Governance News

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

10 February 2021

Contents

Boards and Directors

COVID-19: US research predicts that the shift to wholly virtual board meetings won't persist post-pandemic (but virtual meetings won't disappear either)

Key Takeouts

- Most directors surveyed do not believe that the rapid shift to remote working (and in particular to virtual board meetings) has negatively impacted their ability to perform their roles
- Directors are divided on whether virtual board meetings are as effective as physical meetings
- Post-pandemic, most directors believe that at a proportion of board committee meetings and a smaller proportion of full board meetings will be held virtually.
- The challenges of meeting virtually may ultimately be mitigated through improvements in technology

The National Association of Corporate Directors (NACD) surveyed 749 directors in H2 2020 to gauge the impact of the pandemic, and more particularly the rapid shift to remote working, on boards' operations and on their ability to perform their role.

Some Interesting Findings

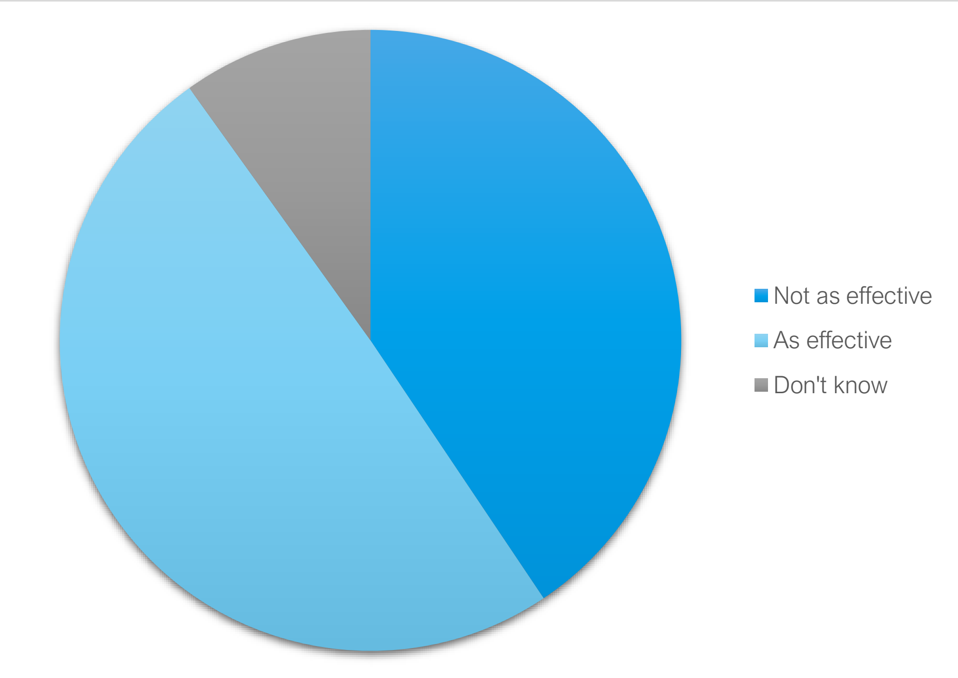
Boards adapted quickly to remote working

The NACD found that though 36% of directors cited their organisation's digital competency as a weakness and 27% described their organisation's technology infrastructure as a weakness, directors were able to adapt quickly to the rapid shift to working remotely (as a result of COVID-19 restrictions).

Overall, directors perceived that the shift to remote working/rapid uptake in technology did not impact their ability to perform their role effectively – an overwhelming majority (94% of directors) consider that they have been able to govern effectively during the crisis.

Directors are divided on the effectiveness of virtual board meetings

The survey identified that many directors (50%) consider that one of the top challenges in responding to the pandemic has been ensuring that virtual board meetings are as effective as in-person meetings.



In particular, directors nominated a) loss of non-verbal communication (72%); b) facilitating questions and answers (30%); and c) ensuring participation by each director (29%) as the top three challenges in adapting to a virtual setting.

A smaller proportion (19%) nominated keeping directors attentive throughout the whole meeting as a challenge.

Interestingly, 41% of directors agreed that virtual meetings were as effective as in person meetings.

The NACD suggests that the findings indicate that though virtual meetings have been effective in 'helping directors to get their work done, ultimately, directors felt that they were not as productive as they could have been'.

The NACD also suggests that directors may be 'overestimating the value of in person meetings' and that in essence, though technical limitations mean that meetings are less effective than they could be, the meetings are still 'good enough'.

Boards will continue to meet virtual post-pandemic (but not 100% of the time)

The NACD also surveyed directors to gauge their views on whether their board will continue to meet virtually post-pandemic.

- Most directors (90%) consider that digital board engagement will be a helpful tool for board operations going forward
- 65% of directors expect 20% (or more) of full board meetings to be held virtually post-pandemic, though within this group only a small proportion (5%) expect 80-100% of full board meetings to be held virtually.
- 35% of directors surveyed said that they expect 0-20% of full board meetings to be held virtually.

Interestingly, directors expect that virtual meetings will be more common at the committee level than they will be at the full-board level - 76% of directors surveyed expect 20% or more of board committee meetings to be held virtually.

Conclusions

- The NACD considers the findings indicate that directors view the greatest challenges in the shift to a virtual setting as being 'operational issues that can be solved through better technology'.
- The NACD considers that though it is unclear to what extent virtual board meetings will persist post-pandemic, there are indications that technology will continue to play a greater role in board operations than it did pre-pandemic, especially at committee level.

[Source: Harvard Law School Forum on Corporate Governance and Financial Regulation 08/02/2021]

Climate risk is a director responsibility: ASIC Commissioner puts forward four recommendations for boards to consider

The Australian Securities and Investments Commission (ASIC) Commissioner Cathie Armour has written an article outlining ASIC's continuing focus climate risk as a systemic risk, ASIC's work in the area and the regulator's expectations of directors in this context.

Some Key Points

Disclosure of material climate risks is a legal requirement

- ASIC considers climate risk to be a systemic risk and further, considers that the law requires an operating and financial review to include a discussion of climate risk when it is a material risk that could affect the company's achievement of its financial performance.
- ASIC's focus in this area is twofold:
  - Effective governance: ASIC is focused on ensuring companies have appropriate governance arrangements in place to manage the issue; and
  - Effective disclosure: ASIC expects companies to provide the market with 'reliable and useful information on their exposure to material climate-related risks and opportunities'.

On this last point, Ms Armour comments that the regulator has found that 'solid governance of this risk generally leads to better disclosure'.

ASIC's recent work in the area – review of TCFD reporting

- ASIC undertook a review of reporting under the Taskforce for Climate-related Financial Disclosures (TCFD) recommendations by a 'selection' of listed companies prior to the pandemic and is following up with a number of entities.
- Based on the observations from the review, ASIC plans to provide 'targeted guidance' to the market as companies commence their next reporting cycle.
- Separately, ASIC has also written to a number of 'potential laggards' in the area 'to remind them of their statutory obligations'.

Improvements since the last review

ASIC observed that:

- voluntary adoption of TCFD reporting by some larger listed companies has materially improved standards of climate-related governance and disclosure in the market
- there has been a 'significant and meaningful increase in the level of engagement, and disclosure' on climate-related issues by larger listed companies since ASIC's last review in 2017–18
- there is 'evidence of board oversight' of the issue across 'all surveillance targets'
- generally TCFD reporting has led to improved quality of disclosure

Areas for improvement/challenges

ASIC considers that there is 'still a way to go and some companies are much further along than others'. Particular challenges identified include:

- scenario analysis (where companies elect to undertake and disclose it)
- disclosure of the assessment, management, mitigation and disclosure of the physical risks of climate change.

On this second issue, Ms Armour writes,

> 'There are various developments in these areas that could see greater alignment and progress, such the work by the industry-led Climate Measurement Standards Initiative and the Australian Prudential Regulation Authority's upcoming climate change vulnerability assessments for the major banks. The TCFD has just released it latest status update and ASIC's observations around improvements and challenges in Australia are echoed in its global review'.

Looking forward

- ASIC plans to take a 'consultative approach' to monitoring the adoption of TCFD reporting and the development of climate disclosure practices.
- In the case of 'serious disclosure failures' ASIC 'may consider enforcement action' should there be serious disclosure failures.

Four recommendations for directors

The article concludes with four recommendations for directors to consider.

