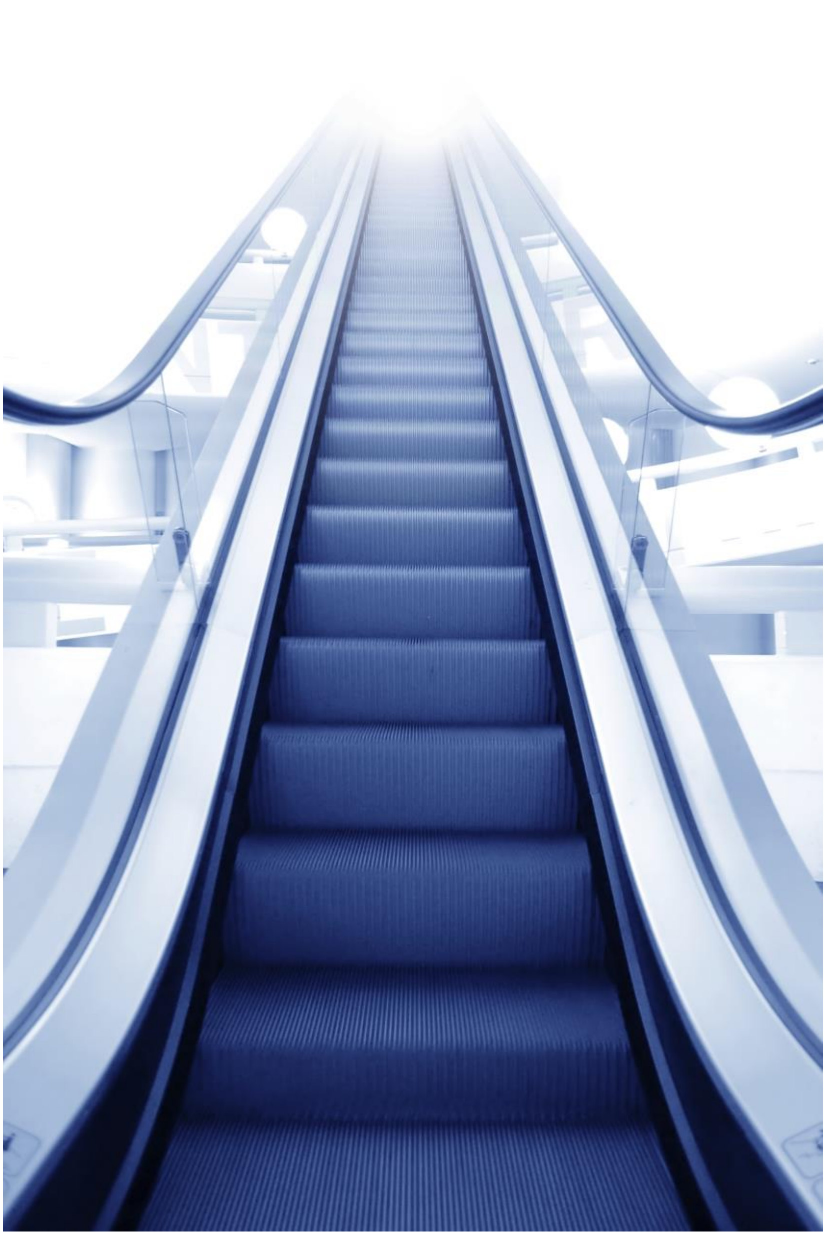
Diversity

Boosting diversity: SEC approves Nasdaq's proposed Listing Rules changes

Key Takeouts

- The changes are not mandatory: Approval of Nasdaq's proposal will mean that in scope companies will need to meet new minimum board diversity targets and disclosure requirements on a 'comply or explain' basis.
- Importantly, the exchange will not assess the substance or merits of explanations provided for not meeting new requirements under the rules.
- The new comply-or-explain requirements will not come into operation for some time.
- The decision to approve the rule was not unanimous – SEC Commissioners were divided on whether SEC should approve the changes
- The UK is considering introducing similar changes

The US Securities and Exchange Commission (SEC) has voted to approve a proposal by the Nasdaq to adopt new Listing Rules which will introduce new minimum diversity targets/disclosure requirements (on a comply or explain basis).



The full text of SEC's order is here.

Nasdaq has released a short statement welcoming the decision.

What's changing?

- The changes will require companies listed on Nasdaq's US exchange (on a comply or explain basis) to do two things:

– include at least two diverse directors on their board ie one director who self-identifies as a woman and one who self-identifies as either an underrepresented minority or LGBTQ+ (on a comply or explain basis).
– to publicly disclose board-level diversity statistics using a standardised template on an annual basis

Importantly the Nasdaq will not evaluate the substance/merits of a company's explanation.

- Flexibility in meeting the new rule:

– Smaller Reporting Companies and Foreign Issuers, are able to meet the new requirement by including two female directors.
– All companies with smaller boards (five or fewer directors) can meet the requirement by including one diverse director.

- Special purpose acquisition companies (SPACs) exempt:

– SPACs listed under IM-5101-2 are not required to provide disclosure information or to have, or disclose that they do not have, any minimum number of diverse directors until their business combination.

Transition arrangements

- The new comply-or-explain requirements will not come into operation for some time.
  - Nasdaq Global Select Market and Nasdaq Global Market companies will have until August 2023 to include at least one diverse director on their board, and until 2025 to include at least two diverse directors.
  - Nasdaq Capital Market companies will have until August 2023 to include at least one diverse director on their board and until 2026 to include two.
- Companies with boards including five or fewer directors will have until 2023 to include one diverse director.

Support for the proposal was no unanimous.

- SEC Chair Gary Gensler said that decision to approve the rules will 'allow investors to gain a better understanding of Nasdaq-listed companies' approach to board diversity, while ensuring that those companies have the flexibility to make decisions that best serve their shareholders'. Mr Gensler also stressed the value for investors in having access to comparable diversity data – 'investors are looking for consistent and comparable data when making decisions about their investments. I believe that our markets work best when investors have access to such information' he said.
- Separately Commissioners Allison Herren Lee and Caroline A Crenshaw also issued a statement emphasising the value from an investor decision making perspective, of having access to consistent, comparable, 'quality information' on the issue. The Commissioners expressed the hope that the rule change is a 'starting point' for improved diversity and transparency around diversity rather than 'the finish line', noting that there is more work to be done. For example, they suggest that the focus on increasing diversity may extend beyond boards to senior management and the broader workforce, and that the concept of diversity could be broadened to include other characteristics eg disability.
- Commissioner Elad L Roisman issued a statement confirming that he voted to approve the proposal in part only. That is, Commissioner Roisman voted to support Nasdaq's proposal to offer listed companies recruiting services to help identify a broader range of diverse candidates, but voted against the introduction of new disclosure targets/requirements for in-scope companies. His primary reason for voting against this part of the proposal, despite supporting the broad goal behind it, is that he considers it was not backed up with sufficient evidence to support SEC approval. For example, the proposal failed, in Commissioner Roisman's view, to demonstrate that increased transparency will increase investor protection/better serve investors' needs.
- Commissioner Hester M Peirce issued a statement outlining her reasons for strongly opposing the proposal. Broadly Commissioner Peirce considers that the proposal is inconsistent with and addresses issues outside the scope of the Securities Exchange Act 1934, is contrary to the public interest, and is 'offensive to important Constitutional principles.'

Related News: UK in consulting on implementing similar changes

- Building on existing diversity initiatives, the Financial Conduct Authority (FCA) is currently consulting on proposed changes to its Listing Rules to enhance transparency for investors on the diversity of company boards and executive management and incentivise companies to prioritise the issue. You can find further details of the proposed changes in Governance News 04/08/2021 at p7.
- If implemented in their current form, the changes will mean that in scope companies will need to disclose annually (on a 'comply or explain' basis): a) whether they have met minimum diversity requirements; and b) standardised data on the composition of their board and most senior level of executive management by gender and ethnic background.
- The due date for submissions to the consultation is 20 October 2021. The regulator plans that the proposed new Listing Rules would apply (once finalised later in the year) to accounting periods starting on or after 1 January 2022.