1. **Climate risk should be built into planning and decision making:** Ms Armour writes that directors and officers of listed companies 'need to understand and continually reassess existing and emerging risks that may be applicable to the company's business, including climate risk. This should extend to both short- and long-term risks. Boards should ask if they have considered climate risk in their decision-making process'.
2. **Boards should consider the effectiveness of their governance arrangements** with respect to climate risk. In particular, Ms Armour suggests that 'boards should consider if they are comfortable with the level of oversight they maintain over climate risks and opportunities and the governance structures in place to assess, manage and disclose these risks and opportunities'.
3. **Boards should take steps to ensure that disclosures are compliant with legal requirements.** Ms Armour writes, 'ASIC considers that the law requires an OFR to include a discussion of climate risk when it is a material risk that could affect the company's achievement of its financial performance. Depending on the circumstances, disclosure of climate risk may also be required by the law in other contexts, such as a prospectus or continuous disclosure announcement. Boards should ask if material climate-related disclosures have been made and updated where necessary and appropriate.
4. **Consideration should be given to reporting under the TCFD** – Ms Armour writes, 'ASIC recommends listed companies with material exposure to climate risk consider reporting under the TCFD framework'.

[Source: ASIC article, ASIC Commissioner Cathie Armour, Managing Climate Risk for Directors 01/02/2021]

Diversity

Less diverse: Global review finds companies were more conservative in their approach CEO appointments after the global pandemic was announced than previously

Heidrick & Struggles has released a report - Route to the Top 2020 – looking at trends in CEO appointments based on analysis of the skills/background/experience of the CEOs at 965 of the largest listed companies in 20 markets globally. The report focuses in particular, on the impact that the COVID-19 pandemic has had on CEO appointments.

Some interesting findings

Fewer CEO appointments

The number of CEOs appointed between 11 March 2020 - the date on which the World Health Organization (WHO) declared COVID-19 a global pandemic - and 30 June 2020 decreased in 2020 to 31 appointments.

CEO selection criteria changed as a result of the pandemic

The report found that overall, companies appeared to be prioritising appointing an experienced leader (and preferably one with a track record of successfully leading through a crisis) over other considerations including diversity. The report comments that a similar trend emerged after the 2018 global financial crisis.

- New CEOs were less diverse: The report found that new CEOs were overall less diverse (on a number of measures) than in previous years. For example, the proportion of women appointees halved from 12% (in the five months prior to the pandemic announcement) to 6% in the four months after 11 March.
- Prior experience prioritised:
  - 63% of CEOs appointed after the pandemic announcement had CEO experience (compared to 44% for CEOs appointed during the six months prior).
  - 75% of new CEOs had C-suite experience.
  - In Australia, 17% of ASX 100 CEO appointments had CFO experience (the highest of any market).
- Rise in external appointments: Though overall, most new CEOs were internal appointments, the pandemic announcement triggered a marked rise in external appointments from 35% (pre-announcement) to 57% in the following months. The report suggests that this is due to companies prioritising appointing an experienced person able to 'take the helm quickly in a global crisis'.
- CEOs were appointed more quickly: The report comments that some companies appear to have 'sped up their timeline for internal appointments' based on the fact that, for internal appointees, the time spent in the company prior to their appointment fell from 15.6 years to 10.3 years.

The trend is unlikely to continue?

The report suggests that the shift back towards 'traditional' selection criteria is unlikely to persist.

> 'While the pandemic undeniably shifted CEO selection criteria and companies' priorities, broader diversity of experience, sustainability, and purpose are not likely to disappear as priorities…
>
> When the global business environment returns to some semblance of normal, we expect that these issues will not only re-emerge as priorities but also be viewed as crucial to long-term survival and growth'.

[Source: Heidrick and Struggles media release 19/11/2020; Full text report: Route to the top 2020]

Minimum targets met (but not by every company): Glass Lewis tracks progress toward gender diversity targets at FTSE 350 companies

Context

The Hampton-Alexander Review was released in November 2016. Key recommendations included that: a) women should hold 33% of FTSE 350 boards positions by the end of 2020; and b) FTSE 100 companies should aim for a minimum of 33% women's representation across their Executive Committee and in the Direct Reports to the Executive Committee by 2020.

Glass Lewis has released a report - Gender Diversity in the FTSE 350 - tracking progress against this 2020 target and outlining its position on gender diversity heading in 2021.

Some Interesting Statistics

Positive developments

- **The 2020 minimum gender diversity target has been met:** Overall, the proportion of board seats held by women in FTSE 250 companies has increased over the past three years, from 25.8% in 2018 to 33.6% in 2020
- **Twelve FTSE 350 companies have greater than 50% representation** of women on their boards.
- **Women hold a high proportion of independent directorships**: 46.2% of independent directors are women.
- **The majority of remuneration Committee Chair roles are held by women** (58%) up from 46% in 2018.
- **The number of women serving as audit committee Chairs has increased** over the past three years from 24% in 2018 to 31% in 2020.
- **No evidence of 'overboarding' among female directors:** Women directors in the FTSE 350 sit on more (slightly) boards than their male counterparts: women directors sit on an average of 2.2 boards, where men sit on an average of 1.8 boards.

Room for improvement

- **One FTSE 350 company still has an all-male board.**
- **Over 90 boards are yet to reach the 2020 board representation target** (ie the proportion of women directors is less than 33%)
- **Proportion of female board chairs remains low:** 10% of FTSE 250 Chairs are now women (up from 5% in 2019)
- **The number of women serving as nomination committee Chairs remains low** at 12% (up from 7% in 2018). The report suggests that this is unsurprising given that generally, the chair of the board serves as chair of the nomination committee, and approximately 90% of board chairs in the FTSE 350 are men as of 2020

Glass Lewis' voting policy heading into 2021

Consistent with Glass Lewis' 2021 voting guidelines, Glass Lewis will 'generally recommend against' the Chair of the nomination committee at any FTSE 350 board that has not met the minimum 33% board gender diversity target.

Having said this, Glass Lewis makes clear that it will adopt a case by case approach to assessment. Where boards have failed to meet the target, Glass Lewis will take into account 'the board's historical performance on gender diversity, the disclosure of initiatives and targets related to gender diversity, and any recent board turnover'.

Outside of the FTSE 350, Glass Lewis 'will generally be recommending against the chair of the nomination committee at any LSE Main Market company that has failed to ensure that the board is not composed solely of directors of one gender'.

[Sources: Glass Lewis blog 01/02/2021; Full report: Gender Diversity in the FTSE 350]

In Brief | Google has agreed to pay more than US$3.8m to 5,500 employees and job applicants to resolve allegations of systemic hiring and compensation discrimination at certain facilities. Google will also review its current policies, procedures and practices related to hiring, compensation and conduct analyses and implement any necessary changes to ensure non-discrimination

[Source: Department of Labor media release 01/02/2021]

In Brief | Glencore has announced the appointment of former Anglo American plc CEO and experienced director Cynthia Carroll as an Independent Non-Executive Director. Ms Caroll holds three other non-executive directorships at Hitachi, Baker Hughes Company and Pembina Pipeline Corporation. Ms Carroll's appointment brings the proportion of women sitting on the Glencore board to 30%

[Source: Glencore media release 02/02/2021]

In Brief | Stalled: Early findings from Green Park's Annual Business Leaders Index 2021 indicates that that the number of Black Chairs, CEOs and CFOs at FTSE 100 companies stands at zero

[Source: Green Park media release 03/02/2021]

Remuneration

Quiet year for 'say on pay' (despite the pandemic)?

Semler Brossy has released a report – 2020 Say on Pay and Proxy Results – highlighting key voting trends at Russell 3000 companies in 2020.

Some Interesting Findings

Say on pay

2,396 Russell 3000 companies held 'Say on Pay' votes in 2020.

- The average level of support for say on pay resolutions was stable at 90.5% (despite the pandemic).
- The proportion of resolutions that received less than 50% support (and failed to pass) fell from 2.7% in 2019 to 2.3% in 2020. This is the lowest fail rate since 2011 (when the rate was 1.4%).
- Looking at the proportion of resolutions received less than 50% support by sector, the fail rate was highest in the Information and Technology sector (at 4%) and lowest in the Communication Services and Materials sector (both 1%).

Shareholder E and S resolutions

During the 2020 proxy season, shareholders voted on 148 social proposals and 38 environmental proposals

- Social proposals – diversity emerged as a key concern
  - Median support for social proposals was stable at 29%, unchanged on 2019 levels.
  - 13 social resolutions received 50% (or more) support. In contrast, only nine social proposals were in this category in 2019.
  - Of the thirteen proposals that received 50% (or more) support, five were diversity related. A proposal seeking disclosure of diversity data received the highest level of support (74% support).