  [Sources: SEC order approving the changes 06/08/2021; SEC Chair Gary Gensler public statement 06/08/2021; SEC Commissioners Allison Herren Lee and Caroline A Crenshaw public statement 06/08/2021; SEC Commissioner Elad L Roisman public statement 06/08/2021; SEC Commissioner Hester M Peirce public statement 06/08/2021; FCA media release 28/07/2021; Consultation; Full text consultation paper: CP21/24: Diversity and inclusion on company boards and executive committees]

Shareholder Activism

Say on Climate: Origin is the latest in a line of ASX companies to grant shareholders an advisory vote

Key Takeouts

- Origin will give shareholders a non-binding advisory vote on the company's climate change reporting at the 2022 AGM becoming the sixth ASX listed companies to give shareholders a 'say on climate' vote.
- Origin has also released its annual review of industry association memberships. The purpose of the review is to identify the extent to which association's lobbying/policy/processes are aligned with the goals of the Paris Agreement/Origin's stated position. Origin has confirmed that it has not exited any association in FY21.
- The ACCR has welcomed Origin's 'say on climate' commitment, but has called on the company to toughen its emissions reduction targets, rule out development of any new coal, gas or oil deposits and reconsider its membership of some industry associations.

Say on Climate vote in 2022

- Origin Energy Limited (Origin) has joined AGL Energy, Oil Search, Rio Tinto, Santos and Woodside Petroleum in announcing that it will give shareholders a 'say on climate' vote.
- Origin will give shareholders a non-binding advisory vote on the company's climate change reporting at the 2022 AGM. The announcement makes no mention of whether this will be an annual vote, or whether it will be a one-off.
- Announcing the decision, Origin Chairman Scott Perkins said that the 'say on climate' vote will 'complement' Origin's existing engagement efforts with stakeholders on the risks/opportunities associated with climate change.

'More ambitious' climate targets

Mr Perkins added that Origin is continuing to 'progress work' on the development of 'more ambitious emissions reduction targets consistent with a 1.5 degree pathway'.

For context, Origin's current emissions reduction targets are as follows:

- 'Aim to' achieve net zero emissions by 2050
- Origin's science-based medium-term emissions reductions targets are to:
  - reduce Scope 1 and Scope 2 emissions by 50 per cent by 2032
  - reduce Scope 3 emissions by 25 per cent by 2032
- Origin also has a short-term emissions reduction target to reduce Scope 1 emissions by 10% on average over FY2021-23 (linked to executive remuneration).

Review of industry association memberships based on their alignment with Origin's stated climate strategy/position

Origin has also released its third annual review of industry association memberships and their respective positions on climate change and climate-related policies.

Origin did not exit any industry associations during FY 2021.

- **Continued membership of 'key industry associations':**
  - The company concluded that there was overall 'strong alignment of climate change positions' with key industry associations. Key industry associations include (among others): Australian Petroleum Production and Exploration Association (APPEA); the Business Council of Australia (BCA); the Australian Energy Council (AEC); the Queensland Resources Council (QRC).
  - The report notes that Origin did suspend its membership of the QRC during FY2021. However, membership was reinstated following changes to the QRC's policies/procedures on political lobbying.
  - Other key associations The AEC, APPEA and the BCA were also found to have strengthened their positions on climate change action and policy, including making explicit commitments to the Paris Agreement and net zero emissions by 2050.

- **Continued membership of 'secondary associations':**
  - Secondary associations include (among others): Australian Financial Markets Association (AFMA); Australian Hydrogen Council (AHC); Australian Institute of Energy (AIE); and the Australian Pipelines and Gas Association (APGA.
  - The report notes that 'several' of the secondary associations to which Origin belongs were assessed as 'partially aligned' with Origin's climate postiion on the basis that they do not 'explicitly support the Paris Agreement'. However, the report comments that Origin found 'no negative public comments on the Paris Agreement or the need for strong action on climate change across all key and secondary industry associations'.
  - The report explains that Origin considers that the benefits of membership 'justified the membership fees across all key and secondary industry associations. Accordingly, we renewed all memberships for financial year 2022'.

The ACCR has welcomed the say on climate commitment but has called on Origin to do more

Responding to Origin's announcement, the Australasian Centre for Corporate Responsibility (ACCR) welcomed Origin's decision to allow shareholders the opportunity to vote on the company's climate plans.

However, the ACCR also makes clear that it considers Origin's existing strategy to be inconsistent with its stated emissions reduction targets. The ACCR has called on the company to set more ambitious targets and to rethink its current strategy.

ACCR Director of Climate and Environment Dan Gocher said:

> 'Put simply, Origin's oil and gas expansion does not align with any of its commitments on climate. Origin continues to mislead shareholders by saying it will be accredited with a 1.5°C science-based target whilst it seeks to expand oil and gas production…The International Energy Agency's recently published Net Zero by 2050 report confirms that we cannot develop any new coal, gas or oil deposits if we are to limit global warming to 1.5°C above pre-industrial levels…Investors will expect Origin to deliver a credible climate transition plan ahead of its 2022 AGM. Origin will be expected to set targets for all of its Scope 3 emissions - including those from Australia Pacific LNG (APLNG) exports, which are currently excluded from its targets'.

Commenting briefly on Origin's continued membership of APPEA, Mr Gocher called on the company to rethink its membership.

> 'If Origin were genuine about its climate commitments, it would rip the bandaid off and end its association with industry groups that continue to advocate for fossil fuel expansion. Instead it sits idle and directly benefits from the gas subsidies that have been unlocked by aggressive lobbying.
>
> [Sources: Origin Energy media release 06/08/2021; Industry Association Review August 2021; ACCR media release 06/08/2021v]

Climate lobbying resolution: ACCR has filed a climate-lobbying resolution at BHP

The Australasian Centre for Corporate Responsibility (ACCR) has filed a shareholder resolution at BHP calling on the company to:

- strengthen its review of industry association membership, to ensure that the review identifies areas of inconsistency in associations policy positions/advocacy/lobbying efforts with the goals of the Paris Agreement;
- suspend membership of associations 'for a period deemed suitable by the board' where inconsistency is detected.

You can find the full text of the resolution and the ACCR's supporting statement are here.

Commenting on the resolution, ACCR Director of Climate and Environment Dan Gocher observed that currently BHP remains a member of a number of associations - the Minerals Council of Australia (MCA); the Australian Petroleum Production and Exploration Association (APPEA); the NSW Minerals Council (NSWMC); and the American Petroleum Institute (API) - whose activities are (in the ACCR's estimatation) not in alignment with the goals of the Paris Agreement.

> 'The advocacy by key BHP industry associations throughout the COVID-19 pandemic has been fundamentally at odds with the Paris Agreement's goals: demands for government support and subsidies, fast-tracked approvals for new fossil fuel developments, and an aggressive deregulation agenda…In 2020, 22.4% of shareholders voted for BHP to suspend membership of industry associations whose advocacy was misaligned with the Paris Agreement. Concerned shareholders will persist in holding BHP to account for the obstructive lobbying of its industry associations'.
>
> [Sources: ACCR media release 06/08/2021; Full text of resolution]

Institutional Investors and Stewardship

New House Committee on Economics inquiry into common ownership announced

On 29 July 2021, the House of Representatives Standing Committee on Economics commenced an inquiry into the 'implications of common ownership and capital concentration in Australia'.

Announcing the inquiry, Committee Chair Tim Wilson made clear that the focus will be on the 'high concentration of ownership of ASX listed companies by a small number of "mega funds"' and what the government considers to be the risks associated with this.

> 'We don't want a stock exchange where a hand full of "mega funds" make all the decisions, and ordinary investors are locked out and higher costs are paid by Australians. Some "mega funds" have already said that has their ownership increases they'd de-list public companies. Common ownership's flow-on risks higher prices and collusion, corporates imposing public policy agendas while bypassing democracy, and disempowering ordinary investors. The law shouldn't empower capital over citizens and that's what we'll be inquiring into…The Committee will investigate the impact of common ownership by institutional investors (e.g. banks, super funds, investment funds, hedge funds, etc.). This inquiry will shine a bright light "under the hood" of the ownership of the ASX today, and ensure that we update the law, regulations and regulators to address the challenges of the future so we empower citizens, not organised capital'.

In his letter of referral, Treasurer Josh Frydenberg expressed agreement with Committee Chair Tim Wilson that 'the consequences of capital concentration in our superannuation sector are well understood given the 'potential broader implications for investors and the economy'.

Scope of the Inquiry

Under the Terms of Reference the Committee will inquire into the following.

- 'The extent of capital concentration and common ownership of public companies, and its likely future trajectory in Australia;
- The influence of capital concentration and common ownership on markets, including on investment decisions, market behaviour, competition and any other relevant factors;
- The changing influence between individual investors and small funds, compared to larger funds, as a result of capital concentration and common ownership;
- Any related consequences that flow from capital concentration and common ownership, including international experiences;
- The role of regulators in responding to these consequences; and
- Policy responses to address these consequences, including by government, regulators and public companies.

The due date for submissions is 13 September 2021.

[Sources: House of Representatives Standing Committee on Economics Inquiry into the implications of common ownership and capital concentration in Australia]

In Brief | Stepping up engagement efforts and pushing specific action: Climate Action 100+ has launched a new initiative to accelerate decarbonisation efforts in specific industry sectors. The initiative will see the release of global 'sector' specific strategies for transition planning which will inform engagement efforts. The first Global Sector Strategy specifically for the steel industry has already been released. Global sector strategies for the Food and Beverage, Electric Utilities, Trucks and Diversified Mining sectors are planned to be released in the 'coming months'

[Source: Climate Action 100+ media release 04/08/2021]

Meetings and Proxy Advisers

Top Story | A welcome measure of certainty on meetings and electronic execution: TLA 1 Bill passes both Houses

We summarise the key reforms introduced by the Treasury Laws Amendment (2021 Measures No. 1) Bill 2021

Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 Bill (TLA 1 Bill) passed both Houses on 10 August 2021 having been amended in the Senate and now awaits Assent.

The Bill as passed, is substantially the same as the Bill originally introduced, with some key exceptions which we've highlighted below. You can find our summary of the Bill (as originally introduced) here.

The Bill will provide temporary relief

For context, the Bill ultimately does two things.

First, the changes in Schedule 1 temporarily enable companies to execute documents, hold meetings, provide notices relating to meetings and keep minutes using electronic means until **31 March 2022** (rather than the 15 September 2021 as originally proposed).

After this point, the government intends that permanent changes will be place. These changes are included in a separate (and as yet still draft) Bill that has not yet been introduced: [exposure draft] Treasury Laws Amendment (Measures for Consultation) Bill 2021: Use of technology for meetings and related amendments (summary here).

Importantly, if permanent changes are not in place when the changes in Schedule 1 expire, we will (in theory) not see a repeat of the legislative uncertainty around convening meetings and execution requirements that has prevailed since the expiration temporary relief in March this year as the Bill introduces new emergency relief powers for ASIC that will enable the regulator to grant short term relief on an individual or class basis. This is discussed in more detail below.

Second, the changes in Schedule 2 introduce permanent changes to existing continuous disclosure requirements. In broad terms, the changes will mean that all civil penalty proceedings brought under the continuous disclosure and misleading and/or deceptive conduct provisions, will need to establish that an entity or officer was at fault – ie that the entity or officer acted with 'knowledge, recklessness or negligence' - in order to establish a contravention.

The permanent introduction of a 'fault' element is expected to insulate companies and their officers from the threat of 'opportunistic' litigation, while ensuring the market is kept informed of material information – an approach the Treasurer has described as striking the right balance.

In a statement welcoming the passage of the changes to continuous disclosure requirements in particular, Australian Institute of Company Directors CEO and Managing Director Angus Armour said,

> 'This reform provides greater certainty for companies to make disclosures to the market, without the apprehension of speculative class actions challenging this disclosure with the benefit of hindsight, and that is in everyone's interest. We are hopeful that overtime these changes will also help to rebalance skyrocketing insurance premiums'.

Key amendments

Important changes to Schedule 1

- **Extension of relief:** As flagged above, the measures in Schedule 1 will apply until **31 March 2022**, rather than 15 September 2021 as originally proposed.
- **Election to receive documents in hardcopy only:** A further government amendment removed the requirement for companies and registered schemes to notify members of their rights to elect to receive documents in hard copy. The supplementary explanatory memorandum states that this is intended to ensure that the Bill 'does not impose onerous obligations on companies and registered schemes, particularly in the context of the ongoing disruptions caused by COVID-19'.

New Part 1 of the Bill: New (permanent) ASIC emergency relief powers

The Bill will also introduce new emergency relief powers for ASIC that will enable the regulator to grant temporary relief from certain Corporations Act requirements in exceptional circumstances (eg COVID-19). More particularly, ASIC will have the power to:

- Make a determination extending the timeframe for companies to hold an AGM on a class basis where the regulator considers that it 'may be unreasonable to expect the companies in the specified class to hold AGMs within the time required under section 250N because of a situation that is beyond the control of the companies in that class'. The supplementary explanatory memorandum explains that the new determination making power only applies to classes of public companies because there is already an individual relief power in section 250P of the Corporations Act.
- Allow companies or registered schemes, or a class of companies or registered schemes, to hold wholly virtual meetings (even where an entity or entities' constitution(s) do not expressly require/allow it) where ASIC considers that it would be unreasonable to expect them, due to circumstances beyond their control eg COVID, to hold a meeting a physical location.

  A point to note is that if the government's proposed permanent changes to meeting requirements are legislated in their current form, companies will have the option to hold meetings in hybrid form, but will only be able to hold wholly virtual meetings where this is expressly permitted/required in their constitutions.

  The supplementary explanatory memorandum observes that in practice ASIC's new emergency relief power will 'only be exercised by ASIC after the temporary relief provided by the Bill ends' as until then, 'all companies and registered schemes may hold wholly virtual meetings (even in the absence of ASIC exercising its emergency relief power)'.
- Grant relief on an individual or class basis, from requirements to give documents/a class of documents in hard copy and/or extend the timeframe for providing the document or class of documents where the regulator considers that may not be reasonable to expect compliance.

Importantly, relief granted by the regulator cannot be in place for more than 12 months after it commences.

The new powers are also **permanent** and will not sunset with Schedule 1 on 31 March 2022.

Schedule 2: Permanent (assuming certain requirements are met) relaxation of continuous disclosure requirements

Schedule 2 was amended in the Senate to include new requirements for:

- the Minister to commission an independent review of the operation of the amendments (in Schedule 2 only) within six months of the second anniversary of the commencement of Schedule 2
- The Minister to table the report of the review within 15 sitting days of receiving it
- The government making its response to the recommendations in the report publicly available within three months after the report is first tabled (at the latest)

If any or all of these requirements are not met within the required timeframes, then the changes to continuous disclosure laws introduced by Schedule 2 would 'sunset' (cease to operate). The effect of this would be that the changes would effectively be undone and the law would revert to its pre-TLA 1 state – it would be 'as if the amendments made by Parts 1, 2 and 4 of Schedule 2 to the amending Act had not been made'.

Timing

The amendments will generally take effect from the day after the Bill receives Assent.