  [Note: This appears to be the proposal coordinated by As You Sow. You can find details here]

- Environmental proposals – disclosure was the key concern
  - Median support for environmental proposals fell from 26% in 2019 to 22% in 2020
  - Six environmental proposals received 50% (or more) support.
  - 100% of proposals concerned disclosure of environmental risk

  [Sources: Semler Brossy media release 04/02/2020; Full text report: 2020 Say on Pay and Proxy Results]

Shareholder Activism

The first of many? Market Forces to target fossil fuel companies with 'wind up' resolutions

Context

Market Forces has released a report – Out of line, Out of time – identifying 23 companies that it considers are undermining climate action by either a) expanding the scale of the fossil fuel sector; and/or b) 'relying on scenarios consistent with the failure of the Paris Agreement to justify their future business prospects'.

The report flags Market Forces' intention to target fossil fuel producers with 'wind up' resolutions - resolutions calling on companies to report annually on their alignment with the Paris Agreement (Including their own transition away from fossil fuel operations/assets) – and also calls on members of superannuation funds that invest in 'out of time' companies to divest their holdings.

Resolutions filed at Santos

Santos has released a statement announcing that it has received a notice seeking to requisition resolutions for consideration at the Annual General Meeting on 15 April 2021.

The resolutions:

- a constitutional amendment enabling shareholders to pass advisory resolutions - Market Forces argues that the proposed change is 'a healthy part of corporate democracy in many jurisdictions' and 'will simply put Santos in a similar position in regard to shareholder resolutions as any listed company in the UK, US, Canada or New Zealand'.
- wind-up resolution requesting that Santos report annually on how its capital expenditure and operations will be managed in alignment with the climate goals in the Paris Agreement, including outlining 'how the company will facilitate the efficient managing down of oil and gas operation and assets.

  Market Forces argues that this it is necessary that the company plan now, for the transition away from fossil fuels and that shareholders have an interest in understanding how the risks associated with the transition to a net-zero economy are being managed. Market Forces states:

  > 'With the transition to a decarbonised economy shrinking our company's markets, capital must be preserved, rather than wasted pursuing production plans based on demand scenarios and price forecasts that are inconsistent with global climate goals. Shareholders are interested in the preservation of capital, maximising future company value, and ensuring sites of operations are restored and employees supported in the energy transition.'

The full text of the resolutions is here.

[Note: Similar 'wind down' or 'capital protection' ordinary resolutions were lodged at Whitehaven Coal and Beach Energy in 2020 and neither passed. The Whitehaven resolution received 3.97% proxy support, Beach Energy received 5.38% proxy support.]

No plans to wind up oil and gas operations

Santos states that it has 'already committed to and announced a credible pathway to achieve net-zero Scope 1 and 2 emissions by 2040' and 'does not intend to close down its oil and gas operations, as doing so would be against the interests of shareholders and would not be consistent with global climate and human development goals, particularly reducing air pollution and poverty.'

Santos states that the Notice of Meeting (which will be released in March) will include all resolutions to be considered at the upcoming AGM and the board's voting recommendations.

[Sources: Santos media release 03/02/2021]

Disclosure and Reporting

Green light: The IFRS Foundation will push forward with a project to develop global sustainability standards following consultation

Key Takeouts

- The IFRS is aiming to have a 'definitive proposal (including a roadmap with timeline) by the end of September 2021
- There may be an announcement on the establishment of a sustainability standards board at the COP 26 Conference in November2021

Context

The IFRS Foundation published a consultation paper in 2020 seeking feedback on: a) whether there is a need for global sustainability standards; b) whether the IFRS Foundation should play a role; and c) what the scope of that role could be (whether a new Sustainability Standards Board should be established, under the governance structure of the IFRS foundation, to develop global sustainability standards).

Consultation closed at the end of 2020 and the IFRS Foundation has now released an update on next steps.

Progress update

- Responses to the consultation confirmed that there is 'growing and urgent demand' for global sustainability standards and support for the IFRS Foundation playing a role in this.
- In light of this, a Trustee Steering Committee to oversee the next stage of work on the project will be established.
- In the first instance, the Trustees will conduct 'further detailed analysis' of the feedback received from stakeholders on the 'requirements for success' of new global standards, before considering whether to establish a new sustainability standards board.
- The IFRS plans to produce a 'definitive proposal (including a roadmap with timeline) by the end of September 2021
- There may be an announcement on the establishment of a sustainability standards board at the meeting of the United Nations Climate Change Conference COP26 in November 2021.
- The Trustees are set to meet again on 2-4 March 2021.

[Source: IFRS media release 02/02/2021]

Below par: Report assessing the quality of climate disclosure by large UK listed companies found that disclosure lacks sufficient detail to be decision useful

Key Takeouts

- Overall, the report concludes that 'The overwhelming majority of top listed companies in the UK are woefully inadequate at disclosing in corporate reporting how climate change will affect their business – with many potentially breaching the law'.
- The report includes a number of recommendations to lift standards including (among other things): a) giving shareholders a mandatory (advisory) 'say on climate' at AGMs; b) ensuring regulators take strong enforcement action for the omission of material climate-change related information; c) ensuring regulators issue formal guidance to companies, directors and auditors on the legal and regulatory risks of ‘greenwash’ in financial reporting; d) pushing institutional investors implement 'a robust stewardship policy' to manage climate change related risks (through their engagement activity, investment decision making and voting behaviour)

A new report - Accountability Emergency: A review of UK-listed companies' climate change-related reporting (2019 20) – into the adequacy/quality of climate risk disclosure by large listed UK companies has identified that a number of reports are failing to provide adequate disclosure.

The key theme to emerge from the report, is that even where climate-related information is provided, it is not sufficiently detailed or specific to be decision-useful and, the report suggests, may not be sufficient to meet existing legal requirements.

> 'The overwhelming majority of top listed companies in the UK are woefully inadequate at disclosing in corporate reporting how climate change will affect their business – with many potentially breaching the law'.

The findings are based on an analysis of climate-related information in the annual reports of FTSE 100 companies and the largest 150 companies on the FTSE 250.

Some Interesting Findings

- Despite clear statements of expectation from standard setters, regulators and investors, most companies do not reference climate change related factors in their financial accounts/notes to their accounts.
  - 93% of companies made no reference at all to climate change-related factors in their financial accounts.
  - 4% of the 250 companies reviewed referenced climate-change related factors in their financial accounts.
  - The report comments that even where climate change related factors were referenced in reports, the information was not decision useful in that it was often 'highly general and nonspecific.
- Largest companies more likely to disclose climate-related information
  - Overall, the report found that FTSE 100 companies were significantly more likely to disclose climate change-related information and to provide more detailed information than FTSE 250 companies
  - Entities not subject to the UK Companies Act 2006 (either because they are incorporated in another jurisdiction, or are structured as investment trusts) are the least likely to provide climate-related information and generally provided 'very limited' disclosure
- Paris-alignment'/'net-zero' targets:
  - Overall, 53% of companies made no reference to any 'net-zero' or 'Paris-alignment' aim or objective.
  - 31% of all companies reviewed, clearly disclosed a target to reduce their greenhouse gas (GHG) emissions in line with the goals of the Paris Agreement, 'net-zero' objectives or 'science-based targets'.

  - The proportion of FTSE 100 companies was significantly higher at 51% and lower for FTSE 250 companies at 18%.
  - In many cases, the information provided was high level/general.
- GHG emissions:
  - 15% of the Annual Reports did not disclose information about Scope 1 and Scope 2 GHG emissions. The majority of these were foreign incorporated companies or investment trusts.
  - 33% of companies disclosed some Scope 3 GHG emissions (though how Scope 3 emissions were calculated was 'often very unclear').
- Risks and impacts: 40% of companies clearly referred to climate change in their discussion of principal risks and uncertainties, though many companies provided no information.
- Boilerplate disclosures were 'common' even among firms that disclosed financial and narrative information about climate change related risks and impacts. The report comments that 'the risks of stakeholders being misled through material omissions, or "greenwash", are significant'.
- The report found that many auditors are not considering climate change related financial risks or assessing the consistency of narrative disclosures in key assumptions infinancial accounts: only 4% of audit reports indicated clearly that auditors had considered climate change related factors in their audit.

Three recommendations to raise standards

The report makes three broad recommendations intended to push companies to improve the quality of information provided to investors.