Until this occurs, ASIC's temporary 'no-action' position on non-compliance with requirements around holding/convening electronic meetings (summarised here) is in place.

A 'bad day for retail shareholders': Passage of the TLA 1 Bill has not been universally welcomed

The Australian Shareholders' Association (ASA) has raised concerns about the impact of reforms that will be introduced by Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 Bill (TLA 1 Bill) (discussed separately above) will have on shareholders.

In particular, the ASA is concerned that the temporary changes in Schedule 1 (relating to meetings/electronic execution) though justified for a short period due to the disruption caused by the pandemic, will be in place for too long, and that ultimately 'some [changes] may not end up being temporary'.

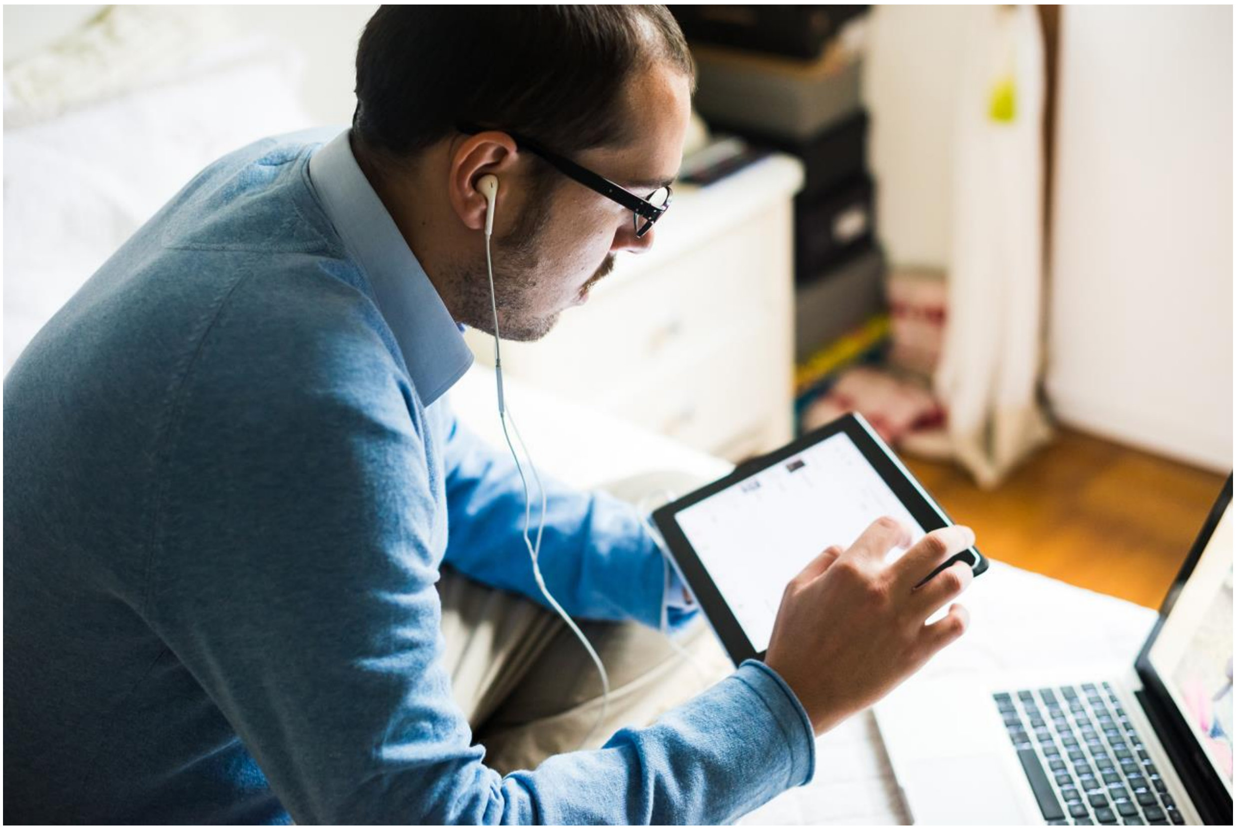
On the issue of virtual AGMs, the ASA's position continues to be that 'they are a mere shadow of the real thing' and negatively impact shareholders' ability to hold companies to account by enabling directors and executive to 'dodge questions'. The ASA asserts that hybrid AGMs are the best option.

On the question of enabling companies to communicate with shareholders using electronic means, the ASA has reiterated its position that shareholders should be able to opt in to receive all relevant information in hardcopy if they wish to do so, rather than receiving 'just a postcard that directs them to a website for further information'. This is particularly the case given that no all shareholders have internet access.

The ASA is also concerned about the relaxation of continuous disclosure requirements.

ASA Chair Allan Goldin commented,

> 'Previously, disclosure laws meant investors only had to prove a company had failed to disclose information to the market, regardless of intention. This meant all Directors had to be aware of what was happening as they were liable. For most Directors who are people with integrity trying to do their best this is not going to change their behaviour. However, for a small number of Directors, this change of liability to situations where a director has acted with "knowledge, recklessness, or negligence" opens the door to the "honest Idiot" defence. For those Directors who really don't care, all they do is tell the executives do what you want, just don't tell me until after, and just pay me each month. For the poor shareholder, this change will significantly limit the grounds on which a plaintiff can make a claim and it will be unlikely a case will be raised… The people who suffer will be the self-funded retiree and mum and dad investors who don't have special interest knowledge about the company's performance. Limits to class actions and disclosure rules will only deny justice to millions of shareholders in an effort to protect the director classes.'
>
> [Source: ASA media release 10/08/2021]



Regulators

SEC Chair calls on Congress to grant the regulator additional scope and resources to regulate cryptocurrency markets

Key Takeouts

- SEC Chair Gary Gensler has highlighted the lack of consumer protection framework around cryptocurrency markets and flagged this a significant potential risk
- Mr Gensler has underlined that the SEC will continue to oversee/regulate and take action to the extent currently possible under existing securities laws
- Mr Gensler has called on Congress to grant the regulator more scope and resources to be able to oversee the sector

Investor protection is key to SEC's mission

In a speech to the Aspen Security Forum, Securities and Exchange Commission (SEC) Chair Gary Gensler reiterated that investor protection is a 'core' aspect of SEC's mission. Mr Gensler cautioned that he considers that as things stand, the cryptocurrency market lacks sufficient investor safeguards.

> 'Right now, we just don't have enough investor protection in crypto. Frankly, at this time, it's more like the Wild West. This asset class is rife with fraud, scams, and abuse in certain applications. There's a great deal of hype and spin about how crypto assets work. In many cases, investors aren't able to get rigorous, balanced, and complete information. If we don't address these issues, I worry a lot of people will be hurt'.

Mr Gensler said that to the extent that digital assets of whatever stripe are securities, existing securities laws apply and underlined SEC's willingness to take enforcement action on this basis.

> 'Make no mistake: It doesn't matter whether it's a stock token, a stable value token backed by securities, or any other virtual product that provides synthetic exposure to underlying securities. These products are subject to the securities laws and must work within our securities regime. I've urged staff to continue to protect investors in the case of unregistered sales of securities.

However, Mr Gensler made clear that SEC's ability to regulate the cryptocurrency market is limited and that he considers this should change. Mr Gensler called on Congress to extend the scope of SEC's remit and to grant the regulator additional resources to do so.

> 'There are some gaps in this space, though: We need additional Congressional authorities to prevent transactions, products, and platforms from falling between regulatory cracks. We also need more resources to protect investors in this growing and volatile sector… Right now, large parts of the field of crypto are sitting astride of — not operating within — regulatory frameworks that protect investors and consumers, guard against illicit activity, ensure for financial stability, and yes, protect national security'.

Mr Gensler said that he considers that legislative priority should be given to: crypto trading, lending and DeFi platforms. In particular, he said that regulators would benefit from 'additional plenary authority to write rules for and attach guardrails to crypto trading and lending'.