- Law reform: The report argues that new laws or regulations implementing the UK Government's commitment to introduce Task Force on Climate-Related Financial Disclosures (TCFD)-aligned reporting must: a) be introduced on a mandatory basis as soon as possible; b) expressly require firms to disclose a strategy, with associated metrics and science-based targets to achieve 'net-zero' global emissions by 2050 (Scopes 1-3); and c) provide shareholders with an advisory vote ('say on climate') at AGMs on the adequacy of climate changes strategies and targets.
- Strong enforcement is required to eliminate 'greenwash': The report recommends that regulators take 'urgent action' to close the 'current enforcement and accountability gap' and eliminate 'greenwash' by: a) ensuring adequate resourcing and training is in place for enforcement teams; b) taking 'strong enforcement action where companies/directors/auditors omit material climate change-related information; and c) issue formal guidance to companies, directors and auditors on the legal and regulatory risks of 'greenwash' in financial reporting.
- Investment stewardship: The report argues that through their investment and stewardship decision making investors need to: a) place companies/directors/auditors 'on notice' of their expectations regarding the 'materiality of granular climate change-related financial information for their decisions'; b) file and support shareholder resolutions at AGMs demanding companies implement a strategy with associated metrics aligned with the Paris Agreement goals to achieve 'net-zero' global emissions by 2050 (Scopes 1-3); and c) implement 'a robust stewardship policy to vote against the reappointment of directors, audit committee chairs and auditors at companies that omit material climate change-related information'.

[Sources: Client Earth media release 04/02/2021; Full text report: Accountability Emergency: A review of UK-listed companies' climate change-related reporting (2019-20)]

In Brief | Insights into reporting against the Wates Principles for large private companies: Sir James Wates, has released an article providing insights into the spectrum of different ways in which companies are approaching reporting against the principles, including instances of good practice. In 2021, the FRC will be overseeing research into reporting practice to provide 'a more complete evidence base'

[Sources: Article: Early indications of Wates Principles reporting; FRC media release 05/02/2020]

Meetings and Proxy Advisers

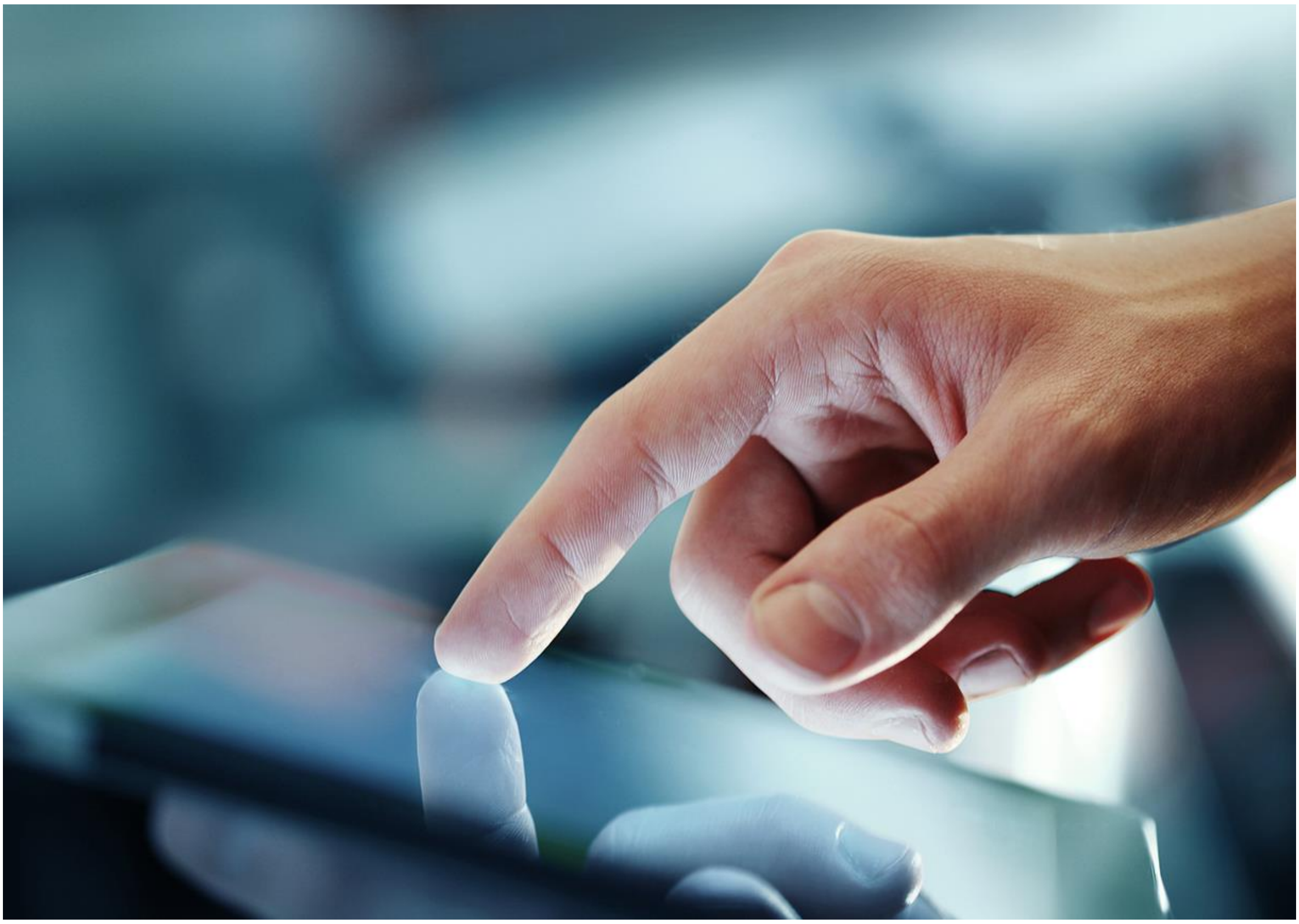
Governance Institute announces key policy priorities for 2021: Advocating for the modernisation of meeting and communication requirements will remain a key area of focus

The Governance Institute has announced its priorities for the next 12 months.

Key priorities include:

- 'Reducing complexity and red tape': The Governance Institute will continue to advocate for the modernisation of existing requirements in the Corporations Act to enable companies to hold electronic meetings and to communicate electronically with shareholders.
- '#FixFundraising': The Governance Institute will continue to advocate for reform of existing laws relating to fundraising activities of charities and not-for-profits.
- 'Encouraging fit-for-purpose business infrastructure': The Governance Institute will maintain its focus on the Modernising Business Registers project (being led by the ATO) by continuing to consult with the modernising project team and advocating with government to ensure that the funding and momentum on the project are maintained.
- Keeping climate change on the agenda also remains a key area of focus for the Governance Institute.
- The Governance Institue will advocate for the establishment of a Commonwealth Integrity Commission as a priority.

[Source: Governance Institute of Australia media release 02/02/2021]



Markets and Exchanges

Time for the UK to allow dual listings?

Context

The UK Listings Review, chaired by Lord Hill, was launched by Chancellor Rishi Sunak on 19 November 2020 as part of a plan to strengthen the UK's position as a leading global financial centre. Among other things, the review will consider whether current settings around dual class share structures 'strike the correct balance between corporate governance and market integrity on the one hand, and the requirements of companies seeking to list on the other'.

The case for allowing dual-class listings

Writing in Oxford Business Law blog, Assistant Professor in Business Law at Queen Mary University of London, Min Yan outlines the case for allowing dual class listings.

Broadly, the author argues that the increased governance risks associated with dual class listings can be mitigated through the implementation of appropriate safeguards (as has occurred in a number of Asian financial centres) – a number of examples are included in the article.

Ultimately, the author argues that:

> 'Permitting dual class listing is increasingly seen as a necessary step to stay relevant in a time of relentless competition in the cross-border IPO business. New York, London, Hong Kong, Singapore and Shanghai are ranked as the top 5 global financial centres by the Global Financial Centres Index…
>
> If London is also eager to attract the most successful and innovative companies to list, especially in the aftermath of Brexit and in the midst of the COVID-19 pandemic, it is perhaps time to relax the limitation on dual class shares on the Premium Segment of the LSE's Main Market. Inspiration could be drawn from Asian financial centres' experience as regards the mechanisms to find a middle ground between founders' focus on the long term and investors' legitimate concern over corporate governance under the dual class share structures'.
>
> [Source: Oxford Law School blog 03/02/2021]

Regulators

SEC creates new senior climate role, Ceres suggestsit is the latest signal of a broader shift in the regulatory approach to climate risk

Acting US Securities and Exchange Commission (SEC) Chair Allison Herren Lee has announced the appointment of Satyam Khanna to the newly created senior role at the regulator - Senior Policy Advisor for Climate and ESG in the office of Acting Chair.

Mr Khanna has been tasked with providing advice on ESG matters and with advancing SEC on 'new initiatives across its offices and divisions'.

Announcing the appointment, Acting Chair Ms Lee stated commented,

> 'Having a dedicated advisor on these issues will allow us to look broadly at how they intersect with our regulatory framework across our offices and divisions'.

A step closer to addressing climate change as a systemic financial risk?

In a statement, Managing Director of the Ceres Accelerator for Sustainable Capital Markets Steven M Rothstein welcomed the creation of the role describing it as a 'critical step forward on the path to mandating climate risk disclosure and addressing climate change as a systemic financial risk'.

The statement goes on to suggest that the creation of the position is another signal of the broader shift in approach to climate risk among US regulators.

> 'In creating this position, the SEC joins other regulators rapidly moving to establish dedicated capacity to address climate risk. This month, the Federal Reserve established a new Supervision Climate Committee, and Treasury Secretary Yellen revealed plans to appoint a "very senior-level" official to lead climate efforts and establish a Treasury climate "hub"'.
>
> [Sources: SEC media release 01/02/2021]

In Brief | APRA report cautions that though the 'Australian financial system remains fundamentally sound', the 'full financial impacts of the events of 2020 are still to be felt and in some ways, 2021 could be just as difficult as 2020'

> [Sources: APRA media release 05/02/2021; Full text report: APRA 2020 Year in Review]

In Brief | ASIC representatives are set to appear before the Parliamentary Joint Committee on Corporations and Financial Services on 19 February

> [Source: Parliamentary Joint Inquiry on Corporations and Financial Services program 19/02/2021]

Financial Services

Top Story | Can you regulate for accountability? New study looks at the impact of the BEAR on individual accountability and risk culture in the banking sector (so far)…

Key Takeouts

- Macquarie University study finds early indications that the Banking Executive Accountability Regime (BEAR) is working as intended to advance individual executive accountability and improve the risk culture within banking institutions
- The study found that the BEAR 'appears to be having a favourable impact on risk governance by bringing home Line 1 accountability'. Line 2 and 3 roles are being accorded more weight within institutions
- Concerns raised prior to the introduction of the BEAR have (in the main) not materialised in practice. For example, the study found no evidence of difficulty in recruiting/retaining quality 'accountable persons'
- BEAR has increased the administrative burden on institutions, but industry participants generally regard this as a price worth paying
- Organisations that took a more 'enthusiastic approach to implementing the BEAR' are more likely to experience the benefits than those who took a 'BEAR-lite' or minimal approach

In a recent podcast, Professor Elizabeth Sheedy discussed the findings of her research into banks' experiences in implementing the Banking Executive Accountability Regime (BEAR) and the positives and negatives to emerge out of that experience in the relatively short time since the scheme has been in operation.

The research is based on analysis of feedback provided by people working within the industry – either 'accountable persons' or, their direct reports – with a particular focus on those working in risk, compliance and internal audit roles.

You can access the podcast here. You can find the full text of the report here.

Some key takeaways

Early signs are positive…

Bearing in mind that the scheme only came into effect for the largest banks in July 2018 and for smaller ADIs in July 2019, Professor Sheedy emphasised in the podcast discussion, that it's too early to draw firm conclusions on the effectiveness of the scheme. Having said this, an early 'look under the hood' suggests that the BEAR is having a positive impact advancing executive accountability and risk culture in banks, with most participants in the study accepting the regime as justified.

The paper provides more detail around this stating,

> 'There was consensus that the introduction of the BEAR was justified when considered from an industry-wide perspective, with a clear majority of participants outlining a positive response in relation to their organisation's implementation of the BEAR'.

Participants in the study reported that the development of individual accountability statements and accountability maps has been a worthwhile exercise in its own right, in that it prompted 'constructive discussion' about grey areas of responsibility and served to clarify individual accountability.

The study found that this additional clarity drove 'greater understanding of what accountability entails', especially in those organisations that took a thorough approach to implementing the scheme.

Executives were found to be 'more likely to be thoughtful and self-reflective about their actions', and more focused on exercising 'due care, skill and diligence' in the performance of their roles. For example, the study found that executives are more likely to consult widely/gather more information and to take a more hands-on approach to management (to be more rigorous in their approach to delegating responsibility, monitoring progress and intervening where necessary).

An empowering effect

Professor Sheedy said that a 'surprising' finding was that increased clarity around individual accountability had an 'empowering effect' on executives, enabling quicker and more streamlined decision making, as well as a sharper focus on effective management of direct reports/projects and on the prompt resolution of issues.

This finding was not mirrored in UK-based research into the Senior Managers and Certification Regime (SMCR) – the accountability regime on which the Australian BEAR was based.

The study found that increased clarity around accountability has also had a positive impact on risk culture within banks, creating opportunities to 'fix long standing issues'.

Positive impact on 'risk culture'

The report comments that one of the biggest risk culture challenges to date, has been the failure of line one roles to accord sufficient weight to concerns raised by those in line two or three roles.

The study found that the BEAR 'appears to be having a favourable impact on risk governance by bringing home Line 1 accountability'. Put another way, awareness on the part of accountable persons that they will be held individually accountable should a problem emerge, is proving effective in motivating them to take a more proactive approach to risk management and to respond more quickly to resolve historical issues as well as any new issues.

Lines two and three are being accorded more weight

From a risk/compliance perspective, study participants reported that the voices of risk/compliance functions are being accorded more weight in decision making, because accountable persons are more likely to consult with support functions before making a decision to ensure the decision can be justified.

Likewise, directors and assurance teams reported finding it easier to ascertain exactly who is accountable, when issues do arise.

The BEAR has also been positive from a resourcing perspective – the BEAR provides Chief Risk Officers and Chief Audit Executives with a 'clear frame of reference that no one can argue with'.

As such the report concludes that people in line 2 and 3 roles (as well as non-executive directors have 'undoubtedly benefited from BEAR' as it is now 'much easier to identify who is on the hook and this can help move towards resolution'.

Addressing underperformance

Some participants reported that their organisations were tougher in the way they address underperformance and poor behaviour, though others flagged performance management as 'still a work in progress' at their organisation.

Negative consequences?

Overall, the study found that 'the drawbacks of the BEAR have been less important in reality than was anticipated' prior to implementation (and overall, participants tended to view any negatives as justified).

- **Increased administrative burden:** The paper comments that 'the BEAR undoubtedly creates additional administrative burdens' and that this was the most commonly mentioned negative consequence. For example, several participants reported that notifying APRA of minor changes to accountabilities imposes a significant burden. However, almost all participants in the study viewed the increased burden as 'manageable and a price worth paying'.
- **'Squandered resources':** Prior to the introduction of the BEAR, concerns were raised about the possibility of 'squandered resources' ie that executives might spend too much time documenting 'reasonable steps' to justify their actions/guard against possible future scrutiny. The study found that the majority of participants did not report

this as an issue. Some participants felt that the additional documentation was not 'overdone' but instead helped the decision-making process, causing executives to be more self-reflective.

- Talent retention and recruitment: Prior to the introduction of BEAR, concerns were raised that the level of scrutiny would result in difficulty in attracting executives to senior roles. However, the study found that 'Interviewees overwhelmingly opined that accountability is appropriate for senior executives and people in such roles should be willing to accept scrutiny'. Overall, the authors conclude, 'We found no evidence that good people have been lost to other industries on account of the BEAR, or that there is a difficulty finding suitable people willing to take on AP roles'.
- Excessive 'unproductive' fear and heightened work stress:
  - In two of the participating organisations some concerns were raised during interviews about 'unproductive fear' and the authors comment that 'while not presently a serious or pervasive issue, it seems that this is an issue that warrants monitoring'.
  - On the issue of causing heightened work stress, the study found that accountable persons did not experience significantly higher levels of work stress than other executives.

Limitations on the effectiveness of the BEAR?

The paper identifies a number of factors that may be moderating the effectiveness of the BEAR. These include the following.