[Source: SEC Chair Gary Gensler: Remarks Before the Aspen Security Forum 03/04/2021]

Financial Services

Top Story | Status update: Tracking progress against each of the Hayne Commission's 76 recommendations

The Financial Services Royal Commission's final report was publicly released on 4 February 2019. In the two (plus) years since its release a number of actions have been implemented in response – though in many cases, the changes have not yet been fully implemented or have been deferred due to COVID-19.

We have prepared a table briefly outlining the actions taken to date and/or the planned actions to be implemented in response to each of the Commission's 76 recommendations.

We will be updating the table regularly. The table was last updated on 11 August 2021. You can access the full text of the table here.

Changes to DDO flagged ahead of 5 October 2021 commencement

- The government has flagged its intention to introduce a number of amendments to 'achieve its intended operation' of the design and distribution (DDO) reforms due to commence on 5 October 2021.
- Treasury has released a brief policy paper providing a high level overview of the proposed changes.
- In the period before the changes are legislated, Treasury states that the Australian Securities and Investment Commission (ASIC) will implement temporary measures that will give effect to the government's policy intention as set out in the policy paper. ASIC is expected to consult with stakeholders prior to implementing any temporary measures
- The commencement date for DDO changes remains unchanged (5 October 2021).

Proposed changes

According to the two page policy paper, the proposed changes will:

- Make clear that the employees of licensees are not subject to their own separate set of DDO obligations as this was 'not an intended consequence of the regime'
- 'Clarify that margin lending to corporates is exempt from DDO obligations, consistent with the intention that all margin lending is to be exempt from DDO'.
- 'Ensure 31-day term deposits fall within the DDO regime which is consistent with Government's intention to capture all basic deposit products'.
- 'Provide consistency in the application of retail and wholesale investor definitions across the Corporations Act by ensuring it extends to the DDO regime'.
- 'Exempt foreign cash settled immediately from the DDO regime, as the risk for consumers is relatively low'.
- 'Exempt non-cash-payment facilities (NCPFs) from the DDO regime except for certain facilities, specifically credit and debit card facilities and stored value facilities – broadly NCPFs are not standalone services and provide a facility for consumers to make non-cash payments, posing lesser risk to them'.

The government considers that the changes are required in order to 'clarify the law, to ensure a consistent application of the law, and that the regime remains fit-for-purpose' in light of stakeholder feedback received in the lead up to the commencement of the reforms.

[Source: Treasury Consultation: Update on the Design and Distribution Obligations (DDO) regime; Policy Paper]

Hayne Implementation: Financial services breach reporting regulations registered

- **Context:** Schedule 11 to the Financial Sector Reform (Hayne Royal Commission Response) Act 2020 (the Act) implements the government's response to Hayne recommendations 1.6, 2.8 and 7.2 by: a) clarifying and strengthening the breach reporting regime for financial services licensees in the Corporations Act; b) introducing a comparable breach reporting regime for credit licensees in the Credit Act; and c) requiring financial services licensees and credit licensees to report serious compliance concerns about financial advisers and mortgage brokers respectively.

- The Financial Sector Reform (Hayne Royal Commission Response— Breach Reporting and Remediation) Regulations 2021 (Regulations):
  - prescribe civil penalty provisions and key requirements that are not taken to be significant (and therefore may not be reportable) under the relevant breach reporting regime if those provisions are contravened;
  - ensure certain breach reporting offences and civil penalty provisions are subject to an infringement notice; and
  - make minor and technical amendments, including updating references to the Corporations Act 2001 (Cth)
- The Regulations were registered on the 5 August 2021 and will commence 1 October 2021.

[Source: Financial Sector Reform (Hayne Royal Commission Response - Breach Reporting and Remediation) Regulations 2021]

Hayne implementation: Views sought on the operation of the (proposed) new single disciplinary body for financial advisers

Context

Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Bill 2021

- Hayne Recommendation 2.10 recommended the establishment of a single disciplinary body for financial advisers and the introduction of a new requirement for all financial advisers who provide personal financial advice to retail clients be registered.
- The Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Bill 2021 (currently before the Senate (the Bill)) proposes to implement the government's response to this recommendation. Among other things, the Bill proposes to: a) expand the role of the Financial Services and Credit Panel (FSCP) within the Australian Securities and Investments Commission (ASIC) to operate as the single disciplinary body for financial advisers; b) introduce additional penalties/sanctions for financial advisers who have breached their obligations under the Corporations Act 2001 (Cth); and c) introduce a new two stage registration system for financial advisers. You can find a brief summary of the Bill in Governance News 30/06/2021 at p15
- Regulations to support the implementation of the Bill, including the operation of the FSCP, have not yet been consulted on. The government intends to consult on draft Regulations 'later this year'.

Views sought: Single Disciplinary body

On 6 August 2021, the government released a policy paper seeking views on two matters to be covered in Regulations to support the implementation of the Bill.

These are:

- the circumstances when ASIC **must** convene the single disciplinary body (FSCP) to determine a disciplinary matter
- the types of administrative sanctions made against a financial adviser that must be included on the Financial Advisers' Register.

Proposed approach

Circumstances where ASIC must convene an FSCP

If legislated in its current form, the Bill will provide that ASIC may convene one or more FSCPs in certain circumstances and further, that the regulator must convene a panel in circumstances to be prescribed in Regulations (if any).

It's proposed that the Regulations will provide that ASIC **must** convene an FSCP if the following three criteria are met.

- ASIC 'reasonably believes that the relevant provider has contravened a restricted civil penalty provision, or a circumstance prescribed in section 921K of the Bill exists or has occurred'; and
- ASIC does not propose to exercise and has not exercised its powers under the Corporations Act 2001 (Cth) against the relevant provider for the matter (eg by making a banning order); and
- the contravention or circumstance:
  a) 'has resulted in, or is likely to result in material loss or damage to clients;
  b) has resulted in, or is likely to result in a material benefit to the relevant provider;
  c) affects the suitability of the person to provide personal advice to retail clients in relation to relevant financial products;

d) involves dishonesty or fraud;
e) involves the provision of financial product advice to retail clients without being registered;
f) involves the provision of financial product advice to retail clients without meeting the education and training requirements (other than the requirements for continuing professional development) in section 921B of the Corporations Act;
g) involves the provision of a Statement of Advice by a provisional relevant provider that has not been approved by a supervisor required under subsection 921F(4) of the Corporations Act; o
h) is a serious or repeated breach'.

Circumstances where ASIC may not convene an FSCP

It's proposed that ASIC may not convene an FSCP where the breach is a breach of:

- continuing professional development requirements;
- the Code of Ethics;
- the following provisional relevant provider requirements:
  – to ensure that appropriate supervision is provided to a provisional relevant provider;
  – that a supervisor must ensure a retail client is informed about the provisional relevant provider;
  – that a provisional relevant provider must not obstruct or hinder a supervisor of the provisional relevant provider in ensuring that appropriate supervision is provided to the provisional relevant provider.

It's further proposed that the following matters under section 921K also may not result in an FSCP being convened:

- a contravention of a financial services law (other than those specified in the Regulations);
- the person has been involved in another's contravention of the financial services law; and
- being twice linked to a refusal or failure to give effect to an AFCA determination.

However, it's proposed that where these breaches otherwise meet the three criteria requiring ASIC to convene an FSCP (outlined above) then ASIC will be required to convene a panel.

A balanced approach?

The policy paper observes that stakeholders raised concerns (during the consultation on the Bill in draft form) that on 'the mandatory convening of panels for alleged misconduct where ASIC does not take other disciplinary action may lead to a large volume of matters being referred to the FSCP'. At the same time, the policy paper acknowledges that Commissioner Hayne intended that FSCPs would not be focussed primarily on serious misconduct, but instead consider a broader range of issues.

The policy paper states that the proposed approach seeks to 'find a balance between lowering the number of matters that require an FSCP to be convened (thereby, reducing cost and time pressures on ASIC and the FSCP) while ensuring that the FSCP considers a broader range of matters so that minor misconduct does not go unaddressed'.

Six specific questions for feedback'

The policy paper includes six specific questions for feedback all of which relate to proposed approach to the convening of FSCPs set out above. The questions are as follows.

- Whether the criteria set out above should include 'other specified breaches of the law such as other restricted civil penalty provisions or circumstances prescribed in section 921K of the Bill'
- Whether the proposed criteria should be linked to the 'significance test' in section 912D in the Financial Sector Reform (Hayne Royal Commission Response) Act 2020). The policy paper comments that the effect of this would be that every breach reported by a licensee to ASIC would then be required to be referred to the FSCP, if ASIC does not take/propose to take action. Complaints received by the public would also be subject to the 'significance test' in the breach reporting regime.
- Whether the terms 'serious' and 'repeated breach' should be defined in the Regulations and, if so, how they should be defined.
- Whether a definition of 'serious' should be drafted to entail consideration of certain factors such as whether there has been material loss or damage to clients; the benefit gained by the relevant provider and whether there have been repeated breaches of a similar nature should be included in the definition of 'serious'.

- Whether a repeated breach should include similar breaches that have occurred on two or more occasions and in a specific timeframe. The policy suggests that this could be a 12 month timeframe.
- Whether the proposed criteria in c) above, should specify breaches that may affect the suitability of a person to provide financial product advice. It's suggested that this could include that the person is not a fit and proper person taking into account the fit and proper criteria in the Bill, or that the person has been involved in conduct that is dishonest or fraudulent.

Publishing the details of sanctions on the Financial Advisers Register

If legislated in its current form, the Bill will not enable the FSCP discretion to determine which sanctions should be included on the Financial Advisers Register. In addition, as currently drafted where a disciplinary action/sanctions are published on the Financial Advisers Register they will remain there permanently, unless they are subsequently revoked by the FSCP.

It's proposed that Regulations will require that the following sanctions must be included on the Financial Advisers Register, including for first time offences.

- a written direction by the FSCP to undertake specified training;
- a written direction by the FSCP to receive specified counselling;
- a written direction by the FSCP to receive specified supervision;
- a written direction by the FSCP to report specified matters to ASIC; or
- a written registration suspension or prohibition order by the FSCP.

It's proposed that written warnings or reprimands issued by ASIC or the FSCP will not be included on the Financial Advisers Register.

The policy paper puts forward no specific questions in relation to the proposed approach to publishing information on the Financial Advisers Register.

Proposed timing

- The due date for submissions is 20 August 2021.
- The government plans that the Regulations (once finalised, and subject to the passage of the Bill) will come into force on 1 January 2022.

[Sources: Treasury consultation: Single Disciplinary Body; Policy Paper; Attachment A: Disciplinary Process – ASIC and the FSCP]

Hayne implementation: Regulations setting out exceptions to anti-hawking provisions registered

- **Context:** Schedule 5 of the Financial Sector Reform (Hayne Royal Commission Response) Act 2020, implements the government's response to Hayne recommendations 3.4 and 4.1 in relation to the hawking of financial products. Relevantly, Schedule 5 to the Financial Sector Reform (Hayne Royal Commission Response) Act 2020 provides that a person cannot offer to sell or issue a financial product to a consumer unless the offer is made in the course of, or because of, unsolicited contact with the consumer.
- **New regulations:** Schedule 1 of the Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021 amend the Corporations Regulations 2001 (Cth) to:
  - introduce exceptions to this prohibition in circumstances 'where a consumer is expected to have enough knowledge to adequately assess the suitability of the product or where another part of the law already provides a consumer with adequate protection from being hawked a financial product'
  - repeal a number of existing exceptions to the hawking prohibition which 'curtail or reduce the effectiveness of the prohibition and increase the risk of consumer harm'.
- The regulations were registered on 6 August 2021 and will commence on 5 October 2021.

[Source: Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021]

Your Future, Your Super Regulations registered

Regulations to support the implementation of reforms introduced by the Treasury Laws Amendment (Your Future, Your Super) Act 2021 (YFYS Act) have been registered.

- Treasury Laws Amendment (Your Future, Your Super - Single Default Account) Regulations 2021: The Regulations support the amendments introduced by Schedule 1 of the YFYS Act by setting out the requirements that a fund must meet to be a stapled fund and procedural matters relating to requests to and responses from the Commissioner of Taxation about stapled funds.
- Treasury Laws Amendment (Your Future, Your Super - Addressing Underperformance in Superannuation) Regulations 2021: The Regulations include amendments that support implementation of Schedule 2 to the YFYS Act by specifying among other things: a) when the Australian Prudential Regulation Authority (APRA) must conduct the annual performance test, b) which products are subject to the test and the requirements for the test; c) the circumstances where products are to be treated as combined for the purposes of the YFYS Act; d) the form/content requirements for the notice that a trustee is required to give beneficiaries who hold a product that has failed the performance test; e) the circumstances where APRA may lift a prohibition on a trustee from accepting new beneficiaries into an underperforming product; and f) the formulas to be used as a 'basis for, or methods for, ranking Part 6A products, under the amendments in the YFYS Act' (enabling the implementation of the YourSuper comparison tool). The amendments relating to the new annual performance test and supporting implementation of the comparison tool apply in relation to MySuper products on and after 1 July 2021 and in relation to other classes of beneficial interest in a regulated superannuation fund specified in the regulations on and after 1 July 2022. The comparison tool will cover MySuper products.

  In a media release announcing the registration of the regulations, Minister for Superannuation Jane Hume and Treasurer Josh Frydenberg commented briefly on the final performance test methodology and its expected impact. They state:

  > 'The final performance test methodology will see the administration fee component of the test based on the administration fee charged by the product over the most recent financial year, benchmarked against peers. This approach for the performance test addresses historical anomalies, including with respect to millions of multiple unintended and inactive accounts, and will create a strong incentive for superannuation funds to reduce fees in order to avoid failing the test. In doing so, this change will enable the reforms to deliver immediate benefits to consumers in the form of lower fees. This builds on previous changes to strengthen the performance test including ensuring that administration fees are part of the performance test and by adding Australian unlisted infrastructure and unlisted property as specific asset classes covered by the performance test. The annual performance test will protect members from poor outcomes. Funds will be required to notify members if they fail the test and persistently underperforming products will be prevented from taking on new members. Members will be notified by 1 October 2021 if their fund fails this test'.

- Superannuation Industry (Supervision) Amendment (Your Future, Your Super - Improving Accountability and Member Outcomes) Regulations 2021: Schedule 1 of the Regulations prescribe the information that must be provided with a notice for an annual members meeting. These requirements apply in relation to an annual members' meeting for each year of income that ends on or after the commencement of the schedule. Schedule 2 to the Regulations removes an exception to the revised prohibition influencing employers.

  [Sources: Treasury Laws Amendment (Your Future, Your Super - Single Default Account) Regulations 2021; Treasury Laws Amendment (Your Future, Your Super - Addressing Underperformance in Superannuation) Regulations 2021; Superannuation Industry (Supervision) Amendment (Your Future, Your Super - Improving Accountability and Member Outcomes) Regulations 2021; Joint media release Treasurer and Minister for Superannuation, Financial Services and the Digital Economy 05/09/2021]

ASIC's review of the first round of super fund annual members' meetings found there is scope to improve members' meeting experience

- The Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Act 2019 introduced the requirement for superannuation trustees to hold annual members' meetings
- The Australian Securities and Investments Commission (ASIC) has released the findings of its first review of a sample of 24 superannuation funds' annual members' meetings. ASIC states that the sample included a mix of industry, retail, corporate and public sector funds of varying sizes.
- The meetings were conducted between October 2020 and March 2021.