- A 'lacklustre approach to implementation': Organisations that took a more 'enthusiastic approach to implementing the BEAR' are more likely to experience the benefits than those who took a 'BEAR-lite' or minimal approach.
- Limited capability – The paper notes that a limitation of the BEAR (and similar accountability regimes) is their reliance on holding accountable persons individually to account for managing well. However, participants in the study observed that this approach will only be effective, if the executive in question has the capability to perform their role effectively – for example, that they can effectively delegate tasks, monitor progress and intervene where necessary to ensure the tasks are carried out correctly. The paper observes that 'capability in this area cannot be assumed; some financial institutions have not done enough to coach and train executives in these areas'.
- Memories fade: The BEAR was introduced 'during a tumultuous time' for financial institutions (Figure 1 at page one of the study is a graphic showing a timeline of the various 'scandals' occurring at the time) and the paper highlights an 'interaction effect' between BEAR and these events. The study found that participants were unable to easily differentiate between the 'BEAR effect' and the effect of these other events on keeping the focus within their organisations on enhancing risk governance. The paper suggests that once the memory of these events fades, the 'BEAR effect' may similarly diminish.
- The role of the board: The paper comments that 'under the BEAR, accountability is intended to come primarily from the board' ie it is up to the board to ensure that underperforming executives 'experience appropriate consequences'. The paper observes that in the past, 'boards have not always done well at this and variable remuneration has too often been considered an entitlement. Deferrals and malus clauses have not been used'. Having said this, the authors note that recent analysis of executive remuneration indicates that 'the tide has turned' on this issue.

  [Sources: The human risk podcast, Professor Elizabeth Sheedy on how Accountabilitycan reduce human risk; Full text paper: Sheedy, Elizabeth A. and Canestrari-Soh, Dominic, Regulating Accountability: An Early Look at the Banking Executive Accountability Regime (BEAR) (December 1, 2020). Available at SSRN: https://ssrn.com/abstract=3775275]

Financial Advice: Committee questions proposed maximum penalties in Hayne Reform Bill

Context

The Financial Sector Reform (Hayne Royal Commission Response No. 2) Bill 2020 was introduced into the House of Representatives on 9 December 2020.

Broadly, the Bill proposes to implement the government's response to four Hayne Commission recommendations.

- Annual renewal and payment: Schedule 1 proposes to implement the government's response to Recommendation 2.1 (annual renewal and payment) by introducing a new requirement for financial services providers that receive fees under an ongoing fee arrangement to: a) provide clients with a single document each year outlining the fees that will be charged and the services which the client will be entitled to in the following 12 months and which seeks annual renewal from clients for all ongoing fee arrangements; and b) obtain written consent before fees under an ongoing fee arrangement can be deducted from a client's account. The proposed commencement date is 1 July 2021.

- Disclosure of lack of independence: Schedule 2 proposes to implement the government's response to Recommendation 2.2 (disclosure of lack of independence) by introducing (from 1 July 2021) a new requirement for providing entities (financial services licensees/authorised representatives) to give a written disclosure of lack of independence where they are authorised to provide personal advice to a retail client.
- Advice fees in superannuation: Schedule 3 proposes to implement the government's response to Recommendations 3.2 (no deducting advice fees from MySuper accounts) and 3.3 (limits on deducting fees from choice accounts) by increasing 'the visibility of advice fees for all superannuation products' and prohibiting the charging of ongoing fees for financial product advice from MySuper products. It's proposed that the new requirements will apply from 1 July 2021 (with a 12 month transitional period commencing 1 July 2021 for arrangements entered into before 1 July 2021).

Scrutiny of Bills committee has raised concerns

The Senate Standing Committee for the Scrutiny of Bills has raised concerns about the lack of detail around the scope of proposed record keeping requirements in the Bill and also about the maximum proposed penalties for non-compliance with these requirements.

Proposed maximum penalties for non-compliance with record keeping requirements: The Committee writes that,

> 'Proposed subsection 962X(1) provides that fee recipients must keep appropriate records to show their compliance with Division 3 of Part 7.7A of the Corporations Act; and that these records must be kept for up to five years and a failure to do so is a criminal offence [with a potential maximum penalty of five years imprisonment]….
>
> ….the explanatory memorandum does not provide any justification as to why it is necessary and appropriate to impose a significant maximum penalty of five years imprisonment for failure to comply with the record keeping obligation in proposed subsection 962X(1). Nor does it include any reference to whether this level of penalty is comparable to similar offences in other Commonwealth legislation'.

In light of these concerns, the Committee has requested that the Treasurer provide 'detailed advice' as to the justification for the 'significant maximum penalty' including whether it is comparable to similar offences in other Commonwealth legislation.

Lack of clarity around record keeping requirements: The Committee writes that,

> 'From a scrutiny perspective, the committee is concerned that the scope and types of records that must be kept in order to comply with the record keeping obligation is not clear on the face of the bill, with details in relation to the records that must be kept to instead be set out in delegated legislation.
>
> The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill. It is unclear to the committee why at least high-level guidance in relation to the scope and type of records that must be kept cannot be provided on the face of the bill'.

In light of these concerns, the Committee has requested that the Treasurer provide 'detailed advice as to: a) why it is necessary/appropriate to leave the scope of record keeping obligations to delegated legislation; and b) whether the Bill can be amended to include 'high-level guidance' concerning the scope/type of records that must be kept on the face of the primary legislation.

[Source: Senate Standing Committee for the Scrutiny of Bills: Scrutiny Digest 1 of 2021]

Financial Advice: The FPA's budget submission makes six recommendations to aimed at reducing the costs/administrative burden on advisers

A key focus of the Financial Planners Association's (FPAs) Budget 2021-22 submission is the need for the government to act to reduce the current costs and regulatory pressures on the advice sector in order to support the provision of affordable advice.

A key recommendation (recommendation 2) is that the government should review the design and impact of the ASIC levy.

[Note: The AFA's submission, which is covered in a separate post below, shares a number of points of similarity with the FPA submission including a recommendation for the government to review the ASIC levy model.]

The submission includes six recommendations. These are summarised briefly in the table below.

FPA RECOMMENDATION	RATIONALE
Recommendation 1: Establishing a single schedule of fees and levies paid by financial planners 'Fees and levies paid by financial planners to the federal government should be consolidated into a single schedule administered by ASIC, which removes duplication of fees and is limited to recovering the cost of efficient and effective oversight.'	▪ The FPA argues that currently policy discussions on the rate and increases to fees/levies paid by planners is hampered by the lack of a 'consolidated view' of the fees/levies being paid. That is, individual government agencies are taking a siloed approach. ▪ The submission argues that establishing a single schedule of fees/levies paid by planners would …'allow for more informed policy discussions about the impact of fee and levy increases and better coordination between the agencies that are collecting them'. ▪ The FPA suggests that the schedule could be created by either ASIC or Treasury.
Recommendation 2: Review of the ASIC industry levy 'The ASIC industry levy should be reviewed with the goal of providing a more predictable annual levy and constraining year-on-year increases to better reflect the capacity of the financial planning profession to support regulatory costs.'	▪ The FPA states that it supports an industry funded model. but identifies two issues with the current approach: – the 'unpredictability of the levy amount' which makes it practically impossible for a financial planner to effectively budget' for it; – the 'dramatic rate' at which the levy is increasing. To address these issues, the FPA suggests that the current approach should be reviewed to consider: ▪ the impact of the levy on the financial services sector ▪ whether the operation of the levy and in particular its 'unpredictable increases' is negatively impacting competition in the sector and viability of planning businesses ▪ 'whether a speed limit should be applied to the industry levy to constrain year-on-year increases to the levy amount' ▪ 'whether there are more appropriate ways of funding ASIC enforcement activity than solely through a broad application levy'. For example, the FPA suggests that allowing ASIC to retain fines and court-ordered costs that relate to the enforcement action may be appropriate.
Recommendation 3: Design of the new single disciplinary system for financial planners 'The design of the single disciplinary body for financial planners within ASIC should focus on reducing duplication with other regulatory functions and providing an effective disciplinary function in the most efficient and cost-effective manner'.	▪ The submission emphasises the importance of ensuring that the new single disciplinary system (to be established within ASIC through building on the Financial Services and Credit Panel) is both effective and 'delivered in a cost-effective manner'. ▪ More particularly the submission calls for the new system to: a) provide direct oversight of financial planners (rather than relying on licensees/other institutional stakeholders); b) 'reduce duplication between oversight at the multiple regulator level, licensee level and with financial planners directly'; and c) be cost effective. ▪ The submission states that the FPA has 'significant expertise in operating a practitioner-focused disciplinary system' and has 'offered its expertise to the Treasury to assist in its design work'.
Recommendation 4: MOU between the TPD and ASIC	▪ In the interests of streamlining processes and reducing duplication, the submission suggests that the Tax Practitioners Board (TPB)