Key findings

- ASIC's review did not identity 'significant failures by the funds to comply with the legislated obligations that were in the scope of the review'.
- However, ASIC considers that there is room for trustees to improve their communications with members and to improve members' ability to ask questions at meetings.

Good practice examples

ASIC has called on trustees to consider the following good practice examples, which the regulator considers may improve members' meeting experience.

- Provide clear information to members about how to submit questions prior to and during the meeting eg through meeting materials and on the fund's website. ASIC suggests that this measure 'will help give members the confidence to ask questions'.
- Share Q&A with the broader membership of the fund. To give all members (including those who did not attend the meeting) 'insights into their fund' ASIC suggests that funds publish a document capturing all the questions asked and answers provided at the meeting, in a document on their website alongside the meeting minutes.
- Make available a video recording of the meeting in addition to the minutes and notify members of where they can access this information eg 'through alternate communication channels such as e-newsletters or social media'.

Key themes in the questions raised by members

- ASIC observed, based on the questions asked by members, that members were most interested in the following issues: a) cybercrimes; b) ESG considerations; c) fund performance/fees; d) the impact of the COVID-19 pandemic; and d) the superannuation guarantee.

  [Source: ASIC media release 06/08/2021]

COVID-19: ASIC review of managed funds' illiquid asset valuation practices concludes there is no need to adjust existing regulatory settings

The Australian Securities and Investments Commission (ASIC) has announced the findings of a review into managed funds' illiquid asset valuation practices.

ASIC undertook the review to assess whether the current regulatory settings for the valuation of illiquid assets are adequate to protect members' interests in times of heightened market volatility (for example, the early stages of the COVID-19 pandemic).

The review included 10 fund managers. The review included listed and unlisted registered schemes targeted at retail and wholesale investors. It covered direct real property, mortgage, infrastructure, private equity, private debt and hedge funds.

The review was based on data collected between 1 March 2020 and 'early November 2020'.

Key Findings

The headline finding is that 'even during the market volatility of 2020…the illiquid-asset valuation practices [of the funds reviewed was]…robust, timely and consistent with ASIC guidance and industry standards'. Accordingly, ASIC considers that there is no need to adjust existing guidance on valuations for managed funds.

More particularly, ASIC concluded that the REs reviewed:

- were responsive to the increased valuation risks during the review period
- continued to provide timely valuations of their illiquid assets, including by increasing the frequency of valuations, expanding the sources of information to benchmark valuations and assumptions
- appropriately revalued illiquid assets downwards and upwards as appropriate
- continued to be able to obtain and rely on external valuations
- had adequate arrangements to manage conflicts of interest

ASIC found that poor practice in valuation was limited to minor inconsistencies between internal policy and compliance plans.

Four 'better practices'

The review identified the following four examples of better valuation practices:

- 'close board supervision of valuation processes and involvement in the adoption of the external valuations
- segregation of roles, involvement of independent committees and the use of multi-level review processes for internal and external valuations to ensure the accuracy of valuations and to support a robust conflicts-of-interest framework;
- recognition of conflicts in valuation processes as a standing organisational conflict and addressing these in compliance frameworks to ensure robustness and independence in the valuation process; and
- clearly defined valuation frequencies and trigger points (such as percentage variation of internal valuation compared to the last external valuation) for external valuations to take place'.

ASIC has called on REs to review their existing practices against these examples and to adopt better practices as applicable.

ASIC has also underlined that REs should ensure that the 'valuation practices in their policies are consistently reflected in their compliance plans and the policies reviewed regularly to ensure they remain adequate'.

[Source: ASIC media release 10/08/2021]

Major financial institutions have paid $1.86 billion in financial advice-related compensation according to ASIC

- The Australian Securities and Investments Commission (ASIC) has announced that as at 30 June 2021, six of Australia's largest financial institutions (AMP, ANZ, CBA, Macquarie, NAB and Westpac) had paid or offered $1.86 billion in compensation for financial advice related misconduct. Of this total, $620.9 million was paid or offered between 1 January 2021 and 30 June 2021.
- You can find a table providing details of the payment made/offered by each of the institutions as at 30 June 2021 here.
- The compensation relates to issues identified through two ASIC investigations see: Report 499 Financial advice: Fees for no service (REP 499) and Report 515 Financial advice: Review of how large institutions oversee their advisers (REP 515).

[Source: ASIC media release 05/08/2021]

Changes to capital adequacy prudential standard finalised

Following two rounds of consultation and engagement, the Australian Prudential Regulation Authority (APRA) has released the final revised Prudential Standard APS 111 Capital Adequacy: Measurement of Capital (APS 111), setting out detailed criteria for measuring authorised deposit-taking institutions' (ADIs) regulatory capital.

APRA states that the 'key revisions' to APS 111 are intended to: a) reinforce financial system resilience; b) promote simple and transparent capital issuance; and c) clarify certain aspects of APS 111, including provision of additional technical information to assist ADIs in issuing capital instruments.

The revised APS 111 will come into effect from 1 January 2022.

[Sources: Prudential Standard APS 111 Capital Adequacy: Measurement of Capital (APS 111); APRA Letter to ADIs: Final revised Prudential Standard APS 111 Capital Adequacy - Measurement of Capital 05/08/2021; APRA media release 05/08/2021]

APRA publishes further information to assist entities to prepare for APRA Connect

- On 6 August 2021, the Australian Prudential Regulation Authority published further information to assist entities in preparing for APRA Connect ahead of the 13 September 2021 'go live' date.
- APRA reminds all entities to prepare for APRA Connect production go-live and nominate their initial Regulatory Reporting Administrator via the D2A form RRA_PROD: APRA Connect nomination for 13 September go-live in readiness for production.
- The first regulatory data collections to be introduced in APRA Connect are the Superannuation Data Transformation collections, due in September 2021 and Private Health Insurance (PHI) Reform (HRS 605.0), due in October 2021.

[Source: APRA media release 06/08/2021]

In Brief | ASIC has announced that between 1 January 2021 and 30 June 2021, it has cancelled or suspended 24 Australian credit licences for failure to comply with the requirement to be a member of AFCA

[Source: ASIC media release 09/08/2021]

In Brief | Significant room for banks to improve compliance with the Banking Code's guarantee provisions: The Banking Code Compliance Committee has released a report outlining 23 recommendations aimed at improving industry practice across the Banking Code's guarantee provisions following a compliance review. The BCCC has said it expects all banks to review their practices and has flagged its intention to follow up with Code subscribers for updates on the steps being taken to implement the report recommendations

[Sources: BCCC media release 11/08/2021; Full text report]

In Brief | COVID-19 lockdown support: The ABA has issued a reminder to customers to contact their lender if they are experiencing financial hardship. According to the ABA, more than 20,0000 customers have received hardship assistance during recent lockdowns, including 15,000 repayment deferrals on home and business loans loan deferrals

[Source: ABA media release 06/08/2021]

Insolvency and Reconstruction

Consultation: Views sought on the potential introduction of an automatic moratorium on credit claims during formation of a creditors' scheme

As part of its broader insolvency reform agenda, the government has released a consultation paper seeking views on potential options to improve the operation of creditors' schemes. The options put forward in the paper are limited to creditors' schemes affecting financially distressed companies.

Among other things, the consultation paper seeks views on the potential introduction of an automatic moratorium on credit claims during formation of a creditors' scheme, and how the change could/should be implemented.

Rationale for the introduction of an automatic moratorium

The consultation paper states, in line with the Productivity Commission's previous recommendation, that the measure 'may enhance the utility of schemes by allowing a company and its creditors the breathing space to create a binding agreement to ensure that restructure of economically viable companies is not disrupted by a minority of creditors'.