FPA RECOMMENDATION	RATIONALE
'The Tax Practitioners Board should pursue an MOU with ASIC to ensure tax (financial) advice complaints are primarily heard by the single disciplinary function being established within ASIC'.	should refer oversight and disciplinary functions for financial planners to the new single disciplinary system being established within ASIC. ▪ It's suggested that this should be done through a formal arrangement – an MOU between the TPD and ASIC – to provide certainty around the division of responsibility. ▪ The MOU would provide that all disciplinary matters relating to financial planners would be investigated and addressed by ASIC, with the TPB making available to ASIC tax expertise where needed. ▪ This FPA considers that, this approach could potentially speed up decision making and importantly, reduce costs/duplication. The submission states that '[the proposed approach] has the potential to reduce duplication if financial planners are subject to a single registration fee for their disciplinary body, rather than multiple fees for multiple different agencies. This option would also allow ASIC to consolidate the registration of financial planners into a single register, rather than the current arrangement where ASIC, TPB and FASEA all have separate registers'.
Recommendation 5: Broad based funding approach to the planned compensation scheme of last resort should be 'The design of a compensation scheme of last resort should include a sustainable and broad funding base that includes all participants in the financial services industry and does not solely rely on contributions from financial planners'.	▪ The submission calls on the government to adopt a broad based approach to funding the planned compensation scheme of last resoirt (CSLR) on the basis that: – adopting a 'narrowly focussed funding model, such as one in which funding was only raised from a small part of the financial services sector, would make a CSLR vulnerable to funding shortfalls' which in turn would limit the effectiveness of the scheme/undermine confidence in the scheme – raising funding from participants in the financial services sector could significantly add to the operating costs for financial planners (and adversely impact their ability to provide affordable advice)
Recommendation 6: Financial advice should be tax deductible 'All financial advice should have tax deductible status, regardless of what stage of the financial advice process it is provided and whether it directly relates to the creation of investment income'.	▪ The rationale for this recommendation is that making initial advice tax deductable would help to address the issue of affordability, especially for those people on lower incomes without established investment portfolios (who do not benefit from tax deductions available for ongoing financial advice). The submission argues that, 'Treating the creation of an initial financial plan differently from ongoing advice is a disincentive for people to get financial advice to help them actively plan, save and secure their financial future. It acts as a barrier to entry for people who have not previously received financial advice'. ▪ The submission acknowledges that providing a tax deduction for initial advice fees would involve additional costs to government. However, the FPA argues that measures could be introduced to control these costs eg through the introduction of caps on the size of the tax deduction or through the introduction of an income cap on those able to receive a deduction.

[Sources: FPA media release 03/02/2021; FPA Budget submission 2021-22]

Financial advice: Reducing costs/administrative burden on financial advisers is the focus of the AFA's budget submission

The focus of the Association of Financial Advisers' (AFA's) budget submission 2021-22 is on increasing access to financial advice and the affordability of financial advice.

Certain of the recommendations in the submission, share several broad points in common with the recommendations in the Financial Planners Association's budget submission (covered separately above).

Among other things, the AFA recommends:

- **Making initial advice tax deductable**. The submission states that the AFA would support the implementatino of a cap of up to $5000 on this deduction (on the basis that this amount would cover the 'majority of the mass market).
- **Review of the ASIC funding levy:** The submission calls for the government to take steps to address 'the excessive increase in the ASIC funding levy' through a review of the design of the current model, 'so a reasonable and sustainable levy can be maintained'. The submission suggests that 'as a minimum' the levy should be 'pegged' to the 2018/19 level. The submission also calls on the government to 'provide relief to financial advisers for the 2019/20 and 2020/21 years'.
- **Ensuring that the proposed single disciplinary oversight body to be established within ASIC is 'fully leveraged':** The submission recommends that the governemnt takes the opportunity to simplify the regulatory regime for advisers and to reduce regulatory oversight cost and fees paid by advisers. The submission states,

  > 'It is our view that this is an important immediate opportunity to consider a range of options to simplify financial advice and to remove non-value adding activity and steps that have arisen over time due to regulatory overlap and excessive compliance standards. We encourage the government to consider a broader set of objectives in achieving this important reform'.

Other recommendations

- **Wage-subsidy:** The submission recommends that the government provide an incentive for financial advice practices to employ professional year students, as a means of helping to address the recent exodus of advisers from the sector. The submission suggests that this incentive could take the form of a wage subsidy (similar to the COVID-19 JobKeeper subsidy). It's suggested that a $10,000 subsidy 'would make a material different in encouragingfinancial advice practices to appoint professional year candidates'.
- **'Comprehensive' review of financial advice:** The submission acknowledges ASIC's consultation on the barriers to the provision of fianncial advice (Consultation paper 332), but argues that 'a more comprehensive exercise will need to be undertaken to consider the full range of options to reduce the cost of financial advice and the regulatory inefficiency in the provision of financial advice and related services'. On this basis, the AFA recommends that the governemnt consider the establishment of a review of 'the financial advice regulatory regime and to cnosider the impediments to the provision of efficient and cost effective, affordable advice and to provide budget for this exercise'.

[Sources: AFA media release 03/02/2021; AFA Submission – Pre-Budget 2021/22]

The Mandatory credit reporting Bill has passed both houses, the ABA says that the changes will mean consumers will have 'better access to finance'

Context

- The government announced in the 2017-18 Federal Budget that it would mandate a comprehensive credit reporting regime if credit providers failed to meet a threshold of 40% data reporting by the end of 2017. In November 2017, the government announced that it would go ahead and mandate comprehensive credit reporting.
- On 2 August 2019, following a review into the operation of financial hardship arrangements, the Attorney General announced that the government would introduce a new type of credit information – financial hardship information – to be reported with repayment history information.
- The National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Bill 2019 which passed both houses on 3 February 2021, will implement these changes.

Details

Broadly, Schedule 1 of the Bill:

- amends the National Consumer Credit Protection Act 2009 to mandate a comprehensive credit reporting regime (the mandatory regime). Under the regime, eligible licensees, who on 1 July 2021 are large ADIs will be requierd to provide credit information on consumer credit accounts to credit reporting bodies.
- expands ASIC's powers to enable the regulator to monitor compliance with the mandatory regime.
- imposes additional requirements on where data held by a credit reporting body must be stored.

Schedule 2 to the Bill:

- amends the Privacy Act 1988 to permit reporting of financial hardship information within the credit reporting framework (as well as other changes intended to improve the overall administration of credit reporting). The commencement of the financial hardship information reporting framework begins on 1 July 2022.

Announcing the passage of the legislation, Treasurer Josh Frydenberg said that,

> 'Consumers and small business will have better access to finance… The strengthened regime will deliver benefits to lenders and borrowers and drive competition in the lending market while preserving and enhancing important security and consumer protections'.

[Source: National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Bill 2019]