Specific questions for feedback

The consultation paper includes a number of specific questions around this potential change. These questions include (among others):

- whether an automatic moratorium should apply from the time that a company proposes a scheme of arrangement
- whether the automatic moratorium should apply to debt incurred by the company in the automatic moratorium period
- whether the proposed moratorium should be modelled on the moratorium applied during voluntary administration. If so, whether there are any adjustments needed to account for the scheme context.
- Whether the court should be granted power to modify or vary the automatic stay.
- When the proposed automatic moratorium should commence and terminate and how long it should last.
- whether additional protections against liability for insolvent trading are needed to support the proposed automatic moratorium
- whether and what additional safeguards should be introduced to protect creditors who extend credit to the Company during the automatic moratorium period

Input is also sought on whether other improvements to schemes of arrangement could be made.

Timing: The due date for submissions is 10 September 2021.

[Source: Treasury Consultation Improving schemes of arrangement to better support businesses]

Risk Management

Climate Risk

Top Story | The science is in – so what now? Implications of the new IPCC report for corporate and government decision-makers

The IPCC has released its landmark 6th Assessment Report on the physical impacts of climate change. The report's findings are highly significant for both government and corporate decision-makers.

MinterEllison has published an article summarising the key takeaways from report for government and corporate decision-makers, and insights into the implications for governance, strategy, risk management and oversight.

You can access the full text here

AIST suggests three improvements to APRA's draft climate guidance

- **Context:** The Australian Prudential Regulation Authority's (APRA) consultation on draft climate risk guidance – draft CPG 229 Climate Change Financial Risks - closed on 31 July 2021. The draft TCFD-aligned guidance is targeted at all APRA-regulated entities. APRA has indicated that it expects final guidance to be released 'before the end of 2021'. You can find a high level overview of the key takeaways in Governance News 28/04/2021at p10.
- **The Australian Institute of Superannuation Trustees'** submission to the consultation expresses 'support' for the draft guidance, but recommends three suggested improvements.
- **Three suggested improvements**:
  - Broader terminology, less 'skewed' to banks/insurers: That the terminology be 'broadened to include terms such as asset allocation and investment strategy to reduce ambiguity amongst superannuation funds'
  - Scenario analysis: The submission suggests that 'a 1.5-degree scenario should be specifically identified given its relevance and the Guidance should highlight the importance of transition risks as well as physical risks. Social impacts associated with a disorderly transition should also be referenced'.
  - Definitions of short and long term: The AIST suggests that the guidance should include a 'definition of short and long term…which indicates if it is in alignment with the timeframes for investment objectives in the majority of MySuper and other products'.

  [Source: AIST submission draft APRA guidance: CPG 229]

Other Developments

Respect@Work implementation: Committee paves the way for the passage of the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021

Context

- The Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (summarised in Governance News 30/06/2021 at p21) was introduced by the government into the Senate on 24 June 2021 and was referred to the Senate Education and Employment Legislation Committee for report by 6 August 2021.
- Broadly, if passed in its current form the Bill would:
  - implement the government's response to the Australian Human Rights Commission's (AHRC's) Respect@Work recommendations 16, 20, 21, 22, 29, and 30 (consistent with the government's implementation roadmap).
  - vary the existing entitlement to compassionate leave in the Fair Work Act to include miscarriage. This would enable an employee to take up to two days of paid compassionate leave (unpaid for casuals) if the employee or the employee's partner (spouse/de facto partner) has a miscarriage.
- In its submission to the Committee (summarised in Governance News 14/07/2021 at p24), the Fair Work Commission (Commission) asked for more time and resourcing to implement the proposed extension of the anti-bullying jurisdiction, which will enable the Commission to make stop sexual harassment orders. Specifically, the

Commission requested that the commencement of the reforms, be pushed back by two months from the day of Assent, rather than commencing the day after Assent.

- In its submission to the consultation (summarised in Governance News 14/07/2021 at p25), The Australian Human Rights Commission (AHRC) called for 11 changes to be implemented to 'further strengthen, simplify and streamline the laws dealt with by the Bill', before it is passed including that 'necessary legislative amendments be made to clarify that victimisation under all four federal discrimination Acts can form the basis of a civil action for unlawful discrimination'.

Committee report recommends the Bill be passed (with some changes)

The Committee recommended that the Bill be passed, noting that there was 'general support for the passage of the bill from stakeholders, including from industry, employer and employee representative groups, and state and territory governments'.

The Committee further recommended that:

- Consistent with feedback from the Fair Work Commission, the commencement date of the amendments that extend the anti-bullying jurisdiction of the Fair Work Commission be deferred for a minimum of two months after the Bill receives Assent.
- Consistent with the AHRC's recommended change, the Committee recommended that the Bill be amended to clarify that victimisation under the Disability Discrimination Act 1992, Racial Discrimination Act 1975, and the Age Discrimination Act 2004, can also form the basis of a civil action for unlawful discrimination.

Scope of the Bill

Commenting briefly on that fact that many submissions raised concerns that the Bill does not address all of the recommendations in the Respect@Work report, the Committee states that it is 'comforted by the department's advice that the current bill does not represent the entirety of the government's response' and that consideration will be given to implementation of a number of other recommendations through 'improvements to the WHS framework'.

Labor and Greens views

Labor and Greens senators recommended further amendments including among others, that the Bill be amended to implement Respect@Work recommendation 17 – a positive duty on employers to

take reasonable and proportionate measures to eliminate, as far as possible, sex discrimination, sexual harassment and victimisation. The report acknowledges that a number of submissions expressed support for implementation of such a duty.

[Source: Senate Standing Committee on Education and Employment: Report: Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021]

OAIC investigates Telco over privacy concerns

- The Office of the Australian Information Commissioner (OAIC) has announced that it is investigating Singtel Optus Pty Ltd (Optus) under the Privacy Act 1988. This follows preliminary inquiries by OAIC into data breaches involving publication of Optus customers' details in the White Pages after individuals had asked for their details not to be published.
- OAIC's investigation will determine whether there are systemic issues at the company that 'can be prevented by ensuring the right practices are in place'.
- OAIC suggests that this could 'set a benchmark for all organisations an build trust in the community'.
- OAIC states that no further comment will be made while the investigation is ongoing.

[Source: OAIC media release 06/08/2021]

Other News

COVID Bill No 2 passes without JobKeeper transparency requirements

Treasury Laws Amendment (COVID-19 Economic Response No. 2) Bill 2021 passed both Houses on 9 August 2021. Broadly, the Bill:

- allows the Treasurer to make rules for economic response payments to provide support to an entity where they are adversely affected by restrictions imposed by a state or territory to control COVID-19.
- amends the Taxation Administration Act to allow the ATO to share data with Australian government agencies, both federal and state, for the purpose of administering only relevant COVID-19 business support program payments.
- amends the Income Tax Assessment Act 1997 to introduce a new power to make eligible Commonwealth COVID-19 business grants free from income tax
- allows information and documentary requirements between government and businesses to (temporarily) be done electronically
- amends the income tax law to make Commonwealth COVID-19 disaster payments received by individuals from the 2020-21 income year onwards non-assessable non-exempt income.

The Bill passed without the senate amendment that would have required the Commissioner to publish details about each entities (with an annual turnover of $10 million or more) that received a JobKeeper payment or a Coronavirus economic response payment.

[Sources: Treasury Laws Amendment (COVID-19 Economic Response No. 2) Bill 2021]

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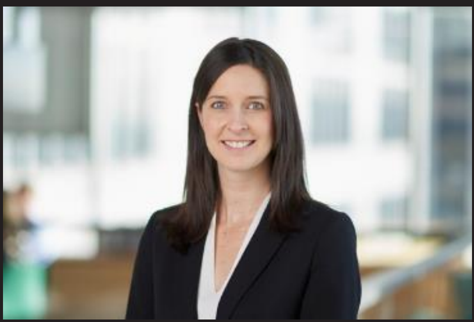

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