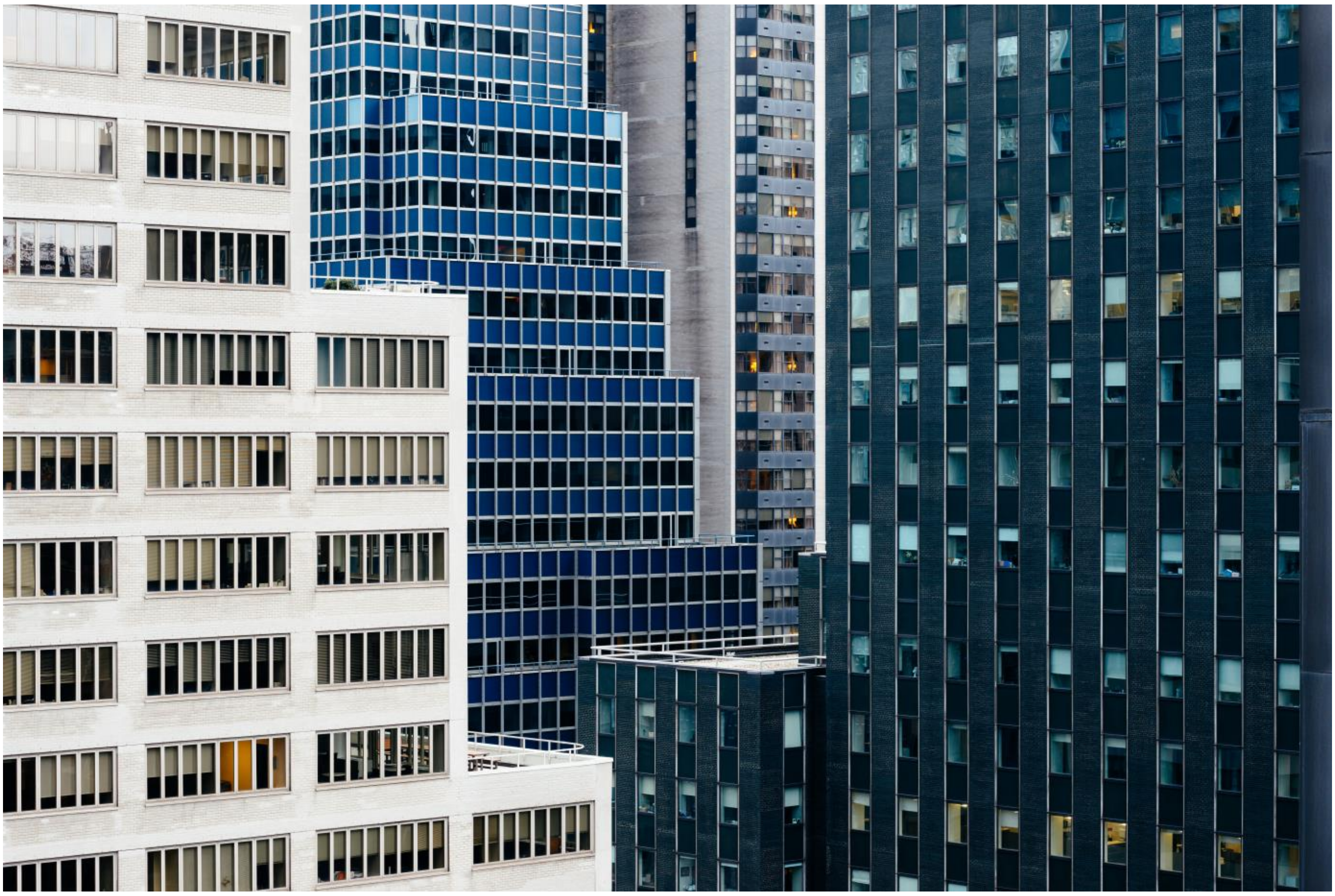
The ABA has welcomed the passage of the Bill

In a statement, welcoming the passage of the Bill, Australian Banking Association CEO Anna Bligh said that the changes will enable households and small businesses to get better access to finance. Ms Bligh said,

> 'More information is better for customers as it gives lenders a more comprehensive picture of a customer's financial situation'

Ms Bligh also said that the Bill is important for customers experiencing financial difficulty as 'more context will help ensure customers' credit histories ae more accurate and reliable'.

[Source: ABA media release 04/02/2021]



COVID-19: With less than 1% of applications still being processed, funds have paid out $36.4 billion under the government's early release of superannuation scheme

The Australian Prudential Regulation Authority (APRA) has a released industry-level and fund-level data on the early release of superannuation scheme which closed to new applications on 1 January 2021.

The update covers the period 20 April 2020 up to 31 January 2021 to capture payments made after the cut-off date. As at 31 January less than 8,000 applications (0.16% of total applications received) were still being processed.

Some key statistics

- Over the duration of the scheme funds received 4.9 million applications with a value of $37.3 billion.
- As at 31 January 2021, funds had paid out $36.4 billion, representing 98% or 4.8 million applications 95,000 applications had been closed or revoked without payment.
- Initial vs repeat applications:
  - A total of 3.5 million initial applications were approved across the full period of the scheme.
  - A total of 1.4 million repeat applications were approved during the second application period from 1 July 2020 to 31 December 2020.
- The average payment made over the course of scheme was $7,638.
- There was a spike in the number of applications after the opening dates of each application period (20 April 2020 and 1 July 2020) with volumes tailing off in the later weeks of these application periods, particularly the second application period.
- Processing times: Overall funds took an average of 3.3 business days to make payments with 95% of payments completed within 1-5 business days
- The top ten funds with the highest number of applications received, made 3.2 million payments worth a total of $23.9 billion (accounting for 66% of total early release payments). The average payment from these funds was $7,569. 95% of payments were completed by these funds within 1-5 business days

[Source: APRA media release 06/01/2021]

In Brief | Two years on from the release of the Hayne Commission's final report consumer groups have underlined the importance of implementing several outstanding recommendations including (among others) the proposed Financial Accountability Regime. Financial Counselling Australia CEO Fiona Guthrie commented, 'The Royal Commission has changed the financial services industry for the better. But we'll be back here in a few years' time if the industry forgets the lessons, returning to the bad old days of loopholes and profit before people'

[Source: Choice, Consumer Action Law Centre, Financial Counselling Australia, Financial Rights Legal Centre joint media release 04/02/2021]

In Brief | Regulation of the BNPL sector: The Woolard Review, reviewed the operation of the UK unsecured credit market. Among the 26 recommendations in the report is a recommendation that BNPL products be brought within the scope of regulation as soon as possible to ensure the product 'develops in a way which is beneficial to consumers'

[Sources: FCA media release 02/02/2021; Full text report: The Woolard Review - A review of change and innovation in the unsecured credit market'

Risk Management

Top Story | Transforming NDAs to prevent sexual harassment

Following the release of the Male Champions of Change report - Disrupting the System, Preventing and Responding to Sexual Harassment in the Workplace (summary here) – MinterEllison has released an article providing practical insights into the steps boards can take to refocus their approach and better manage the issue of sexual harassment within their organisation.

The full text of the article is here.

In Brief | Tighter regulation: Inquiry report recommends the establishment of a new, independent casino regulator and the tightening of rules to lift governance/risk standards within the sector

> [Source: Crown Resorts ASX announcement 09/02/2021; Full text report: Report of the Inquiry under section 143 of the Casino Control Act 1992 (NSW), dated 1 February 2021 (Volumes One and Two)]

Other News

Audit of the JobKeeper scheme – the Australian National Audit Office is now collecting audit evidence

The Australian National Audit Office (ANAO) will conduct an audit into the administration of the JobKeeper scheme.

The audit will examine whether the ATO has

- effectively administered the rules of the scheme
- implemented measures 'to protet the integrity of JobKeeper payments'
- effectively monitored and reported on the operational performance of the scheme.

The ANAO is due to report by October 2021.

The audit is now collecting audit evidence and is open for contributions from members of the pubic. The ANAO writes that is now open for contributions. The ANAO states that 'We particularly value information that deals with significant matters or insights into the administration of the subject of this audit'.

The ANAO 'anticipate[s] accepting contributions to this audit until Monday 26 April 2021'.

Calls for transparency: The audit follows calls from Shadow Assistant Minister for Treasury and Charities Andrew Leigh for more transparency around the operation and administration of the scheme. In particular, Mr Leigh has raised concerns (eg in recent interveiws on 3 February – transcript here, and here) about the design of the scheme - both the fact that there is no public register of companies that received the support, or repayment mechanism in place to compel companies that saw their profits increase in 2020, refund the payments.

Mr Leigh has welcomed moves by some companies to voluntarily return JobKeeper payments.

Voluntarily returning JobKeeper support: Nick Scali is the latest company to voluntarily decide to return JobKeeper support. In a statement, the company said,

> '…the company fully recognises, that it has benefited from the increased consumer confidence this program has created, which resulted in record sales and net profit after tax. The board of directors and management have considered the $3.6m wage subsidy received in the half year ended 31 December 2020 and decided to refund this amount to the Federal government.'
>
> [Source: ASX announcement 08/02/2021] DO NOT DELETE THIS LINE (THIS TEXT IS HIDDEN AND WILL NOT PRINT)

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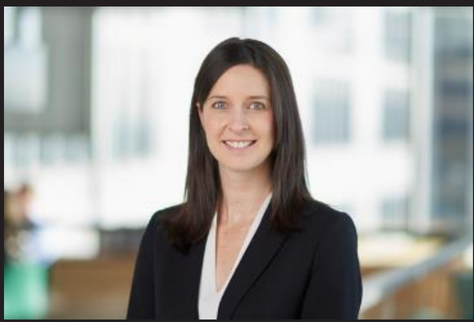

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